

Winter December 13, 2014

# The Widespread Handcuffing of Arrestees in the United States

Francois Quintard-Morenas

## The Widespread Handcuffing of Arrestees in the United States

### Introduction

Handcuffing in the United States has become ubiquitous, regardless of age, offense, or circumstances. Across the nation, children,<sup>1</sup> teenagers,<sup>2</sup> women,<sup>3</sup> men,<sup>4</sup> and elders<sup>5</sup> are handcuffed upon arrest for the most minor offenses. Their ages range from five<sup>6</sup> to ninety-seven.<sup>7</sup> This phenomenon has received little attention from legal scholars,<sup>8</sup> despite its dramatic reversal of a long-standing common law rule.

At common law, police officers were prohibited from handcuffing arrestees absent special circumstances, such as a threat to safety, resistance, or risk of escape.<sup>9</sup> Established in nineteenth-century England<sup>10</sup> and embraced early by U.S. courts,<sup>11</sup> this principle still prevails in most common law jurisdictions,<sup>12</sup> yet it has all but vanished in the United States.<sup>13</sup>

- 
- DESS, University of Paris II-Assas, 1996, DEA, University of Paris I-Sorbonne, 1998, LL.M., Georgetown University Law Center, 2003. This article is dedicated to Gail Atwater, Anshe Hedgepeth, and Harriette “Dolly” Kelton.

<sup>1</sup> Quentin Letts, *Where 5-Year-Olds Are Handcuffed*, THE TIMES, Nov. 9, 1996, at 7; *A 9-Year-Old Girl Accused of Stealing a Rabbit and \$10 from a Neighbor’s Home was Arrested, Handcuffed and Questioned at a Police Station*, CNN, Apr. 9, 2004; Bob Herbert, *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17; Ben Waldron, *Seven-Year-Old Handcuffed Over Lunch Money Dispute*, ABC NEWS, Jan. 30, 2013; Christopher Mathias, *Advocates Demand the NYPD Stop Handcuffing 5-Year-Olds*, THE HUFFINGTON POST, Oct. 30, 2014.

<sup>2</sup> Douglas Stanglin, *New York City Girl Handcuffed and Arrested for Doodling on Her Desk*, USA TODAY, Feb. 2, 2010; *G.M. v. Casalduc*, 982 F. Supp. 2d 1235, 1247 (D.N.M. 2013) (upholding the handcuffing of a fourteen-year-old girl who refused to turn over her phone at school).

<sup>3</sup> *7 Overdue Library Books Get Mother Handcuffed, Arrested*, ST. LOUIS POST-DISPATCH, June 11, 1999, at A6; Catherine Wilson, *Marshmallow Mistake Lands Woman in Handcuffs, Court*, THE BRADENTON HERALD, June 19, 2004, at 3; *A Woman in Washington Ended up in Handcuffs After Chewing a Peanut and Caramel Bar*, THE TIMES, Aug. 10, 2004, at 4.

<sup>4</sup> Martin Kettle, *Shackled for Driving Too Slowly*, THE GUARDIAN, June 26, 1998, at 3; Peter Applebome, *Handcuffed in Scarsdale, For the Crime of Beetlemania*, N.Y. TIMES, July 25, 2004, at A25; Melissa Grace, *Handcuffs, Bars For Bicycle Rider*, N.Y. DAILY NEWS, Nov. 14, 2005.

<sup>5</sup> David Teibel, *Police Probing Complaint of Excessive Force: 80-Year-Old Man Handcuffed Before Misdemeanor Citation*, TUCSON CITIZEN, Nov. 17, 1990, at 5A; *Texas Cops Slap Cuffs on 97-Year-Old Woman*, CHICAGO SUN-TIMES, Apr. 29, 2004, at 5.

<sup>6</sup> *See infra* note 1. A child as young as three was handcuffed as part of a Terry stop. *See Duggan v. City of League, Texas*, 975 F. Supp. 968 (S.D. Tex. 1997).

<sup>7</sup> *See supra* note 146.

<sup>8</sup> Scholars have predominantly focused on the handcuffing of defendants at trial. *See, e.g.*, Roderick Munday, *Handcuffing the Defendant*, 139 NEW L.J. 47 (1990); *Trials of Defendants in Handcuffs*, 157 JUST. OF THE PEACE 35 (1993). For an earlier study on the topic, see Louis B. Ewbank, *Extent of Right to Search and Bind Persons When Arrested*, 56 CENT. L.J. 303 (1903).

<sup>9</sup> *See infra* Part I.

<sup>10</sup> *See infra* Part I.A.

<sup>11</sup> *See infra* Part II.A.

<sup>12</sup> *See infra* note 75.

<sup>13</sup> *See infra* Part II.B.

Police departments in the United States have increasingly adopted mandatory handcuffing policies,<sup>14</sup> which judges have been reluctant to challenge.<sup>15</sup> As the routine use of handcuffs gradually became the norm, courts increasingly deferred to police discretion, but this deference has gone too far. “Auto Driver Handcuffed; Court Scolds Constable,”<sup>16</sup> reported the *Washington Post* in the 1920s. The same newspaper today reports that handcuffing a woman for not wearing her seatbelt,<sup>17</sup> or a twelve-year-old girl for eating a french fry in a subway station<sup>18</sup> is *per se* reasonable as long as there is probable cause that a law has been violated. Handcuffing is so pervasive that law enforcement agencies no longer consider it a reportable use of force.<sup>19</sup>

Judges commonly argue there are no precedents preventing police officers from handcuffing compliant arrestees.<sup>20</sup> Even if there were no precedents, the indignities inflicted during the “first step to justice”<sup>21</sup> that constitutes an arrest conflict with the right

---

<sup>14</sup> Gary W. Buchanan, *Handcuffing All Arrested Persons: Is the Practice Objectively Reasonable?*, 60 (8) THE POLICE CHIEF 26 (1993). See also John Kleinig, *Legitimate and Illegitimate Uses of Police Force*, 33 CRIM. J. ETHICS 83, 88 (2014) (noting that “there is generally no discretion regarding the handcuffing of arrestees. Every arrestee, from a 5-year-old child to a 97-year-old grandmother, is handcuffed...”); *Model Policy on Arrest*, IACP National Law Enforcement Policy Center (2010) (“All arrested persons shall be handcuffed after being taken into custody, except as otherwise provided by departmental policy.”); E-mail from Don Stern, Police Officer/Analyst, NYPD (Jan. 21, 2004) (on file with author) (“The Department’s policy is to handcuff all prisoners with hands behind their back.”); MPD General Order GO-PCA-502.01, *Transportation of Prisoners* (2001) (“Every person arrested and prisoners, including juveniles ... shall be handcuffed.”) (District of Columbia). A prior case argued before the Supreme Court shows that Justice O’Connor, who wrote the dissent in *Atwater*, was unaware that handcuffs were routinely part of a full custodial arrest. See Transcript of Oral Argument at \*8, *Knowles v. Iowa*, 119 S. Ct. 484 (1998) (No. 97-7597), available at 1998 WL 781827 (“MR. ROSENBERG: ... [I]n order to effectuate an arrest, the officer would have to essentially handcuff the person and take them to the police station. An arrest – QUESTION: Handcuffs are required? MR. ROSENBERG: All arrested persons are handcuffed, yes.”).

