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Unshackling Shawanna: The Battle Over Chaining Women Prisoners during Labor and Delivery

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UNSHACKLING SHAWANNA: THE BATTLE OVER CHAINING WOMEN PRISONERS DURING LABOR AND DELIVERY

Elizabeth Alexander[*]

I. INTRODUCTION

On October 2, 2009, in *Nelson v. Correctional Medical Services*,[1] the en banc United States Court of Appeals for the Eighth Circuit issued a historic decision, becoming the first federal appellate court to hold that the law is "clearly established" that shackling a woman prisoner during labor and delivery, in the absence of a clear security justification for such restraints, violates the Eighth Amendment to the United States Constitution by imposing cruel and unusual punishment.[2] The court of appeals accordingly reversed the panel decision and remanded for trial the claims against the correctional officer who shackled the plaintiff, Shawanna Nelson.[3] This article describes the history of that litigation, its significance for the cause of protecting the health and dignity of women prisoners during pregnancy, as well as its general significance for protecting prisoners from restraint practices that brutalize them. The article also suggests some broader implications of the *Nelson* decision.

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* Elizabeth Alexander argued *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir. 2009) (en banc), the case condemning the routine shackling of women prisoners in labor, discussed in this article. She would particularly like to thank Shawanna Nelson, who went through more than many of us can imagine, and who pursued this case to prevent other women from being subjected to such shackling. In addition, Ms. Alexander would like to thank Amy Fettig, staff lawyer at the National Prison Project, Diana Kasdan from the Reproductive Freedom Project, and Cathi Compton, who served as Ms. Nelson's counsel from the beginning, for their tireless efforts in obtaining justice in the litigation described in this article.

1. 583 F.3d 522 (8th Cir. 2009) (en banc).
2. *Id.* at 532–33.
3. *Id.* at 536.

II. THE STRUGGLE OVER SHACKLING PRIOR TO *NELSON*

The last several years have seen a burgeoning movement to end the practice of shackling pregnant women prisoners, particularly during labor and delivery. Advocates cite medical opinion condemning the practice as dangerous to the woman and the child she hopes to bear because women in labor need to be able to change their position freely.[4] Shackling to a bed or other stationary object is also dangerous to women in labor because of the possibility that unexpected emergencies may require that the women be moved to a delivery room without the delay caused by the need to unlock and remove shackles.[5] The practice is also intrinsically undignified and humiliating.[6] It is particularly dangerous to the mental health of women in prisons because such women frequently have serious histories of sexual and physical abuse that have already traumatized them.[7] Survivors of sexual trauma are at high risk for a variety of symptoms typical of post-traumatic stress disorder, including feelings of powerlessness, low self-esteem, and a pervasive sense of personal defilement. As a result, some survivors are "constantly on alert" for the threat of renewed trauma.[8]

Despite the well-known risks of shackling women prisoners and detainees during labor and delivery, it was not until 2000 that Illinois became the first state to pass legislation to limit this practice.[9] Since that time, six additional states have restricted shackling by statute and other states have adopted administrative policies in the last few years that have limited, to varying degrees, the shackling of women prisoners during labor and delivery.[10] Often the change has come after media coverage of a particular inci-

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4. Amnesty International USA, Fact Sheet: Shackling of Pregnant Prisoners, http://www.amnestyusa.org/violence-against-women/abuse-of-women-in-custody/fact-sheet-shackling-of-pregnant-prisoners/page.do?id=1108308 (last visited Mar. 1, 2010) [hereinafter Shackling of Pregnant Prisoners]; *see also* Letter from Ralph Hale, Executive Vice President, Am. Coll. of Gynecologists & Obstetricians, to Malika Saada Saar, Executive Dir., The Rebecca Project for Human Rights (June 12, 2007), *available at* http://www.acog.org/departments/underserved/20070612SaarLTR.pdf.

5. Shackling of Pregnant Prisoners, *supra* note 4.

6. *Id.*

7. Women in Prison Project, Corr. Ass'n of N.Y., Survivors of Abuse in Prison Fact Sheet (Apr. 2009), http://www.correctionalassociation.org/publications/download/wipp/factsheets/Suvivors_of_Abuse_Fact_Sheet_2009_FINAL.pdf; ACT 4 Juvenile Justice, Fact Sheet: Girls and Juvenile Justice, http://act4jj.org/media/factsheets/factsheet_29.pdf (last visited Mar. 1, 2010).

8. Erwin R. Parson & Luerena K. Bannon, *Stress Responses in Sexual Trauma Victims and in Others Experiencing Overwhelming Events*, GIFT FROM WITHIN, 2004, at 6, http://www.giftfromwithin.org/pdf/strategy.pdf.

9. *Movement Builds to Stop Shackling Pregnant Prisoners*, THE CRIME REPORT, AUG. 31, 2009, http://thecrimereport.org/2009/08/31/movement-builds-to stop-shackling-pregnant-prisoners [hereinafter *Movement Builds*].

10. *Id. See also* Jennifer Sullivan, Gregoire Signs Bill Barring Shackling of Pregnant

dent highlights the harm caused by the use of shackles, as well as the lack of need for such restraint during labor and delivery.

California's enactment of legislation, for example, came after media coverage in 2005 of the experience of Desiree Callahan, confined at the San Joaquin Valley Prison. Amnesty International, which compiles accounts of women shackled during labor and childbirth, notes that Ms. Callahan was rushed to a hospital with her ankle chained to a gurney.[11] Her baby daughter died after an emergency Caesarian, and for most of the next four days in the hospital Ms. Callahan was reportedly shackled to her bed. Ms. Callahan described the restraints as "humiliating" and reported that the restraints interfered with her recovery from the traumatic delivery: "You have to be stuck to a bed even though the doctors say you need to get up and walk because your stomach was cut open."[12] In January 2006, California enacted a statute banning the shackling of prisoners after arrival at the hospital for labor and delivery "unless deemed necessary for the safety and security of the inmate, the staff, and the public."[13]

The New York legislature recently banned the practice of shackling prisoners during labor and delivery. The reform bill passed the New York Assembly on September 30, 2009,[14] following news reports of the consequences of requiring pregnant prisoners and detainees to go through labor and even give birth in shackles. The *New York Times*, for example, described the experiences of Venita Pinckney, a prisoner who was shackled with a chain twice around her waist, handcuffs, and ankle shackles.[15]

> At least once a week, somewhere in one of New York's prisons or jails, a pregnant women [sic] goes into labor. Nearly all of them, including Ms. Pinckney, are behind bars for drug offenses. Even so, they are often as severely restrained in the final hours of pregnancy as the most nimble and dangerous of criminals. While their bodies heave toward childbirth, they become walking, clanking jail cells.[16]

The other five states regulating by statute the use of restraints on women prisoners during labor are California, New Mexico, Texas, Vermont, and

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Inmates, Seattle Times, March 23, 2010 [hereinafter Bill Signed], *available at* http://seattletimes.nwsource.com/html/localnews/2011421494_restraints24m.html.

11. Amnesty International USA, California Women in Prison, Custodial Sexual Misconduct, http://www.amnestyusa.org/women/custody/states/california.pdf (last visited Mar. 1, 2010).

12. *Id.*

13. CAL. PENAL CODE § 5007.7 (West 2005); *see also* Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. TIMES, Mar. 2, 2006, *available at* http://www.nytimes.com/2006/03/02/national/02shackles.html?_r=1.