<sup>15</sup> See, e.g., *McPherson v. Auger*, 842 F. Supp. 25, 30 (D. Maine 1994); *Limbort v. Twin Falls County*, 955 P.2d 1123, 1127 (Idaho Ct. App. 1998); *McDermott v. Town of Windham*, 204 F. Supp. 2d 54, 67 (D. Maine 2002).

<sup>16</sup> *Auto Driver Handcuffed; Court Scolds Constable*, WASH. POST, Aug. 25, 1929, at M1 (“I, too, would resist arrest if the officer attempted to put handcuffs on me for a traffic violation. That is no way to command respect for the law.”).

<sup>17</sup> Charles Lane, *Police Win Latitude on Minor Cases; High Court Uphold Arrest, Jailing for Seat Belt Offense*, WASH. POST, Apr. 25, 2001, at A01. See also Frank J. Murray, *Cuffing of Minor Offenders is Upheld*, WASH. TIMES, Apr. 25, 2001, at A1; Sandy Banks, *Why a Mom’s Fate Should Worry Us All*, L.A. TIMES, Apr. 27, 2001; Akhil Reed Amar, *An Unreasonable View of the 4th Amendment*, L.A. TIMES, Apr. 29, 2001, at M1.

<sup>18</sup> Lyndsey Layton, *Metro Arrest for Snacking Ruled Legal*, WASH. POST, Oct. 3, 2003, at B1.

<sup>19</sup> PRINCIPLES FOR PROMOTING POLICE INTEGRITY: EXAMPLES OF PROMISING POLICE PRACTICES AND POLICIES 6 (U.S. Department of Justice, 2001) (“The routine use of handcuffs need not be considered a reportable use of force.”).

<sup>20</sup> See, e.g., *McPherson v. Auger*, 842 F. Supp. 25, 30 (D. Maine 1994) (“Plaintiff has pointed to no case law or set of facts to indicate that the Town’s uniform handcuffing policy reflects an excessive use of force....”); *Trout v. Frega*, 926 F. Supp. 117, 122 (N.D. Ill. 1996) (“Although many cases hold that handcuffing is a reasonable restraint, neither the court nor the parties have found cases stating that it is unreasonable.”); *Peters v. City of Biloxi*, 57 F. Supp. 2d 366, 374 (S.D. Miss. 1999) (“Plaintiffs have cited no authority, and the court has uncovered none, in this circuit or any other holding that [being handcuffed and verbally abused] is actionable under §1983.”).

<sup>21</sup> THE LAW OF ARRESTS IN BOTH CIVIL AND CRIMINAL CASES I (London, 1742).

to be free from punishment (including humiliation) before conviction. Unless handcuffing all arrestees regardless of the circumstances serves a legitimate law enforcement purpose, such a treatment constitutes a form of punishment that undermines the presumption of innocence.<sup>22</sup> The connotation of guilt associated with wearing handcuffs is undeniable. Judges have long acknowledged it.<sup>23</sup> But it is only in court that suspects have the right to be clothed with the “appearance, dignity, and self-respect” of free and innocent individuals.<sup>24</sup>

Most handcuffing claims against police officers are excessive force claims brought under the Fourth Amendment.<sup>25</sup> Despite the U.S. Supreme Court’s holding in *Graham v. Connor*<sup>26</sup> that the use of force be “objectively reasonable”<sup>27</sup> in light of the circumstances, courts have increasingly sanctioned a blanket policy of handcuffing all arrestees based on “anything is possible.”<sup>28</sup> Failing to acknowledge that some circumstances do not warrant any use of force, courts have developed an odd injury-based jurisprudence that has made it almost impossible for handcuffed arrestees to prevail on their excessive force claims unless they can allege “severe physical injuries” resulting from the use of handcuffs.<sup>29</sup>

Some courts have questioned the practice of handcuffing all arrestees,<sup>30</sup> but they have fallen short of recognizing that arrestees have a constitutional right not to be handcuffed. A recent en banc ruling by the Ninth Circuit<sup>31</sup> might affect how courts decide handcuffing cases, at least as it relates to the handcuffing of children. The Supreme Court has yet to formally decide the issue

Handcuffing all arrestees regardless of the circumstances for ease of police work is fundamentally inconsistent with *Graham*’s command that any use of force be “objectively reasonable”. Handcuffing, in and of itself, constitutes excessive force where the circumstances do not warrant any use of force and should be ruled unconstitutional.

The common law tradition established the right not to be handcuffed upon arrest. U.S. courts initially applied this principle through the mid-twentieth century and then erroneously abandoned it. Current handcuffing jurisprudence is thus unsound and should return to a standard that prohibits handcuffing arrestees, absent special circumstances.

---

<sup>22</sup> On the presumption of innocence as a shield against premature punishment, see our article *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107 (2010).

<sup>23</sup> See, e.g., *State v. Mollman*, 2003 S.D. 150 (2003) (observing that courts must “guard against practices which unnecessarily mark the defendant as a dangerous character or suggest that his guilt is a foregone conclusion.”); *Deck v. Missouri*, 544 U.S. 622, 630 (2005) (“Visible shackling undermines the presumption of innocence and the relative fairness of the fact finding process.”).

<sup>24</sup> *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973).

<sup>25</sup> The Fourth Amendment prohibits unreasonable searches and seizures.

<sup>26</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>27</sup> *Id.* at 397.

<sup>28</sup> See *infra* Part II.B.

<sup>29</sup> See *infra* note 195.

<sup>30</sup> See *infra* note 193.

<sup>31</sup> See *infra* note 198.

## I. The Common Law Right Not to Be Handcuffed Upon Arrest

Historically, the handcuffing of compliant arrestees had been considered such a “grievous indignity”<sup>32</sup> that common law judges did not hesitate to condemn police officers who abused their handcuffing power. Such an abuse violated the principle that presumptively innocent arrestees cannot be treated harshly absent special circumstances.

### A. An Officer Cannot Handcuff a Compliant Arrestee

When the Fourth Amendment was adopted, there is some indication that police officers used handcuffs only as a last resort,<sup>33</sup> though there is nothing conclusive to support this assertion.<sup>34</sup> Little is learned from the great common law commentators, as they focused on the fettering of unconvicted prisoners in jail, at arraignment, or during trial, not at the time of arrest.<sup>35</sup> When Justice John Bayley of the Court of King’s Bench condemned in 1825 the handcuffing of a suspected felon on the ground that there was no evidence that “it was necessary [to prevent his escape], or that he had attempted to escape,”<sup>36</sup> his decision firmly established in the common law the right of suspects not to be handcuffed upon arrest. Applied in the

---

<sup>32</sup> Regina v. Taylor, 59 JP 393 (1895). See also Statham v. Wheeler, THE MANCHESTER GUARDIAN, Aug. 1, 1874, at 9 (Salford Hundred Assizes, 1874) (denouncing the “gratuitous indignity” of handcuffing plaintiffs arrested for a venial offense who offered no resistance to the police).