14. B. A9168 2009-2010 Leg. Assem., Reg. Sess. (N.Y. 2009)

15. Jim Dwyer, *Giving Life, Wearing Shackles and Chains*, N.Y. TIMES, July 12, 2009, at MB1, *available at* http://www.nytimes.com/2009/07/12/nyregion/12about.html.

16. *Id.*

Washington.[17] At least six additional states, as well as the District of Columbia, the United States Marshals Service, and the Federal Bureau of Prisons, limit the practice of shackling women during labor and delivery by written policy.[18] Ten other states report that their practice is not to use restraints during labor and delivery.[19] Nonetheless, the survey demonstrates that a majority of jurisdictions, at best, lack clear policies prohibiting shackling during labor and delivery. Thus, while shackling women during labor and delivery could easily meet a layperson's description of "cruel," such shackling has not been at all "unusual" in America's prisons and jails.

III. SHAWANNA NELSON'S ORDEAL

A. The McPherson Unit

In June 2003, Shawanna Nelson entered the Arkansas Department of Correction and was assigned to the McPherson Correctional Unit in Newport, Arkansas.[20] In November 2003, the United States Department of Justice issued a report on McPherson that concluded that the prisoners confined there were subjected to "deliberate indifference towards their serious medical needs."[21] Significantly, among the specific findings of the Department of Justice were that the facility violated the Eighth Amendment to the Constitution in failing to provide minimally acceptable treatment with regard to emergency care, necessary staffing, proper supervision of staff, and in failing to implement written medical policies consistently.[22]

The findings letter noted that prisoners with serious medical conditions were often not referred to a doctor or hospital in a timely manner, and it gave an example in which a McPherson prisoner with chest pains and elevated blood pressure was sent back to her dormitory by a nurse without a referral to the physician.[23] Another prisoner, who was diagnosed with asth-

17. *See Movement Builds*, *supra* note 9; *see also* VT. STAT. ANN. tit. 28, § 801a (2006) (providing that pregnant prisoners shall not ordinarily be restrained after the first trimester of pregnancy). Interestingly enough, when surveyed about its shackling practices, the Vermont Department of Corrections stated that it does not know of any statute restraining shackling of pregnant prisoners. *Movement Builds*, *supra* note 9. *See also* Bill Signed, *supra* note 10.

18. *Movement Builds*, *supra* note 9.

19. *Id.*

20. Arkansas Department of Correction, Shawanna Nelson Grievance Statement at 2 (Sept. 29, 2003) (on file with author).

21. Letter from R. Alexander Acosta, Assistant Attorney General, to Mike Huckabee, Governor of Arkansas at 1 (Nov. 25, 2003), *available at* http://www.justice.gov/crt/split/documents/mcpherson_grimes_findinglet.pdf [hereinafter Letter to Gov. Huckabee]. McPherson was built and initially operated by a private prison company, Wackenhut Corrections Corporation, until 2001 when the state assumed its operation. *Id.* at 2.

22. *Id.* at 4.

23. *Id.* at 10.

ma and HIV infection, had complained of chest pains and shortness of breath but was not seen for two days.[24] When the patient was finally seen, her vital signs were abnormal. Nonetheless, the nurse waited an additional twelve hours to send her to the hospital with a diagnosis of pneumonia.[25] After the patient was hospitalized, she was diagnosed with a potentially fatal opportunistic infection associated with HIV infection.[26]

The findings also included numerous cases in which McPherson prisoners had not received adequate follow-up care from a specialist.[27] In fact, one of the specific recommendations from the Department of Justice was that McPherson needed to "ensure that inmates with special medical needs are promptly scheduled for and transported to outside care appointments."[28] Another recommendation was that the use of a restraint chair, in which prisoners are mechanically restrained in a sitting position, be restricted to "appropriate circumstances."[29]

McPherson shared one full-time physician with another prison, Grimes Correctional Unit, also in Newport, Arkansas.[30] That physician, however, spent much of her time on administrative matters.[31] The Department of Justice also concluded that McPherson failed to adequately protect prisoners from harm because of lapses in supervision of staff and prisoners, violations of the privacy of prisoners, and substandard investigations of incidents of possible misconduct, which "create[d] an atmosphere conducive to misconduct and abuse."[32] The findings letter noted at least thirteen reported incidents of sexual misconduct or abuse at McPherson and Grimes.[33] The letter also criticized McPherson based on the discovery of prisoner grievances complaining of retaliation from correctional officers that were never investigated.[34] The findings letter led to a subsequent agreement between the Department of Justice and Arkansas, under which the state agreed, among other things, to "provide on-site physician coverage to ensure the supervision of nursing staff;" to ensure that "inmates with special medical needs are appropriately scheduled for and transported to outside care appointments;" to ensure that "outside treatment recommendations are followed as clinically indicated;" and to "provide adequate correctional officer staffing and supervision to ensure inmate safety."[35]

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24. *Id.*
25. *Id.*
26. *Id.* at 10–11.
27. Letter to Gov. Huckabee, *supra* note 21, at 11.
28. *Id.* at 31.
29. *Id.* at 32.
30. *Id.* at 1, 11.
31. *Id.* at 12.
32. *Id.* at 23.
33. Letter to Gov. Huckabee, *supra* note 21, at 23.
34. *Id.* at 26.
35. Memorandum of Agreement from the Dep't of Justice to the State of Ark. 3–5 (Aug.

At the time that Ms. Nelson entered the prison, Arkansas had various policies regulating the use of mechanical restraints on prisoners. Most significant among them was Administrative Regulation 403, which permitted the use of leg irons as well as handcuffs and security belts to transport prisoners within a prison but did not specifically address the issue of the type of restraints to be used in transporting prisoners outside the perimeter of the prison.[36] The Administrative Regulation provides guidance of the most general sort: restraints are to be used to "prevent escape, assault, or the commission of some other offense by violent or disruptive offenders" and to "protect employees, offenders, and other individuals."[37] There is also a 1995 Administrative Directive that indicates that all prisoners transported to or from a prison must be handcuffed and that prisoners being transported from maximum security may also be subjected to leg irons.[38] In short, the policies of the Department of Correction are unclear but appear to give tremendous discretion to the correctional officer who is in charge of the transport, including discretion that allows the correctional officer to decide whether to use leg shackles in a hospital on a woman in active labor.

There was also a local policy related to restraining prisoners transported for medical care. McPherson Unit is part of the Newport Complex within the Department of Correction, and thus correctional officers at McPherson were also governed by the Newport Complex Hospital Security Post Order.[39] That post order provides in relevant part as follows:

> 1. Restraints will not be removed unless the doctor advises it for medical reasons. In that event, the Warden/designee will be contacted for approval.
>
> 2. If handcuffs are to be removed, leg shackles will be secured before removing the wrist restraints.
>
> 3. Pregnant inmates in the final stages of labor will not be restrained while in the delivery room giving birth, or at any time the physician in charge determines that such application would be a health risk to the unborn child or the health of the inmate.
>
> B. All inmates, regardless of Class[ification], will be restrained with handcuffs. One (1) or more of the following restraints will also be used, if warranted:

27, 2004), *available at* http://www.justice.gov/crt/split/documents/split_mcpherson_agree_8_27_04.pdf.

36. Use of Restraints, Ark. Admin. Reg. 403 (Feb. 28, 1992) (on file with author).

37. *Id.* at 1.

38. Admin. Directive 95:21, at 2 (Oct. 20, 1995) (on file with author).

39. Arkansas Department of Correction, Newport Complex, Hospital Security Post Order (Aug. 1, 2003) (on file with author).

1. Waist chain/security belt

2. Leg shackles

NOTE: All restraints will be double-locked.[40]

The post order accordingly gave correctional officers general authority not to require a pregnant prisoner to be restrained using leg shackles, except when the handcuffs were removed and there was no medical order restricting the use of shackles.

B. Ms. Nelson's Labor and Delivery

Shawanna Nelson entered the Department of Correction on June 3, 2003, following convictions for credit fraud and writing checks with insufficient funds.[41] On September 20, 2003, she experienced labor pains and a correctional officer sent her to the prison infirmary.[42] The infirmary nurse sent her back to her barracks on the ground that her contractions were still six to seven minutes apart. When Ms. Nelson returned to the infirmary, the nurse again declined to send Ms. Nelson to the hospital for delivery although her contractions were by then recurring at five to six minute intervals.[43] A correctional officer ultimately insisted that Ms. Nelson be taken to a hospital.[44]

Correctional Officer Patricia Turensky escorted Ms. Nelson to the outside hospital.[45] Ten minutes after Ms. Nelson arrived at the hospital, Ms. Nelson's cervix was dilated to seven centimeters.[46] When the cervix dilates to approximately eight centimeters, the woman is nearing the end of active labor and transitioning to delivery of her baby.[47] Nonetheless, Officer Turensky placed both of Ms. Nelson's legs in shackles.[48] Every time Ms. Nel-

40. *Id.* at 2.

41. Shawanna Nelson Grievance Statement, *supra* note 20, at 1; Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007), Deposition of Shawanna Nelson at 8 (Feb. 8, 2006) (on file with author).

42. Deposition of Shawanna Nelson, *supra* note 41, at 20, 23; *see also* Department of Correction Security Check Log, Hospital Sit-Down Log (Sept. 20, 2003) [hereinafter Hospital Sit-Down Log] (on file with author).

43. Deposition of Shawanna Nelson, *supra* note 41, at 35.

44. Shawanna Nelson Grievance Statement, *supra* note 20, at 2.

45. *Id.*

46. Hospital Sit-Down Log, *supra* note 42.

47. WebMD, Pregnancy and the Stages of Labor and Childbirth, http://www.webmd.com/baby/pregnancy-stages-labor?page=2 (last visited Mar. 1, 2010).

48. Shawanna Nelson Grievance Statement, *supra* note 20, at 2; Deposition of Shawanna Nelson, *supra* note 41, at 43. The account of Ms. Nelson's experiences in this article is primarily based on Ms. Nelson's own statements, but most of her account has not been directly disputed by Officer Turensky. Officer Turensky did dispute that she shackled both of Ms. Nelson's legs to the hospital bed. Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-

son experienced a labor contraction, her leg would cramp up and she would experience severe pain.[49] When the nurse wished to check how much the cervix had dilated, Officer Turensky would remove a shackle but would immediately reshackle Ms. Nelson once the examination was completed.[50] One of the nurses stated, in Officer Turensky's presence, that she wished that Ms. Nelson would not be shackled.[51] While still in the labor room, with Ms. Nelson still shackled, the nurse attempted to assist Ms. Nelson in delivering the child.[52] During the labor and delivery, Ms. Nelson suffered a hip dislocation and an umbilical hernia.[53]

After Ms. Nelson had dilated to eight centimeters, the physician arrived and asked Officer Turensky to remove the shackles.[54] Officer Turensky shackled Ms. Nelson to the stretcher, and she was moved to the delivery room.[55] The physician again asked that the shackles be removed.[56] The physician declined to provide Ms. Nelson with an epidural for the pain of childbirth on the ground that delivery was too imminent for an epidural to be safely provided.[57] Ms. Nelson thereafter delivered a baby weighing about nine-and-a-half pounds.[58]

After Ms. Nelson gave birth, she was reshackled to her hospital bed by the correctional officer who replaced Officer Turensky.[59] During the night, when Ms. Nelson needed to relieve herself, the need to unlock the shackles, combined with the length of time it took Ms. Nelson to move because of the injury to her hip resulted in Ms. Nelson being unable to wait to use the restroom, and she was forced to soil herself.[60] Finally, on the second night of her hospital stay, the second correctional officer left Ms. Nelson unshackled.[61]

Officer Turensky provided a number of statements that appear to show that she was aware of the substantial risk of the shackling to Ms. Nelson. For example, Officer Turensky stated that although she had been trained that she needed to use full restraints only on prisoners who "weren't too

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JMM-JWC (E.D. Ark. June 11, 2007), Deposition of Patricia Turensky at 24 (Sept. 7, 2006) (on file with author).

49. Shawanna Nelson Grievance Statement, *supra* note 20, at 2.

50. *Id.*

51. *Id.* at 43–44.

52. Hospital Sit-Down Log, *supra* note 42; Shawanna Nelson Grievance Statement, *supra* note 20, at 2.

53. Shawanna Nelson Grievance Statement, *supra* note 20, at 55–56.

54. *Id.* at 3.

55. *Id.*

56. *Id.*

57. Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007), Deposition of Paul J. Hegenroeder at 78–79 (May 17, 2006) (on file with author).

58. *Id.* at 20, 23; *see also* Hospital Sit-Down Log, *supra* note 42.

59. Hospital Sit-Down Log, *supra* note 42, at 3.

60. Deposition of Shawanna Nelson, *supra* note 41, at 46–47.

61. *Id.* at 47.

crippled or pregnant to do so," she nonetheless proceeded to shackle Ms. Nelson at a time that birth appeared imminent.[62] Officer Turensky did not consider Ms. Nelson to be a safety risk or an escape risk.[63] In Officer Turensky's response to Ms. Nelson's later institutional grievance about the shackling, Officer Turensky made the puzzling statement that an"[inmate] while pregnant does not wear shackles, chain and box for obvious medical reasons."[64] Indeed, Officer Turensky was able to identify a few of the specific "obvious medical reasons" herself; she stated that she preferred not to shackle pregnant women because of the danger of tripping along with the difficulty the women face when walking in shackles.[65] Officer Turensky also volunteered that the shackles were "not very sanitary" when the pregnant woman needed to be examined.[66] The only reason identified by Officer Turensky for applying shackles to Ms. Nelson was her fear that if she did not do so, she would violate institutional rules and be disciplined by the warden.[67]

In Ms. Nelson's statement in the prison grievance system, she described the effects of the shackling as follows:

> As a result, I am traumatized by this event, my hip is still very sore, and I can only sleep on my back. It is not a day that goes by that I don't wonder why I was treated that way. Cpl [Turensky] had her gun so, why was I restrained? . . . It is enough to be [separated] from a newborn baby, but to be treated like an animal while giving birth totally ruins your whole mental and emotional state of mind.[68]

Following Ms. Nelson's release from prison, she had surgery for the hernia and later for the hip displacement, which caused her extreme pain.[69] In addition, because of damage to her muscles during the delivery, Ms. Nelson was advised to avoid future childbirth.[70] Further, Ms. Nelson also presented evidence in the form of an undisputed affidavit by a Fellow of the American College of Obstetricians and Gynecologists that contained the following statements:

> It is my opinion, to a reasonable degree of medical certainty, that it is inherently dangerous to both the mother and the unborn fetus to have a woman shackled during the final states of labor. During the final stages

62. Deposition of Patricia Turensky, *supra* note 48, at 16–17.
63. *Id.* at 21.
64. Shawanna Nelson Grievance Statement, *supra* note 20, at 5.
65. Deposition of Patricia Turensky, *supra* note 48, at 24.
66. *Id.* at 43.
67. *Id.* at 24.
68. *Id.* at 3.
69. Deposition of Shawanna Nelson, *supra* note 41, at 57–58; Gathered by personal communication from Shawanna Nelson.
70. Deposition of Shawanna Nelson, *supra* note 41, at 62.