<sup>33</sup> This conclusion stems from an examination of cases tried at the Old Bailey in the City of London in the eighteenth and early nineteenth centuries. See, e.g., Old Bailey Proceedings Online (www.oldbaileyonline.org), June 28, 1769, trial of Thomas Meller for rape (t17690628-8) (“The constable said, the prisoner must have his hands tied, he having made a resistance. He was very obstropulous.”); June 9, 1772, trial of James Morgan, Henry Edwards, and John Falmy for theft (t17720109-62) (“He was very resolute; we were obliged to handcuff him.”); Jan. 13, 1773, trial of Barnard Kilroy for theft (t17730113-24) (“I seized him; he attempted to get away, and behaved so ill I was obliged to handcuff him.”); Apr. 4, 1779, trial of Richard Hyde for breaking the peace (t17800628-111) (“When he was brought to me; he did a great deal of mischief; we were obliged to handcuff him.”); July 9, 1800, trial of James Riley for theft (t18000709-93) (“[H]e was very restive going along, I was obliged to handcuff him.”); Oct. 31, 1810, trial of William Trueman and Joseph Holbrook for theft and robbery (t18101031-25) (“I told the prisoner if he would go quietly I would neither tie him nor handcuff him.”).

<sup>34</sup> Other cases tried at the Old Bailey in the same period reveal that some prisoners were immediately handcuffed upon arrest. See, e.g., Dec. 6, 1769, trial of Joseph Brown for theft (t17691206-20) (“We tied his hands with the cord, and took him to the watch-house.”); June 25, 1788, trial of John Place and Francis Harris for theft with violence (t17880625-14) (“I told him I wanted him, he said what for; I told him for a robbery; I tied his hands....”).

<sup>35</sup> 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 385 (1968) (1268) (“When the person thus arrested is to be brought before the justices he ought not to be brought with his hands tied (though sometimes in leg-irons because of the danger of escape) lest he may seem constrained to submit to any form of trial.”); 2 MATTHEW HALE, PLEAS OF THE CROWN 219 (1736) (“The prisoner, tho under an indictment of the highest crime, must be brought to the bar without irons, and all manners of shackles or bonds ... unless there be a danger of escape.”); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 297 (1769) (“But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only....”).

<sup>36</sup> Wright v. Court, (1825) 107 Eng. Rep. 1182 (K.B.).

context of a warrantless arrest, the principle laid down in *Wright v. Court* would soon spread to the apprehension of suspects under a warrant.<sup>37</sup>

The law was consistent: absent special circumstances, an officer had no right to handcuff a person in custody, especially when the offense was trivial, and doing so rendered the officer liable for assault.<sup>38</sup> Thus courts awarded damages to plaintiffs handcuffed for such offenses as driving too close to the sidewalk,<sup>39</sup> forging electoral papers,<sup>40</sup> selling tripe on a Sunday,<sup>41</sup> failing to pay a road tax,<sup>42</sup> conveying tobacco to a prisoner,<sup>43</sup> or committing perjury.<sup>44</sup> Even for more serious offenses such as theft,<sup>45</sup> illegal gaming,<sup>46</sup> robbery,<sup>47</sup> breach of the peace,<sup>48</sup> or assault,<sup>49</sup> judges consistently reminded officers that a proper arrest did not necessarily warrant the use of handcuffs and that even though probable cause existed for the arrest, they had no right to handcuff unconvicted prisoners unless it was necessary. “The police are apt to imagine that a prisoner in custody loses all his rights as a citizen”<sup>50</sup> complained one judge. Judges regularly stressed there was no “greater mistake”<sup>51</sup> than to suppose that the police could handcuff anyone they pleased and that handcuffing everyone upon arrest amounted to “treat all alike,”<sup>52</sup> which was “absurd, and contrary to law.”<sup>53</sup> This jurisprudence was in line with the instructions issued in 1839 by the United Kingdom’s Home Office for the guidance of officers: “After arrest the Constable is, in all cases, to treat a prisoner properly, and impose only such constraint upon him as may be necessary for his safe custody.”<sup>54</sup> Soon police forces in the realm adopted

---

<sup>37</sup> Thurston v. Lipscomb, 8 THE COUNTY CTS. CHRON. 147 (London, 1855) (County Court of Monmouthshire, 1855).

<sup>38</sup> ADDISON ON TORTS 396 (London, 1860). See also SNOWDEN’S POLICE OFFICER’S GUIDE 5 (London, 1885); *Handcuffing Unconvicted Prisoners*, THE STAR, Feb. 4, 1884.

<sup>39</sup> German v. Smith, THE TIMES, Mar. 16, 1837, at 7E (Court of Common Pleas, 1837).

<sup>40</sup> Taylor, *supra* note 32.

<sup>41</sup> *Have the Police a Right to Handcuff Peaceable Prisoners*, THE WESTERN AUSTRALIAN TIMES, June 5, 1877, at 2 (citing a decision by the Salford Hundred Court).

<sup>42</sup> Babappu v. de Silva, 1 CEYLON SUP. CT. REP. 166 (Colombo, 1893) (Supreme Court of Ceylon, 1892). See also Perera v. Allis, 2 CEYLON L. REP. 39 (Colombo, 1892) (Supreme Court of Ceylon, 1891).

<sup>43</sup> Hamilton v. Massie, [1889] 18 O.R. 585 (Can.).

<sup>44</sup> Norman v. Smith (Manchester Assizes, 1880), cited in *Handcuffing Accused Persons*, JUST. OF THE PEACE, Jan. 25, 1896.

<sup>45</sup> Cooke v. Wood, THE MANCHESTER GUARDIAN, Dec. 3, 1872, at 6 (Salford Hundred Assizes, 1872). See also Lees v. Treweek, OTAGO DAILY TIMES, June 13, 1866, at 5 (Otago Supreme Court, 1866).

<sup>46</sup> Chong v. Cox (Supreme Court of New Zealand, 1902), cited in *Arrests and Handcuffing: An Important Point*, THE EVENING POST, Aug. 15, 1902, at 5.

<sup>47</sup> Dawes v. Slack, THE LAW TIMES, May 25, 1878, at 71 (Wakefield County Court, 1878).

<sup>48</sup> Statham v. Wheeler, THE MANCHESTER GUARDIAN, Aug. 1, 1874, at 9 (Salford Hundred Assizes, 1874).

<sup>49</sup> Sein v. The Crown, 8 BURMA L. REP. 134 (Rangoon, 1902) (Court of Lower Burma, 1902).

<sup>50</sup> *Have the Police a Right to Handcuff Peaceable Prisoners*, *supra* note 41.

<sup>51</sup> *Id.* See also Leigh v. Cole, 6 Cox Crim. Cas. 329 (Eng. 1853); Burns v. Beatson, EMPIRE, Aug. 8, 1860, at 5 (Sydney Jury Court, 1860); *The Right of Policemen to Handcuff Prisoners*, THE BELFAST NEWS-LETTER, Oct. 12, 1875.

<sup>52</sup> Statham, *supra* note 48.