> of labor, it is important to the delivering physician to be able to move quickly and act quickly, in order to avoid potentially life-threatening emergencies for both the mother and the unborn fetus.[71]

IV. THE LITIGATION BATTLE IN THE COURTS

A. The District Court Proceedings

On April 15, 2004, Ms. Nelson filed suit in federal court against Correctional Medical Services (CMS), a for-profit company that, pursuant to a contract with the Arkansas Department of Correction, provides medical care to prisoners at the McPherson Unit.[72] The complaint alleged that Ms. Nelson was shackled during labor and delivery, that since the delivery she has needed specialty medical care, and that CMS had been "deliberately indifferent" to her medical needs.[73] The complaint further alleged that Ms. Nelson, who was still incarcerated at the time of filing, had exhausted her administrative remedies, a requirement imposed on prisoners seeking to challenge their conditions of confinement in federal court by the Prison Litigation Reform Act.[74] An amended complaint, filed on June 1, 2004, added as defendants the medical director of the Arkansas Department of Correction, some unidentified nurses whose names were unknown to Ms. Nelson, the Director of the Department of Correction, and Officer Turensky.[75]

Various pre-trial skirmishes resulted in the dismissal of the claims against the unnamed nurses,[76] as well as the dismissal of the claim for injunctive relief, since Ms. Nelson had been released from prison after the filing of the complaint.[77] At that point, the various state defendants filed a motion for summary judgment against Ms. Nelson,[78] and CMS filed its own summary judgment motion.[79] On June 11, 2007, the district court adopted

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71. Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007), Affidavit of Cynthia Frazier, M.D. at 1 (Jan. 3, 2007).

72. Complaint at 1, Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007).

73. *Id.* at 2–3. Officials who know of and disregard an excessive risk to prisoner health or safety are "deliberately indifferent" and thereby violate the Eighth Amendment to the United States Constitution. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

74. *See* 42 U.S.C. § 1997e(a) (2009).

75. Amended Complaint at 3–5, Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007).

76. Proposed Findings and Recommended Partial Disposition at 6, Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007).

77. *Id.* at 6–8.

78. Motion for Summary Judgment of Defendant Arkansas Department of Correction, Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007).

79. Motion for Summary Judgment of Defendant Correctional Medical Services, Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007).

the findings and recommendation of the magistrate judge.[80] The court ordered that certain claims related to alleged retaliation by Officer Turensky be dismissed because Ms. Nelson failed to exhaust these claims administratively by filing appeals on these issues to the final stage of the internal prison grievance system.[81] The district judge also adopted the recommendation of the magistrate judge that the claims against CMS and the medical director be dismissed with prejudice, on the ground that Ms. Nelson had offered no evidence demonstrating the unconstitutionality of the CMS policy, allegedly adopted by the medical director, regarding monitoring of women in labor and, in particular, the policy of not transporting such women to the hospital until their contractions were occurring at intervals of five minutes or less.[82]

At the same time, the court refused to dismiss the claims of Ms. Nelson against Officer Turensky and Department of Correction Director Norris related to her shackling during labor until she was actually in the delivery room.[83] The most important ruling of the district court was its adoption of the magistrate judge's rejection of the asserted defense of qualified immunity.[84] If the defendants had qualified immunity, Ms. Nelson would have lost the case even if she were to have ultimately established that the defendants had violated her constitutional rights.[85] Indeed, the defense of qualified immunity is powerful because denial of a public official's asserted defense of qualified immunity frequently, as in this case, allows the defendant the opportunity to appeal from the rejection of qualified immunity, despite the general rule that an order simply requiring a matter to proceed to trial is not appealable until after the entry of final judgment.[86] In this case, defendants Turensky and Norris decided to immediately test the district court's conclusion that a reasonable jury could find them liable for the injuries suffered by Ms. Nelson, and the defendants appealed the denial of qualified immunity to the Eighth Circuit Court of Appeals.[87]

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80. Nelson v. Corr. Med. Servs., No. 1:04-cv-00037-JMM-JWC (E.D. Ark. June 11, 2007), *rev'd in part*, 533 F.3d 958 (8th Cir. 2008), *aff'd in part, rev'd in part*, 583 F.3d 522 (8th Cir. 2009) (en banc).

81. *Id.* at *6.

82. *Id.* at *10 & n.8.

83. *Id.* at *10.

84. *Id.* at *11.

85. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that government officials performing discretionary functions are generally not liable for violations of civil rights unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known.").

86. *See* Mitchell v. Forsyth, 472 U.S. 511, 525–27 (1985) (holding that a defendant official aggrieved by a district court's denial of a claim of qualified immunity on the basis of an issue of law may file an immediate appeal of that order despite the ordinary rule barring interlocutory appeals because qualified immunity entails a right not to be required to stand trial unless the violation of law is clearly established).

87. *See* Notice of Interlocutory Appeal, Nelson v. Corr. Med. Servs., 533 F.3d 958 (8th

B. The Panel Decision

On July 18, 2008, the panel issued its decision reversing the district court and remanding for dismissal of the complaint.[88] At the time that the panel issued its decision, a federal court considering an issue of qualified immunity was required to first determine whether the conduct that was the subject of the plaintiff's claim stated a violation of law.[89]

The panel accordingly began by considering whether plaintiff's allegations stated a violation of the Eighth Amendment.[90] In determining whether prison conditions violate the Eighth Amendment, the court must determine, under *Farmer v. Brennan,*[91] whether the conditions of confinement posed an excessive risk of substantial harm[92] and also whether the prison officials possessed actual knowledge of that excessive risk.[93] The appellate panel agreed that Ms. Nelson suffered from a serious medical condition,[94] but the panel found no evidence that either defendant Norris, the Director of the Arkansas Department of Correction, or defendant Turensky "deliberately disregarded Nelson's medical needs."[95]

In addition, the panel applied another test, derived from its previous decision in *Haslar v. Megerman,*[96] to determine that defendants were not in violation of the Constitution. *Haslar,* although it post-dated the Supreme Court's seminal decision in *Farmer v. Brennan,*[97] looked at the issue of shackling the jail detainee plaintiff while he was hospitalized as an issue of the permissible uses of physical force to prevent escape, rather than a question of the extent to which jail officials violated their duty to supply necessary medical care to detainees. *Haslar* involved a jail detainee who, while virtually comatose, had his legs shackled to a hospital bed.[98] The detainee's

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Cir. 2008).

88. Nelson v. Corr. Med. Servs. (*Nelson I*), 533 F.3d 958 (8th Cir. 2008), *vacated*, 583 F.3d 522 (8th Cir. 2009) (en banc).

89. *See* Saucier v. Katz, 533 U.S. 194, 201 (2001), *receded from by*, Pearson v. Callahan, 129 S. Ct. 808, 818 (2009). Since the time of the panel decision, the Supreme Court decided in *Pearson v. Callahan* that federal courts need not always first decide the question of the existence of a violation of law before the court decides the question of qualified immunity. Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).

90. *Nelson I*, 533 F.3d at 962.

91. 511 U.S. 825 (1994).

92. The Court characterized this determination as the objective component of a conditions of confinement violation. *Id.* at 837.