<sup>53</sup> *Id.*

<sup>54</sup> INSTRUCTIONS RESPECTING THE DUTIES AND POWERS OF CONSTABLES (The National Archives, East Sussex Record Office, HO45/6647, Nov. 22, 1839) (on file with author). Comp. FRENCH

policies restricting the use of handcuffs on arrestees.<sup>55</sup> The most notorious of all, the London Metropolitan Police Force, had its officers carry a “Duty Book” reminding them not to “handcuff an unconvicted prisoner except in case of actual necessity, and in any case care must be taken not to expose a person to avoidable degradation.”<sup>56</sup> The handcuffing of suspects was the exception, not the rule.<sup>57</sup>

*B. An Officer May Handcuff an Arrestee Under Special Circumstances*

Placing arrestees in handcuffs was considered an extreme measure, and only special circumstances justified officers in resorting to it. In *Leigh v. Cole*,<sup>58</sup> Justice Vaughan Williams summarized the law:

[W]ith respect to handcuffing, the law undoubtedly is, that police officers are not only justified, but they are bound to take all reasonably requisite measures for preventing the escape of those persons they have in custody for the purpose of taking them before the magistrates; but what those measures are must depend entirely upon the circumstances, upon the temper and conduct of the person in custody, on the nature of the charge, and a variety of other circumstances which must present themselves to the mind of any one.<sup>59</sup>

These circumstances were special, not routine, and the onus of showing that the handcuffing was necessary fell on the officer.<sup>60</sup> Courts held the handcuffing legal where the suspect had been “very violent”<sup>61</sup> and “escaped more than once,”<sup>62</sup> was of “great muscular powers,”<sup>63</sup> offered “forcible resistance,”<sup>64</sup> or was charged

---

DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN, art. 9 (1789) (“Every man being presumed innocent until he has been found guilty, if it is deemed indispensable to arrest him, every act of rigor used, not necessary to secure his person, ought to be severely repressed by the law.”)

<sup>55</sup> See, e.g., COUNTY OF OXFORD CONSTABULARY. ORDERS AND REGULATIONS FOR THE GOVERNMENT OF THE FORCE 39 (1857).

<sup>56</sup> *The Bobbies of London Town: How the Metropolitan Police Force is Run that Guards the Capital of the British Empire*, N.Y. TIMES, Sept. 9, 1923, at 5. The Metropolitan Police has replaced the “Duty Book” with “Justify, Account and Record” memo cards carried on patrol by officers today. The message as to handcuffing is the same. See *infra* note 78.

<sup>57</sup> See, e.g., *Memorandum on the Subject of Handcuffing Prisoners* 4 (The National Archives, Kew Record Office, HO 144/280/A61828, 1900) (on file with author) (noting their infrequent use); *Sixty-Five Pairs of Handcuffs*, N.Y. TIMES, Sept. 22, 1889, at 3 (from the *London Truth*: “The corporation of Southampton invites tenders for sixty-five pairs of handcuffs. What on earth can they be required for, as it is very seldom that it is necessary to handcuff prisoners who are taken into custody!”).

<sup>58</sup> *Leigh v. Cole*, 6 Cox Crim. Cas. 329 (Eng. 1853).

<sup>59</sup> *Id.*

<sup>60</sup> *Perera v. Allis*, 2 CEYLON L. REP. 39 (Colombo, 1892) (Supreme Court of Ceylon, 1891).

<sup>61</sup> *Leach v. Simpson*, THE TIMES, June 10, 1839, at 5F. See also *Smith v. Brears and Beach*, 1 IR. L. T. 611 (1867) (validating the handcuffing of a violent man arrested for improperly working a horse).

<sup>62</sup> *Id.*

<sup>63</sup> *Thurston v. Lipscomb*, 8 THE COUNTY CTS. CHRON. 147 (London, 1855) (County Court of Monmouthshire, 1855).

<sup>64</sup> *Clements v. Egan*, THE TIMES, Apr. 4, 1851, at 7C.

with a serious offense such as murder.<sup>65</sup> Being drunk, using offensive language or even threatening with violence was not enough;<sup>66</sup> the officer had to honestly believe that the prisoner would attempt to escape if handcuffs were not used.<sup>67</sup> Special circumstances, such as an arrest late at night<sup>68</sup> or without the assistance of other officers,<sup>69</sup> justified the use of handcuffs even though the alleged offense was minor.<sup>70</sup>

Courts cautioned against defining “with over-minute exactness”<sup>71</sup> when handcuffs could be used, being mindful not to unreasonably interfere with the discretion of the police,<sup>72</sup> while insisting on their role as protector of the liberty of the subject.<sup>73</sup> The abuse of the use of handcuffs was real and it was for the courts to guard against the tendency of the police to automatically handcuff arrestees. The handcuffing of women, elders, and infirm persons was particularly reprovved.<sup>74</sup>

The principles outlined above have been carefully preserved in modern common law jurisdictions, where the traditional right to be free from handcuffs upon arrest is reaffirmed from time to time,<sup>75</sup> most recently by the Supreme Court of Ireland: “[I]t is unlawful to place handcuffs on suspects who are being arrested without giving any consideration to the context and in particular to the behaviour and demeanour of the individual being arrested. It is unlawful because, as a matter of

---

<sup>65</sup> *Arrests and Handcuffing. An Important Point*, *supra* note 46.

<sup>66</sup> *McAllister v. Johnson*, 40 REP. OF CASES DETERMINED BY THE SUP. CT. OF NEW BRUNSWICK 73 (Toronto, 1911) (Supreme Court of New Brunswick, 1910).

<sup>67</sup> *Thurston*, *supra* note 63.

<sup>68</sup> *Gill v. Hines*, THE ARGUS, Nov. 25, 1870, at 4 (Melbourne County Court, 1870).

<sup>69</sup> *Thurston*, *supra* note 63.

<sup>70</sup> *Gill*, *supra* note 70.

<sup>71</sup> *Thurston*, *supra* note 63.

<sup>72</sup> *Chong v. Cox* (Supreme Court of New Zealand, 1902), *cited in Arrests and Handcuffing: An Important Point*, THE EVENING POST, Aug. 15, 1902, at 5.

<sup>73</sup> *Babappu v. de Silva*, 1 CEYLON SUP. CT. REP. 166 (Colombo, 1893) (Supreme Court of Ceylon, 1892). *See also* *Sein v. The Crown*, 8 BURMA L. REP. 134 (Rangoon, 1902) (Court of Lower Burma, 1902).

<sup>74</sup> SNOWDEN’S POLICE OFFICER’S GUIDE, *supra* note 38, at 6. *See also* Maurice Moser, *Handcuffs*, 7 THE STRAND MAGAZINE 94 (1894); *Handcuffed Women. A Scene At Cardiff Railway Station*, WESTERN MAIL, Mar. 14, 1899.