93. This knowledge was characterized by the Court as the subjective component of an Eighth Amendment violation. *Id.* at 837.

94. *Nelson I*, 533 F.3d at 962.

95. *Id.* at 963.

96. 104 F.3d 178, 180 (8th Cir. 1997).

97. *See supra* note 73 and accompanying text.

98. *Haslar*, 104 F.3d at 179.

medical problems caused his legs to swell substantially.[99] Despite the detainee's complaints that the shackles were hurting him, the correctional officers guarding him neither checked the shackles nor asked a nurse to examine him.[100] As a result, the detainee suffered permanent leg damage and pain.[101] Significantly, the actions of the correctional officers were inconsistent with asserted jail practices; ordinarily, a correctional officer would check the shackles, or ask a nurse to do so, if a detainee complained that they were too tight.[102]

Unfortunately, the detainee sued only the County and the director of the Department of Corrections, alleging that these defendants had been deliberately indifferent to his medical needs and had imposed punishment barred by the Constitution.[103] The court, applying the Supreme Court's holding in *Bell v. Wolfish,* a jail conditions of confinement case, decided that the unwritten "policy"[104] of the county did not impose punishment because it lacked an express intent to punish, and the court could not infer an intent to punish unless the policy "is either unrelated to a legitimate penological goal or excessive in relation to that goal."[105] The court concluded that shackling hospitalized detainees, as part of an unwritten policy that included safeguards to attempt to ensure that detainees were not accidentally injured by the shackles, satisfied the Due Process standard applicable to jail detainees[106] by serving the legitimate penological goal of preventing escape:

> A single armed guard often cannot prevent a determined, unrestrained, and sometimes aggressive inmate from escaping without resorting to force. It is eminently reasonable to prevent escape attempts at the outset by restraining hospitalized inmates to their beds, and the policy provides

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99. *Id.*

100. *Id.*

101. *Id..*

102. *Id.*

103. *Id.* The detainee was being held in the jail prior to trial for a criminal offense. In *Bell v. Wolfish,* 441 U.S. 520 (1979), the Supreme Court held that pre-trial detainees' rights are protected by the Due Process Clause of the Fourteenth Amendment to the Constitution and that conditions of confinement imposed on pre-trial detainees violate the Due Process Clause if they amount to the imposition of punishment. *Bell,* 441 U.S. at 535. *Haslar* cites *Bell* for this point. *Haslar,* 104 F.3d at 180 (citing *Bell,* 441 U.S. at 535). Notwithstanding the different sources of the constitutional protections of convicted prisoners and jail detainees, many federal courts apply the same substantive standards to conditions of confinement claims filed by prisoners (governed by the Eighth Amendment) and conditions of confinement claims filed by jail detainees (governed by the Due Process Clause). *See, e.g.*, Natale v. Camden County Corr. Facility, 318 F.3d 575, 581–82 (3d Cir. 2003); Craig v. Eberly, 164 F.3d 490, 495 (10th Cir. 1998); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996).

104. *Haslar,* 104 F.3d at 180. In context, the reference to "policy" in the opinion refers to the asserted practice or custom of the jail staff. *See id.* at 179.

105. *Haslar,* 104 F.3d at 180 (citing *Bell,* 441 U.S. at 538).

106. *See supra* note 103.

> for exigencies such as Haslar's by requiring the guards, upon a doctor's request, to request permission from the shift administrator at the jail to replace the shackles with another means of restraint. The Constitution, moreover, does not require that governmental action be the only alternative, or even the best alternative, in order to be constitutional.[107]

Thus, *Haslar* and the panel opinion in *Nelson I* deal with an important issue related to constitutional challenges to prison and jail conditions of confinement. Constitutional challenges to the quality of medical care required for prisoners are generally considered not to involve weighing of possible security concerns because "the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities."[108] Shackling prisoners transported outside of a prison for medical care who are also particularly vulnerable to medical harm by reason of those shackles is, however, an obvious example of a situation in which the need of the prisoner to be protected from medical harm is in potential tension with the need of prison authorities to prevent escape.

The court in *Nelson I* addressed this issue by applying both the *Farmer* "deliberate indifference" standard[109] and the *Bell* test of whether the shackling imposed "punishment."[110] There is, however, a significant question of whether the *Bell* "punishment" standard applies in this situation. As noted above, the *Bell* standard requires that a court consider whether a practice is unrelated to a legitimate penological goal or excessive in relation to that goal.[111] That standard is in many ways a stripped-down version of the standard established in yet another Supreme Court case, *Turner v. Safley*,[112] which governs most constitutional interests possessed by prisoners, such as First Amendment and privacy interests.[113] The *Turner* standard establishes a four-part test, as follows:

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. . . . First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. . . . A second factor relevant in determining the reasonableness of a prison restriction . . . is

107. *Haslar*, 104 F.3d at 180 (citing *Bell*, 441 U.S. at 542–43 n.25).
108. Whitley v. Albers, 475 U.S. 312, 320 (1986).
109. *See supra* note 73 and accompanying text.
110. *See supra* note 103 and accompanying text.
111. *Bell*, 441 U.S. at 538.
112. 482 U.S. 78 (1987).
113. *See id.* at 91, 94–95 (applying test to prisoner correspondence and to the right to marry).

> whether there are alternative means of exercising the right that remain open to prison inmates. . . . A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . . Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.[114]

The problem in the *Haslar* court's application of the *Bell* test is that the Supreme Court, after *Haslar,* explicitly rejected the application of the related *Turner* standard to Eighth Amendment claims.[115] Thus, while there are other, more obvious ways to distinguish the circumstances in *Haslar* from the circumstances in *Nelson,*[116] there are substantial reasons to question whether the *Bell* punishment standard as used in *Haslar* remains good law.

Accordingly, the background issues in *Nelson* involve one of the most significant Eighth Amendment issues on which the Supreme Court has yet to provide clear guidance—the issue of the extent to which, if at all, prison officials should be able to justify conditions of confinement that would otherwise violate the Eighth Amendment when the conditions serve an actual security need.

C. The En Banc Eighth Circuit Decision

Ms. Nelson filed a petition for rehearing addressed to the full Eighth Circuit, which the court of appeals granted. The decision provided the court with an opportunity to clarify the law regarding the relationship between proffered security justifications for actions that would otherwise violate *Farmer*'s standard for judging Eighth Amendment challenges to conditions of confinement. At a minimum, the court seemed destined to be the first to address the issue of shackling a prisoner during labor and childbirth, on a record that included evidence of a substantial risk to the prisoner and fetus from the shackling, as well as evidence of the correctional officer's knowledge of that risk.

On October 2, 2009, the sharply-divided en banc court issued its opinion. All members of the court agreed that Larry Norris, the Director of the Department of Correction, could not be held liable for his role in formulating the discretionary policy that led Officer Turensky to use shackles on Ms. Nelson. The six-member majority of the court, however, reversed the panel and held that the district court appropriately allowed Ms. Nelson's case to

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114. *Id.* at 89–91 (citing *Bell*, 441 U.S. at 551).

115. *See* Johnson v. California, 543 U.S. 499, 511 (2005). "We judge violations of [the Eighth] Amendment under the 'deliberate indifference' standard, rather than *Turner*'s 'reasonably related' standard." *Id.* (citing Hope v. Pelzer, 536 U.S. 730, 738 (2002)).

116. For example, Ms. Nelson, unlike the plaintiff in *Haslar*, actually sued the correctional officer who was responsible for the shackling that caused her injuries.

proceed to trial against Officer Turensky, concluding that a reasonable jury could find that Officer Turensky's conduct violated the Eighth Amendment and that Officer Turensky was not entitled to judgment as a matter of law on her qualified immunity defense.[117]

1. *The Eighth Amendment Standard*

The most important analytic choice made by the six-member majority was their decision to treat this case as one raising solely a conditions of confinement claim[118] and consider the implicit question of a security justification for shackles simply as an issue that could limit the scope of the court's decision, rather than a justification for applying a separate standard. The court discussed the asserted security interest in shackling Ms. Nelson directly but briefly:

> While "deliberate indifference to a prisoner's serious illness or injury can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff," from the record evidence in Nelson's case there does not even appear to have been a competing penological interest in shackling her. . . .
>
> A reasonable factfinder could determine from the record evidence that Nelson did not present a flight risk while under the supervision of Turensky, an experienced correctional officer who was equipped with a fire arm.[119]

Of note, the dissent does not argue that *Haslar* allows the court to reject Ms. Nelson's Eighth Amendment claim unless the court finds that the actions of Officer Turensky imposed punishment. The dissent does cite *Haslar* for the claim that a single armed correctional officer cannot prevent an escape without using force and it notes that the detainee in *Haslar* was virtually comatose.[120] The implicit corollary of the dissent's approach is that any shackling policy related to prisoners undergoing labor in an outside facility is constitutional on its face, at least if, like the policies in *Haslar* and *Nelson*, the policy provides some safeguards against injury, such as a provision that a medical request to stop the shackling of a particular prisoner would be considered by correctional staff.[121] One response to the dissent

117. Nelson v. Corr. Med. Servs. (*Nelson II*), 583 F.3d 522 (8th Cir. 2009) (en banc).

118. *See id.* at 528 (stating that the court is applying the Eighth Amendment conditions of confinement standard of "deliberate indifference" from *Farmer* rather than the Eighth Amendment use of force standard applicable to prison riots from *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986)).

119. *Id.* at 530–31 (citations omitted).

120. *Id.* at 541 (citing Haslar, 104 F.3d at 180) (Riley, J., concurring in part and dissenting in part).

121. *Nelson II*, 583 F.3d at 533 (describing written policy related to shackling); *see Has-*

might have been that in neither *Haslar* nor *Nelson* was there a penological interest that would have justified a correctional officer in shackling the plaintiff.[122]

The majority then had a rather easy time finding that Ms. Nelson had presented enough evidence on both the objective and subjective prongs of the *Farmer* Eighth Amendment standard to proceed to trial. The objective component of *Farmer,* involving a showing of an excessive risk of substantial harm,[123] was satisfied by the affidavit of the physician who stated that it is always dangerous to shackle a woman during the final stages of labor.[124] Ms. Nelson similarly satisfied the subjective component of the *Farmer* Eighth Amendment standard, requiring evidence that a defendant understood the risk created by his or her actions, by providing Officer Turensky's statements, which could be read to show actual knowledge of the risk to Ms. Nelson.[125] The court also noted that Officer Turensky had been present while the nurses were attempting to help Ms. Nelson push her baby through the birth canal and that medical personnel had repeatedly asked that the shackles be removed.[126]

The dissent's response to the majority's conclusion that Ms. Nelson was entitled to have a jury decide whether Officer Turensky had actual knowledge of the excessive risk to Ms. Nelson was to cite other facts in the record that could show that Officer Turensky did not comprehend the actual risk.[127] The dissent pointed to other statements in Officer Turensky's deposition in which she contradicts her own testimony and ambiguously expresses doubts about whether Ms. Nelson was a flight risk.[128] In response to questions from Officer Turensky's counsel, she stated that she was "a tad nervous" because she was unaware of any information about Ms. Nelson's crime or background.[129] The dissent makes no attempt to evaluate the consistency of these statements with Officer Turensky's other statements that she did

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lar, 104 F.3d at 179 (describing unwritten policy at issue).

122. Of course, it is important to remember that the correctional officers responsible for the shackling in *Haslar* were not in fact defendants. *Haslar,* 104 F.3d at 179–80.

123. Farmer v. Brennan, 511 U.S. 823, 837 (1994).

124. *Nelson II,* 583 F.3d at 529 (citing Affidavit of Cynthia Frazier, M.D., *supra* note 71).

125. *Nelson II,* 583 F.3d at 529.

126. *Id.* at 530.

127. *Id.* at 541 (Riley, J., concurring in part and dissenting in part).

128. *Id.* The actual exchange in the deposition is as follows:

> "Q: At any time, did you feel that Ms. Nelson was a flight risk?
>
> A: I had my doubts, yes, ma'am.
>
> Q: Tell me about that.
>
> A: Because I did not know what her crime was and the way that was talking about how she should not be considered an inmate because she was in the free world in a free-world hospital. This made me a tad nervous."

Deposition of Patricia Turensky, *supra* note 48, at 26–27.

129. *See* Deposition of Patricia Turensky, *supra* note 48.

not view Ms. Nelson as a flight risk or a safety risk.[130] Similarly, the dissent views the evidence that Officer Turensky removed the shackles when asked to do so by hospital medical personnel as evidence that Officer Turensky did not think she was exposing Ms. Nelson and her soon-to-be-born child to danger.[131] Another view of this evidence, as the majority opinion implicitly notes, is that Officer Turensky continued to reattach the shackles even though medical personnel continued to ask for their removal.[132] The dissent also argues that because Ms. Nelson did not challenge the actions of the medical staff at the hospital, the majority was holding a correctional officer to a higher standard than medical personnel in recognizing a danger to Ms. Nelson.[133] Again, however, another view of this record is that medical staff never suggested the shackling and in fact, did everything they thought they could to stop it.[134] Indeed, one of the nurses told Ms. Nelson that she wished Ms. Nelson would not be shackled.[135] As such, one could read the dissent as analyzing only whether a reasonable fact-finder could find that Officer Turensky did not have actual knowledge of the unreasonable risk to Ms. Nelson; the dissent does not attempt to refute the majority's reasoning that evidence in the record would allow a reasonable fact-finder to reach the opposite conclusion and decide that Officer Turensky did have such knowledge.

One way of looking at the difference between the view of the majority and the dissent with regard to whether Ms. Nelson demonstrated sufficient evidence of a constitutional violation to preclude summary judgment is to consider whether these differences in fact reflect the experience and values that the judges bring to their task. The importance of such considerations is illustrated by the Supreme Court's decision in *Scott v. Harris*.[136] That case involved a high-speed police chase that began when police saw a speeding automobile and ended when police rammed the car, causing a crash that left the fleeing driver a quadriplegic.[137] On an interlocutory appeal of the denial of qualified immunity to the defendants,[138] the Supreme Court, with Justice Stevens dissenting, held that the defendants should have been granted summary judgment on the ground that no reasonable jury could find a constitutional violation in the conduct of the police officers.[139] In doing so, the majority relied almost exclusively on its own sensory conclusions drawn from

130. *See Nelson II*, 583 F.3d at 540–41 (Riley, J., concurring in part and dissenting in part).
131. *Id.* at 541 (Riley, J., concurring in part and dissenting in part).
132. *See id.* at 530 (Murphy, J.).
133. *Id.* at 541–42 (Riley, J., concurring in part and dissenting in part).
134. *See id.* at 530 (Murphy, J.).
135. Deposition of Shawanna Nelson, *supra* note 41, at 43–44.
136. 550 U.S. 372 (2007).
137. *Id.* at 374–75.
138. *Id.* at 376.
139. *Id.* at 386.