<sup>75</sup> *See, e.g.*, *Slaveski v. Victoria*, (2010) V.S.C. 441 (Austl.) (“A police officer is not entitled to use handcuffs on a person merely because an arrest has been effected. All the circumstances must be examined to determine whether there are reasonable grounds for the use of handcuffs.”); *Gregory v. Canada*, [2002] 218 F.C. 287 (Can.) (“The unvarying use of handcuffs on all persons arrested without regard for the seriousness of the offence, a reasonable apprehension of violence, risk of escape, or the condition of the arrested person is improper.”); *Bibby v. Chief of Constable of Essex*, [2000] 164 J.P. 297 (Eng.) (“[T]he use of handcuffs in the circumstances was not reasonable.”); *Kumar v. Minister for Immigration, Local Government and Ethnic Affairs and Others*, [1991] 100 A.L.R. 439 (Austl.) (“If a person is unreasonably handcuffed then he is entitled at common law to bring an action to recover damages for the indignity.”); *Crawley v. Attorney General*, [1987] H.K.L.R. 379 (H.C.) (“The sergeant’s explanation for the use of handcuffs was simply that it was normal procedure, and he did not apply his mind to the particular circumstances. The handcuffing was not justifiable and amounted to an assault and battery for which the plaintiff was entitled to compensation.”); *Prem Shankar Shukla v. Delhi Administration*, [1980] 3 S.C.C. 526 (India) (“Handcuffing is prima facie inhuman and, therefore, unreasonable.... [H]andcuffs must be the last refuge, not the routine regimen.”).

principle, the police must use only such force as is reasonable in the circumstances.”<sup>76</sup> In London, the Metropolitan Police Force is required, as in the past,<sup>77</sup> to justify the use of handcuffs.<sup>78</sup> This contrasts significantly with the widespread handcuffing of arrestees in the United States.<sup>79</sup>

## II. A Disappearing Right in the United States

Through the mid-twentieth century, U.S. law recognized a standard similar to the one adopted in other common law jurisdictions: even though the police had probable cause to arrest, they could still be liable for unnecessarily handcuffing arrestees. This police accountability would vanish as the use of handcuffs by officers became routine and the judiciary largely abdicated its role as guardian of civil liberties.

### A. Probable Cause Was Not Enough to Justify Handcuffing Arrestees

Even though manual touching is unnecessary to constitute an arrest,<sup>80</sup> U.S. courts recognized early that the act of tying the hands of prisoners was within the authority of police officers.<sup>81</sup> Officers had the duty to safely bring their prisoners before a magistrate when they reasonably could,<sup>82</sup> and allowing an escape could expose them to liability.<sup>83</sup> But ministers of the law abused their authority when they treated arrestees with unnecessary harshness.<sup>84</sup> “Remember that under the law all

---

<sup>76</sup> Director of Public Prosecutions v. Cullen, [2014] I.E.S.C. 7 (Ir.) (Fennelly J.). *See also* Criminal Law Act, 1967, c. 58, § 3 (Eng.); GUIDANCE ON THE USE OF HANDCUFFS (Association of Chief Police Officers of England, Wales & Northern Ireland, 2009).

<sup>77</sup> *See supra* note 56.

<sup>78</sup> Each officer must carry on patrol “Justify, Account and Record” memo cards. The card on handcuffing reads: “‘Handcuffed for officer safety’ ‘Not sufficient! We can handcuff anyone but we must be able to justify it. Fully detail all the circumstances, set the scene, and describe their build, your build, their demeanour, and any warning signals. Include all the factors available to you.’” E-mail from Damion Baird, Information Manager, Directorate of Professional Standards, Metropolitan Police Service (Apr. 25, 2012) (on file with author).

<sup>79</sup> USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 33 (U.S. Department of Justice, National Institute of Justice and Bureau of Justice Statistics, 1999) (measuring the amount of force used by the police in six jurisdictions and reporting the use of handcuffs in 82.3 percent of arrests).

<sup>80</sup> Gold v. Bissell, 1 Wend. 210 (N.Y. Sup. Ct. 1828); California v. Hodari, 499 U.S. 621, 626 (1991) (“An arrest requires either physical force ... or, where that is absent, submission to the assertion of authority. ‘Mere words will not constitute an arrest, while, on the other hand, no actual, physical touching is essential.’” *See also* State v. Deatherage, 35 Wash. 326, 331 (1904) (“The fact that the appellant was not handcuffed does not show that he was not under arrest.”)).

<sup>81</sup> State v. Stalcup, 24 N.C. 50 (1841).

<sup>82</sup> *See, e.g.*, Wright v. Court, (1825) 107 Eng. Rep. 1182 (K.B.); Butler v. Washburn, 25 N.H. 251 (1852).

<sup>83</sup> *Police Trials*, BROOKLYN EAGLE, June 25, 1873, at 4. *But see* State v. Hunter, 94 N.C. 829 (1886) (holding that a failure to handcuff is not negligence *per se*).

<sup>84</sup> JOHN G. HAWLEY, THE LAW OF ARREST ON CRIMINAL CHARGES, AS IT HAS BEEN ADJUDGED BY THE FEDERAL AND STATE COURTS OF THE UNITED STATES 18 (Chicago, 1889); JOSEPH HENRY BEALE, JR., A TREATISE OF CRIMINAL PLEADING AND PRACTICE 24 (Boston, 1899); Rolin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 262 (1940).

persons are assumed to be innocent until proven guilty in the manner provided,”<sup>85</sup> stressed the training inspector at the New York Police Department in the early 1900s. As a result, the manner in which arrests were conducted was particularly scrutinized.

Thus a New York newspaper article, “Constable Charged With Brutality. Manacles Prisoner’s Hands Behind His Back”<sup>86</sup> exemplified the law in the nineteenth and early twentieth centuries: an officer was not justified in handcuffing an arrestee unless the circumstances dictated otherwise.<sup>87</sup> Several factors were considered in assessing whether the handcuffing was reasonable: the seriousness of the offence, the demeanor and build of the suspect, the time and place of arrest, whether resistance was offered, and whether the officer honestly believed that the suspect posed a threat or was likely to escape. Thus an unresisting debtor quietly submitting to the authority of a sheriff could not be loaded with bonds and fetters,<sup>88</sup> or a citizen handcuffed for not leaving promptly after voting and for taunting a policeman absent a showing he was quarrelsome, dangerous, or desperate, or intended to commit a breach of the peace.<sup>89</sup> As for a man charged with criminal libel and offering no resistance, nothing could justify handcuffing him and leading him through the streets of a city in broad daylight, especially when the sole purpose was to punish and humiliate him.<sup>90</sup>

But the handcuffing was deemed justified under special circumstances: a fisherman arrested without a warrant for illegal fishing and making a “pretty hostile threat of violence,”<sup>91</sup> a woman who had “violently resisted”<sup>92</sup> her arrest under a warrant, a man suspected of “felonious assault,”<sup>93</sup> a prisoner who had shown himself “swift and slippery”<sup>94</sup> by twice escaping, a man arrested for a misdemeanor and conveyed “long after dark”<sup>95</sup> with another prisoner for a “considerable distance”<sup>96</sup> by

---

<sup>85</sup> CORNELIUS F. CAHALANE, *POLICE PRACTICE AND PROCEDURE* (New York, 1914). *See also* Lewis Hochheimer, *Disposal and Treatment of Persons Accused of Crime*, 52 *CENTRAL L. J.* 265 (1901) (“The underlying doctrine which shapes and controls the entire system of procedure is that of the presumption of innocence. . . . No unnecessary or excessive force or violence must be resorted to in effecting the arrest.”).