seeing a videotape, stating that "it is clear from the videotape that [the plaintiff] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."[140] Justice Stevens viewed the videotape quite differently, concluding that a jury could find that the chase exposed motorists to no greater risk than the risk motorists encounter with a speeding ambulance.[141]

Thus *Scott* poses an interesting question of the wisdom of a judicial holding, in the course of granting summary judgment, that no reasonable juror could reach a conclusion different from that of the judge. Three law school professors chose to explore this question by showing the same videotape that the Supreme Court justices saw to a diverse sample of 1350 Americans.[142] The professors collected data related to the individual characteristics of the viewers, dividing them into categories based on demographic characteristics including race, gender, income, and residence in rural or urban areas.[143] The authors discovered that seventy-five percent of those participating in the survey agreed that the police were justified in using deadly force against the plaintiff and twenty-six percent disagreed.[144] Aside from the question of whether these statistics directly undermine the Supreme Court's claim that "no reasonable juror" could fail to find the use of deadly force justified, the survey also found that African-Americans, low-income workers, survey participants from the Northeast, persons who characterized themselves as liberals, and Democrats tended to end up with views on the videotape that were more favorable to the plaintiff than did the majority of the Supreme Court:

> Individuals with these characteristics tend to share a cultural orientation that prizes egalitarianism and social solidarity. Various highly salient, "symbolic" political issues—from gun control to affirmative action, from the death penalty to environmental protection—feature conflict between persons who share this recognizable cultural profile and those who hold an opposing one that features hierarchical and individualistic values. We found that persons who subscribed to the former style tended to perceive less danger in [the plaintiff's] flight, to attribute more re-

140. *Id.* at 384.

141. *Id.* at 391 (Stevens, J., dissenting). Justice Stevens also points to specific points at which he believes the majority drew debatable inferences from the videotape, including his suggestion that the motorists seen pulling over on the videotape did so because the drivers heard sirens or saw flashing lights rather than as a result of being forced off the road by the plaintiff. *Id.*

142. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009).

143. *Id.* at 859.

144. *Id.* at 866. At the same time, forty-five percent agreed at least slightly with the conclusion that the chase was not worth the risk. *Id.* at 865.

> sponsibility to the police for creating the risk for the public, and to find less justification in the use of deadly force to end the chase. Indeed, these individuals were much more likely to see the *police,* rather than [the plaintiff], as the source of the danger posed by the flight and to find the deliberate ramming of [the plaintiff's] vehicle unnecessary to avert risk to the public.[145]

The issues in the *Nelson* case seem tailor-made for mapping in the categories of the authors, with the interests of prisoners, women, civil rights plaintiffs, and African-Americans[146] versus prison staff, and those who have generally conservative views with respect to civil rights claims, or claims on behalf of women or African-Americans. It is therefore interesting that all eleven judges on the en banc court decided the Eighth Amendment issue in favor of the same party that the judge concluded should prevail on the qualified immunity issue. While it would be clearly unjustified to suggest that any member of the en banc court was influenced in either direction by such considerations, the law professors who conducted the study of reactions to the videotape are surely correct that "[f]acts 'speak for themselves' only against the background of preexisting understandings of social reality that invest those facts with meaning."[147] For that reason, as the authors argue, judges should be particularly alert to the need to exercise restraint when they are inclined to decide that a case should not be allowed to proceed to a jury trial, particularly when the judge can foresee that others with recognizable identity-defining characteristics—either inherent or ideological—would be likely to perceive an "exclusionary message" in having their statistically-likely views defined as ones that no reasonable juror could hold.[148]

2. *The Rejection of Qualified Immunity*

The section of the majority opinion rejecting Officer Turensky's defense of qualified immunity began with a recitation of some general principles governing the application of the defense. A public official will not have such a defense if the official's actions violated a "clearly established" constitutional right.[149] There need not be a case with materially or fundamentally similar facts in order for a constitutional right to be "clearly established."[150] Indeed, "officials can still be on notice that their conduct violates

145. *Id.* at 841 (citation omitted) (emphasis added).

146. Possibly because Shawanna is similar to Shawna, a common African-American name, in the author's experience many people assume that Ms. Nelson is African-American before meeting her. *See* African American Baby Names Dictionary—Letter S, http://www.babynames.org.uk/african-american-names-list-s.htm (last visited Mar. 1, 2010).

147. Kahan et al., *supra* note 142, at 883.

148. *Id.* at 898–99.

149. Nelson v. Corr. Med. Servs., 583 F.3d 522, 527 (2009) (en banc).

150. *Id.* at 531.

established law even in novel factual circumstances."[151] In addition, a court can find that a defendant had notice of the "clearly established" law through the Constitution itself, or through decisions of the lower federal courts.[152]

The majority relied on several cases to hold that the law is "clearly established." The first was *Hope v. Pelzer*,[153] in which the Supreme Court held that the practice of handcuffing prisoners to an outside hitching post, in the absence of an emergency situation, when the restraint created a danger of particular pain and humiliation, violated the Eighth Amendment.[154] The majority also relied upon *Estelle v. Gamble*,[155] in which the Supreme Court held that prisoners challenging a failure to provide medical care as a violation of the Eighth Amendment must demonstrate that defendant prison staff were "deliberately indifferent" to serious medical needs,[156] as well as *Farmer v. Brennan*,[157] in which the Court defined the "deliberate indifference" standard as involving situations in which the prison official acts or fails to act despite knowledge of a substantial risk of serious harm.[158] The court of appeals also cited two of its own cases applying *Farmer* to hold that a trier of fact could find an Eighth Amendment violation based on evidence that prison officials had ignored an "obvious" risk to a prisoner related to a serious medical need.[159] Finally, the majority cited *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*, in which the district court found that shackling a woman prisoner during labor violated the Eighth Amendment.[160]

The dog that does not bark in the discussion of whether the law was clearly established that Ms. Nelson's treatment violated the Eighth Amendment is *Miller v. Shoenen*.[161] In that case, the Eighth Circuit Court of Appeals reviewed an interlocutory appeal based on an asserted defense of qualified immunity by prison doctors where a prisoner alleged that prison doctors had denied him medical care that he required as a result of his previous

151. *Id.* (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).
152. *Id.* (citations omitted).
153. 536 U.S. 730 (2002).
154. *Id.* at 738.
155. 429 U.S. 97 (1976).
156. *Id.* at 104–05.
157. 511 U.S. 825 (1994).
158. *Id.* at 842.
159. Nelson v. Corr. Med. Servs. (*Nelson II*), 583 F.3d 522, 532 (8th Cir. 2009) (en banc) (citing Tlamka v. Serrell, 244 F.3d 628, 633 (8th Cir. 2001); Coleman v. Rahija, 114 F.3d 778, 786 (8th Cir. 1997)). *Farmer* states that a fact finder may conclude that a prison official had actual knowledge of a risk on the basis of circumstantial evidence, such as the fact that a risk is obvious. *Farmer*, 511 U.S. at 842.
160. *Nelson II*, 583 F.3d at 532–33 (citing Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 668–69 (D.D.C. 1994), *vacated in part & modified in part on other grounds*, 899 F. Supp. 659 (D.D.C. 1995), *remanded*, 93 F.3d 910 (D.C. Cir. 1996)).
161. 75 F.3d 1305 (8th Cir. 1996).

heart transplant.[162] The district court held that the physicians were not entitled to qualified immunity,[163] and the court of appeals affirmed the denial of immunity because it concluded the plaintiff had introduced sufficient evidence for a reasonable jury to find that the plaintiff had serious medical needs and that defendants knew of these needs but failed to provide adequate treatment.[164] In short, the court of appeals applied the same *Farmer* standard, used for determining whether defendants were entitled to summary judgment on the underlying Eighth Amendment issue, to the question of qualified immunity, suggesting that whenever a plaintiff successfully proves a *Farmer* Eighth Amendment claim involving medical care, the plaintiff has also proven all that is necessary to defeat qualified immunity.