<sup>86</sup> *ST. LAWRENCE REPUBLICAN*, Oct. 22, 1913, at 8 (judge denouncing as “unnecessary and brutal” the handcuffing of a man arrested for a breach of the Liquor Act).

<sup>87</sup> 5 *C.J.S. Arrest* § 72 (1916) (“As a general rule an officer is not justified in handcuffing a prisoner whom he has in charge unless it is necessary to do so to prevent an escape.”). *See also* HARVEY CORTLANDT VOORHEES, *THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS* 171 (2d ed. 1915) (“The right to handcuff must depend on the circumstances of each particular case, considering the nature of the charge, and the conduct and temper of the person in custody.”).

<sup>88</sup> *M’Donald v. Neilson*, 2 *Cowen’s Rep.* 139, 185 (Ct. Err. N.Y. 1823).

<sup>89</sup> *Giroux v. State*, 40 *Tex.* 97 (1874).

<sup>90</sup> *Shields v. Pflanz*, 41 *S.W.* 267 (Ct. App. Ky. 1897) (holding that “[t]here may be cases in which an officer would have a right to place handcuffs upon a prisoner, but from the allegations in the petition in this case it is made to appear that the acts complained of were done maliciously, unnecessarily, and for the purpose of degrading and punishing the appellant, and not for the purpose of enabling the officer to properly execute the writ then in his hands.”).

<sup>91</sup> *Sheets v. Atherton*, 62 *Vt.* 229 (1890).

<sup>92</sup> *Dehm v. Hinman*, 56 *Conn.* 320 (1887).

<sup>93</sup> *Edger v. Burke*, 96 *Md.* 715 (1903).

<sup>94</sup> *State v. Sigmnan*, 106 *N.C.* 728 (1890).

<sup>95</sup> *McCullough v. Greenfield*, 133 *Mich.* 463 (1903).

<sup>96</sup> *Id.*

a single officer, or a suspect charged with a “heinous crime”<sup>97</sup> and known as a “bad man.”<sup>98</sup>

One court gave further discretion to the police, though it stands alone in its broad holding until well into the twentieth century. In *Firestone v. Rice*,<sup>99</sup> the Supreme Court of Michigan held that a certain discretion must be given to the officer and absent recklessness, wantonness, or malice, an officer may lawfully handcuff a prisoner if he has “good reason”<sup>100</sup> to do so, even if it turns out that the suspect was innocent, harmless, and had no intention of escaping.<sup>101</sup> Yet there were special circumstances in this case. The court upheld the handcuffing of suspected felons known to be “slippery and desperate”<sup>102</sup> and conveyed through the woods on a dark night and at a late hour for a great distance. *Firestone* was paradoxically interpreted as giving broad discretion to the police<sup>103</sup> despite the court’s own acknowledgement that handcuffing was an “extreme measure”<sup>104</sup> used under certain circumstances.

In 1934 and again in 1965, the Restatement of Torts still stated the common law rule that an officer may not handcuff a suspect without “reasonable ground,”<sup>105</sup> and stressed that custodial power could not be used in a manner “grossly offensive to a reasonable sense of personal dignity....”<sup>106</sup> In the 1940s, Professor Rollin Perkins, a national authority on criminal law, taught his students that using handcuffs depended on the circumstances; therefore “an officer would be acting unlawfully if he should handcuff one arrested on a minor traffic charge if there was no resistance and no other reason to believe handcuffing necessary.”<sup>107</sup> Courts heard the message: “A Handcuffed Driver Wins in Traffic Court,” reported the *Chicago Daily Tribune* in 1959.<sup>108</sup> “Indiscriminate use of handcuffs” by the police is an “infringement of the rights and privileges of individual citizens” ruled a New York court in 1965.<sup>109</sup>

---

<sup>97</sup> *Diers v. Mallon*, 46 Neb. 121, 134 (1895).

<sup>98</sup> *Id.* See generally EDWARD C. FISHER, LAWS OF ARREST §145 (1967).

<sup>99</sup> *Firestone v. Rice*, 71 Mich. 377, 384-385 (1888) (holding that “[i]t is not necessary ... that the prisoner must be unruly, or attempt to escape, before he can be handcuffed, or do anything indicating a necessity for such restraint. Nor, in the event that he does nothing, at the time of the arrest, in the way of attempting to escape, or resisting the officer, is it necessary that he should be a notoriously bad character in order to justify the tying of his hands. There may be other and sufficient reasons ... why such extreme measures should be resorted to in order to secure and safely lodge the prisoner.”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 386. See also *Chrisman v. Carney*, 33 Ark. 316 (1878) (holding that handcuffing does not transcend the power of the officer when done with a view to security).

<sup>102</sup> *Firestone*, 71 Mich. at 385.

<sup>103</sup> *Handcuffing of Prisoners - Discretion of Officers*, 3 N.Y. Op. Att’y Gen. 424 (1930) (“It seems that an officer is entitled to use his judgment as to the handcuffing of a prisoner, and that while he will be liable for a malicious and wanton abuse of such discretion, there will ordinarily be a strong presumption that he has acted reasonably and honestly.”).

<sup>104</sup> *Firestone*, 71 Mich. at 385.

<sup>105</sup> RESTATEMENT (FIRST) OF TORTS § 132 cmt. b (1934); RESTATEMENT (SECOND) OF TORTS § 132 cmt. b (1965).

<sup>106</sup> *Id.*

<sup>107</sup> Perkins, *supra* note 84.

<sup>108</sup> CHI. DAILY TRIB., Mar. 10, 1959, at B7 (traffic court judge dismissing the charges of improper left turn, disorderly conduct, and resisting arrest against a twenty-one-year-old man handcuffed upon arrest).

<sup>109</sup> *Faccioli v. State of New York*, 261 N.Y.S.2d 416, 420 (Ct. Cl. 1965) (Donaldson, J.) (“When an officer restrains an individual, he is entitled to use his judgment in every case as to whether he will

In all of these cases, the officers were still expected to justify the use of handcuffs, and judges held accountable those who abused their discretion. This long-standing common law would soon be replaced by routine, unquestioned handcuffing.

*B. A Stunning Reversal: Probable Cause Arrest Renders Handcuffing Per Se Reasonable*

By the 1970s, routine handcuffing was well underway in the United States, as handcuffs became an integral part of police uniform.<sup>110</sup> Complaints against their unvarying use rose.<sup>111</sup> Citizens denounced the unnecessary handcuffing of non-threatening arrestees.<sup>112</sup> In 1975, the International Association of Chiefs of Police, an influential law enforcement lobbying organization founded in Chicago in 1893, recommended that all arrestees be handcuffed.<sup>113</sup> In stark contrast, the Association of Chief Police Officers of England, Wales and Northern Ireland maintains to this day the traditional view that using handcuffs is unlawful unless it can be justified.<sup>114</sup>

One 1976 case would significantly, but mistakenly, influence the development of modern handcuffing jurisprudence. In *Bur v. Gilbert*,<sup>115</sup> a decision involving the handcuffing at his office of a man charged with a traffic offense, a federal district court ruled that “mere handcuffing, without more, cannot form the basis of a complaint under §1983”,<sup>116</sup> a formulation used by many courts since.<sup>117</sup> But the court misinterpreted a precedent from 1972 to make its point. The court cited *Taylor v. McDonald*,<sup>118</sup> a case holding that handcuffing a minor for a traffic offense was “reasonabl[e] under the circumstances”<sup>119</sup> given that the officer had “good reason to believe”<sup>120</sup> that the suspect would carry out his threats to leave the scene of arrest. The court in *Taylor* added that there was “no abuse either physical or mental shown towards the plaintiff.”<sup>121</sup>

On this basis alone, the court in *Bur* developed a new injury-based jurisprudence, setting aside that there were circumstances in *Taylor* justifying the use of handcuffs. Only if handcuffed arrestees suffered an injury “beyond an abrasion of

---

handcuff a prisoner provided that he has acted reasonably, honestly and accordingly to his best information and belief.”), *aff’d*, 271 N.Y.S.2d 351 (App. Div. 1966). The court added that the “attitude of an individual, argumentative words, facial expressions and appearance can be influencing factors.” *Id.*

<sup>110</sup> *Handcuffs Added To Police Uniform*, WASH. POST, June 5, 1969, at B6.

<sup>111</sup> *Complaints Against Police*, 77 HARV. L. REV. 513 (1964).

<sup>112</sup> Sydney B. Ross, *Handcuffing of Accused Protested*, N.Y. TIMES, Nov. 15, 1958 at 22.

<sup>113</sup> A MANUAL OF MODEL POLICE TRAFFIC SERVICES POLICIES (IACP, Bureau of Operations and Research, 1975) (“Our rule is that, whenever a subject is placed under physical arrest and is being transported to the station, for whatever reason ... then that person shall be handcuffed.”).

<sup>114</sup> *See supra* note 76.

<sup>115</sup> *Bur v. Gilbert*, 415 F. Supp. 335 (E.D. Wis. 1976).

<sup>116</sup> *Id.* at 342.

<sup>117</sup> *See, e.g.*, Glenn v. City of Tyler, 242 F.3d 307, 314 (5th Cir. 2001); Durruthy v. Pastor, 351 F.3d 1080, 1094 (11th Cir. 2003); Lamont v. City of New York, No. 12-cv-2478 (E.D.N.Y. 2014).

<sup>118</sup> *Taylor v. McDonald*, 346 F. Supp. 390, 395 (N.D. Tex. 1972).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

[their] wrists”<sup>122</sup> could they now expect to prevail in court. The court held that because the “use of such minimal force is not uncommon or unusual in the course of an arrest,”<sup>123</sup> as “many, if not most arrests are bound to involve some touching of the person,”<sup>124</sup> and because the initial arrest was made under due process,<sup>125</sup> the “secondary effects of the use of minimal force incident to that arrest is not violative”<sup>126</sup> of due process. The court thus sanctioned routine handcuffing regardless of the circumstances surrounding the arrest, *de facto* abrogating a more than a century-old common law rule.

Other courts quickly followed suit,<sup>127</sup> endorsing preemptive handcuffing based on “anything is possible.” While newspapers around the country reported the handcuffing of children as young as seven<sup>128</sup> and elders as old as eighty,<sup>129</sup> courts held it was reasonable to handcuff a man for not paying city taxes,<sup>130</sup> a woman for not paying a fine,<sup>131</sup> or a woman for refusing to sign traffic tickets for making unnecessary noise with tires.<sup>132</sup>

---

<sup>122</sup> *Bur*, 415 F. Supp. at 341. *See also* Hanula v. City of Lakewood 907 F.2d 129 (10th Cir. 1990); Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993); Martin v. Heideman, 106 F.3d 1308, 1313 (6th Cir. 1997); Tarver v. City of Edna, 410 F.3d 745, 752 (5th Cir. 2005); Esmont v. City of New York, 371 F. Supp. 2d 202, 215 (E.D.N.Y. 2005) (holding that handcuffing an arrestee tight enough to cause nerve damage may constitute excessive force); Lamont v. City of New York, No. 12-cv-2478 (E.D.N.Y. 2014). On the risk of injuries caused by handcuffs, see Arthur C. Grant & Albert A. Cook, *A Prospective Study of Handcuff Neuropathies*, 23 *MUSCLE & NERVE* 933 (2000); John Kleinig, *Legitimate and Illegitimate Uses of Police Force*, 33 *CRIM. J. ETHICS* 83, 89 (2014) (noting that “the most common form of injury is superficial radial neuropathy, which may clear up in a week or two but the effects of which can take up to three years to disappear.”).

<sup>123</sup> *Bur*, 415 F. Supp. at 341.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 342. *Bur* predates *Graham v. Connor*, a U.S. Supreme Court decision holding that excessive force claims “are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard, rather than under a substantive due process standard.” 490 U.S. 386, 388 (1989).

<sup>126</sup> *Id.*

<sup>127</sup> *See, e.g.,* Healy v. City of Brentwood, 649 S.W.2d 916, 919 (Mo. App. 1983) (“Police officers face serious risks every time they carry out an arrest. Sometimes the most inoffensive appearing individuals turn out to be uncharacteristically violent. A police officer who is proceeding to convey any prisoner to a police headquarters in a police vehicle should not be faced with a civil law suit because he takes the precaution to handcuff the prisoner to prevent her from causing trouble on the way to headquarters.”); Franklin v. City of Boise, 806 F. Supp. 879, 890 (D. Idaho 1992) (“It is undisputed that such a custodial arrest puts the officer’s safety at risk; are we to remove both the officer’s discretion and the one procedure that would protect him, simply because the arrestee ‘appears’ passive and was arrested for a minor crime? There is no law, rule, or city policy that dictates such a result. Common sense recoils at its suggestion.”). *See also* *Missouri Court Upholds Officer’s Right To Handcuff Nonresisting Arrestee*, 127 *LAW ENFORCEMENT LIAB. REP.* 4 (1983).

<sup>128</sup> *7-Year-Old Girl Learn Lesson About Handcuffs*, TUCSON CITIZEN, July 15, 1991, at 3C. *See also* Erin Doolittle, *Village Cops Handcuff 13 Year-Old Skater*, THE LAKE PLACID NEWS, Nov. 11, 1987; *Police Handcuff, Arrest Two 13-Year-Olds for Digging Hole*, ROCKY MOUNTAIN NEWS, May 6, 1993, at 32A.

<sup>129</sup> *See supra* note 5.

<sup>130</sup> Rondelli v. Pima County, 120 Ariz. 43 (1978).

<sup>131</sup> Healy, 649 S.W.2d at 919. *See also* Charles A. Radin, *Slammed Into the Cooler for a 78 Ticket*, BOSTON GLOBE, Jan. 16, 1987.

<sup>132</sup> McPherson v. Auger, 842 F. Supp. 25, 30 (D. Maine 1994).