Possibly the reason that the *Nelson* court of appeals was hesitant to rely on *Miller* was the Supreme Court's later decision in *Saucier v. Katz*[165] regarding qualified immunity. In *Saucier*, the Court held, in the context of a Fourth Amendment claim alleging that a police officer had used excessive force, that the inquiry into whether a reasonable jury could find a violation of the Fourth Amendment was logically distinct from the inquiry as to whether the law was clearly established that the officer's conduct was unconstitutional, so as to deprive the officer of the defense of qualified immunity.[166]

This is in some ways a difficult distinction to understand because in the context of *Saucier* the applicable constitutional standard required the plaintiff to prove that the officer's use of force was objectively unreasonable.[167] This inquiry on its face seems quite similar to an inquiry into whether the law was clearly established that the officer's conduct was prohibited. The Supreme Court, however, concluded that judicial decisions will not always give a clear answer as to whether a use of force will be determined excessive in a particular factual circumstance, and in such circumstances, the law cannot be said to be "clearly established" so as to deprive a defendant of qualified immunity.[168] The danger in such an approach is that if a federal court applies *Saucier* to allow defendants to claim qualified immunity when their conduct does not significantly differ from previous conduct held to constitute deliberate indifference, defendants who are deliberately indifferent to an excessive risk of harm to a prisoner, but with a type of harm or degree of risk slightly different from any previous successful case, will avoid liability for the resulting constitutional violation. Many precedents

162. *Id.* at 1307.
163. *Id.*
164. *Id.* at 1310–11.
165. 533 U.S. 194 (2001), *receded from by*, Pearson v. Callahan, 129 S. Ct. 808, 818 (2009).
166. *Id.* at 203–05.
167. *Id.* (citing Graham v. Connor, 490 U.S. 386, 396–97 (1989)).
168. *Id.* at 205–06.

from the United States Supreme Court, such as *Saucier*, support an analysis that requires great factual similarity with previous cases to defeat qualified immunity,[169] but other Supreme Court precedents, like *Hope*[170] and other cases cited by the majority in *Nelson II*, appear far less demanding. Federal judges, in fact, apparently have a great deal of latitude in the application of the defense.

Two relatively minor points about the qualified immunity discussions in *Nelson II* also warrant some discussion. The strongest argument of the dissent is its objection that the majority cites only *Women Prisoners*[171] as existing precedent holding that shackling a woman prisoner during labor violates the Constitution. On its own, without *Hope* and the Eighth Circuit precedents cited by the majority, the dissent's argument might well be persuasive. The factual circumstances in *Hope* were, however, in many respects parallel to those in *Nelson II*, and to some extent there was less justification for the restraints and more risk of harm to the prisoner in *Nelson II* than in *Hope*. Both cases involved the use of mechanical restraints to attach a prisoner to a stationary object while the prisoner was outside the prison; both cases involved a situation in which the use of restraints posed a serious risk to both the physical health of the prisoner and to the prisoner's dignity. Neither case involved a claim of an emergency security need for restraining the prisoner to a stationary object. Indeed, the risk of harm from restraining both legs of a woman in labor seems intrinsically greater than the risk inherent in handcuffing a prisoner to a hitching post who has no known special medical contra-indications to such treatment.

Further, unlike the factual setting in *Hope,* in which the prisoner had previously been involved in disciplinary issues while outside the prison,[172] the record does not remotely suggest that Ms. Nelson had a similar disciplinary history. The Supreme Court suggested in *Hope* that, even without any previous decisions condemning the attachment of a non-protesting prisoner to a stationary object in a manner that posed a significant risk of harm to that prisoner, it might still have found that the law was "clearly established" that such conduct violated the Eighth Amendment.[173] Given this, the court of appeals in *Nelson II* would have been justified in denying qualified immunity even if *Women Prisoners* had never been decided.

Finally, the majority opinion vigorously argues that the correctional officer's actions were unsupported by Arkansas Department of Correction's policy, while the dissent just as vigorously argues that the officer acted in a

169. *See Saucier*, 533 U.S. 194.

170. *See* Hope v. Pelzer, 536 U.S. 730 (2002).

171. Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 877 F. Supp. 634, 668–69 (D.D.C. 1994), *vacated in part & modified in part on other grounds*, 899 F. Supp. 659 (D.D.C. 1995), *remanded*, 93 F.3d 910 (D.C. Cir. 1996)).

172. *See Hope*, 536 U.S. at 734–35.

173. *Id.* at 741.

manner consistent with the policy.[174] It is not clear why this issue seemed of great significance to members of the en banc court. The Supreme Court case that is most closely on point to the issues in *Nelson II* is, as discussed above, *Hope v. Pelzer*.[175] At issue in *Hope* was a formal policy of the Alabama Department of Corrections that allowed use of the hitching post.[176] Significantly, in *Hope*, the Supreme Court held that the officers who were involved in the hitching post lacked qualified immunity[177] even though the Court also affirmed the determination of the Eleventh Circuit that "the *policy* and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment."[178]

V. BEYOND *NELSON II*

The Eighth Circuit en banc decision in *Nelson II* represents an extraordinarily important precedent for women prisoners who face the physical risks and inherent indignities of being forced to labor and give birth in chains. At the same time, the case raises even more questions than it answers: What about preventive measures taken against a prisoner who does pose a risk of escape or some other security threat but who is also at extreme risk of harm from these measures? This situation does not fall neatly into the *Farmer* "deliberate indifference" standard for failure to respond to known medical risks[179] nor the *Whitley v. Albers* "malicious and sadistic" standard that applies to claims that a correctional officer used excessive force in an emergency situation when the use of some force was appropriate.[180] What policies should a Department of Correction promulgate to assure that correctional officers have appropriate guidance on the issue of the use of mechanical restraints on prisoners with a variety of health needs, in a broad spectrum of factual settings, particularly when, as Ms. Nelson's experience shows, it is not safe to assume that a physician will be available to provide guidance to the officer? Finally, *Nelson II* raises critical issues that go far beyond the prison context of the case itself regarding the degree of specificity required in previous decisions for the law to be "clearly estab-

174. *Compare Nelson II*, 583 F.3d at 533, *with Nelson II*, 583 F.3d at 540 (Riley, J., concurring in part and dissenting in part).

175. *Hope*, 536 U.S. at 730.

176. *Id.* at 744–45.

177. *Id.* at 745–46.

178. *Id.* at 736 (quoting Hope v. Pelzer, 240 F.3d 975, 980–81 (11th Cir. 2001) (emphasis added)); *see also Hope*, 536 U.S. at 747 (stating that the Supreme Court's decision that the act of cuffing a prisoner to a hitching post in a non-emergency situation violates the Eighth Amendment "adequately rests on the same assumption that sufficed for the Court of Appeals.").

179. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

180. Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

lished" and the degree to which federal judges should be reluctant to take factual issues from a jury when those issues are embedded in a case raising claims that are ideologically controversial.