A glimmer of hope for a return to reasonableness came in 1993 when the Second Circuit held in *Soares v. State of Connecticut*<sup>133</sup> that “[a]lthough handcuffing will be the reasonable course in many, if not most arrest situations, we do not accept the principle that handcuffing is *per se* reasonable or that *Graham v. Connor* requires such a conclusion ... In determining whether the force used to effect a particular seizure is reasonable, a court must evaluate the particular circumstances of each case.”<sup>134</sup> The hope was short-lived. The court granted qualified immunity to the officers on the ground there was “still no clear authority on whether and under what circumstances, if any, a person has a constitutional right not to be handcuffed in the course of an arrest.”<sup>135</sup>

Officers had carte blanche to handcuff at will, and handcuff they did, with the blessing of the courts.<sup>136</sup> It was held reasonable to handcuff a nine-year old girl for throwing acorns at an apartment building,<sup>137</sup> a woman for making an improper left turn and refusing to sign a citation,<sup>138</sup> a man for failing to appear in court for a dog-running-at-large-citation,<sup>139</sup> or a woman for driving with a suspended license.<sup>140</sup> As for newspapers, they now reported the handcuffing of children as young as five.<sup>141</sup>

This disproportionate response to minor offenses would culminate with the U.S. Supreme Court’s 2001 ruling in *Atwater v. City of Lago Vista*,<sup>142</sup> which held that handcuffing and booking a woman for violating Texas’s seat-belt law, a misdemeanor punishable by a maximum fine of \$50, was “not so extraordinary as to violate the Fourth Amendment”<sup>143</sup> given that probable cause existed to arrest her. Based solely on this binding precedent, a federal district court would soon after validate the handcuffing and booking of a twelve-year-old girl for eating a french fry in a subway

---

<sup>133</sup> *Soares v. State of Conn.*, 8 F.3d 917 (2d Cir. 1993) (Walker, J.).

<sup>134</sup> *Id.* at 921.

<sup>135</sup> *Id.* 922 (“Neither the Supreme Court nor the Second Circuit has established that a person has the right not to be handcuffed in the course of a particular arrest, even if he does not resist or attempt to flee. Plaintiff has not cited, nor are we aware of any case from other circuits which acknowledged the existence of such a right prior to the time of plaintiff’s arrest.”). *See also* Deborah Pines, *Circuit Court Allows Handcuffs’ Use During Arrest*, 210 N.Y. L.J. 1 (1993).

<sup>136</sup> *See, e.g.*, *Frazier v. City of Philadelphia*, 927 F. Supp. 881 (E.D. Pa. 1996) (“[T]he use of handcuffs must be justified by the circumstances. Certainly arrest is one of the circumstances justifying the use of handcuffs.”).

<sup>137</sup> *Branch v. McGeeney*, 123 Md. App. 330 (1998).

<sup>138</sup> *Ortega v. Reyna*, 114 Nev. 55 (1998).

<sup>139</sup> *Limbirt v. Twin Falls County*, 955 P.2d 1123 (Idaho Ct. App. 1998).

<sup>140</sup> *Morreale v. City of Cripple Creek*, 113 F.3d 1246 (10th Cir. 1997). The woman, a tourist driving with a friend through the mountain town of Cripple Creek, Colorado, ended up in a jail jumpsuit, a belly belt with handcuffs, and separate leg irons. The court ruled that such treatment was neither unreasonable nor shocked the conscience. *See also* Paul Gottbrath, *Woman Cuffed for Traffic Offense*, THE CINCINNATI POST, June 6, 2000, at 1A.

<sup>141</sup> *See supra* note 1. *See also* *Father Sues Over 5-Year-Old Son’s Handcuffing*, SAN ANTONIO EXPRESS-NEWS, May 17, 1996; *First-Grader Is Arrested, Handcuffed*, LEDGER-ENQUIRER, Apr. 25, 1997, at A2.

<sup>142</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (5-4 decision).

<sup>143</sup> *Id.* at 355. Gail Atwater was taken to the local police station, where she had to remove her shoes, jewelry, and eyeglasses, and empty her pockets. Her “mug shot” was taken and she was placed alone, in a jail cell for about one hour. *Id.*

station,<sup>144</sup> a case affirmed on appeal by Judge John Roberts, the future Chief Justice of the U.S. Supreme Court.<sup>145</sup> At the same time, it was reported that officers in Texas had handcuffed and taken to jail a ninety-seven-year-old woman for not paying a traffic ticket.<sup>146</sup> “Standard procedure” was their answer.<sup>147</sup> Most courts have not since disagreed.<sup>148</sup>

### III. For a Return to Reasonableness: No Handcuffing of Arrestees Absent Special Circumstances

In response to the handcuffing of arrestees, judges apply selective case memory rather than follow long-standing common law principles.<sup>149</sup> This has resulted in a profound divide between members of the judiciary and common citizens, who witness in disbelief the disappearance of their right to be treated with dignity upon arrest.<sup>150</sup>

The U.S. Supreme Court in *Atwater* cited numerous precedents, legal treatises, and statutes, some dating back to the thirteenth century, to answer whether the Fourth Amendment forbade a warrantless arrest for a minor criminal offense.<sup>151</sup> Having concluded that it did not because the officer had probable cause to arrest,<sup>152</sup> the Court then relied on a single, conveniently chosen precedent<sup>153</sup> to rule that the arrest was

---

<sup>144</sup> *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 284 F. Supp. 2d 145 (D.D.C. 2003) (Sullivan, J.). Her treatment consisted of removal of shoelaces, placement in the windowless rear compartment of a police vehicle, transportation to a juvenile processing center, booking, fingerprinting, and detention for three hours until released to her mother. *Id.* at 151.

<sup>145</sup> *Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004).

<sup>146</sup> Hugh Aynesworth, *Old Lady Gets Bad-Guy Treatment; Hauled Off in Handcuffs at 97 for Registration Offense*, WASH. TIMES, Apr. 30, 2004, at A8.

<sup>147</sup> *Id.*

<sup>148</sup> *See, e.g., Cavataio v. City of Bella Villa*, 570 F.3d 1015 (8th Cir. 2009) (holding that the handcuffing of a compliant seventy-five-year-old man arrested for violating a city sanitation ordinance did not violate the Fourth Amendment).

<sup>149</sup> On the tendency of the U.S. Supreme Court to manipulate precedents to achieve a desired result, see generally Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM. CRIM. L. REV. 1387 (2003).

<sup>150</sup> On the continuous erosion of the rights of presumptively innocent arrestees in U.S. Supreme Court jurisprudence, see *Florence v. Board of Chosen Freeholders of the County of Burlington*, 132 S. Ct. 1510 (2012) (5-4 decision) (holding that a person arrested for a minor traffic violation may be strip searched); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (5-4 decision) (holding that a person arrested without a warrant may be kept in jail for up to 48 hours before seeing a judge); *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (5-4 decision) (holding that the “presumption of innocence is a doctrine that allocates the burden of proof in criminal trials ... [b]ut it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”). *Contra* R.I. CONST. art. I, § 14 (“Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person, shall be permitted.”); OR. CONST. art. XV, § 10(2).

<sup>151</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

<sup>152</sup> *Id.* at 354.

<sup>153</sup> The majority cited *Whren v. United States*, 517 U.S. 806, 818 (1996) (Scalia, J.), as the controlling precedent: “Where probable cause has existed, the only cases in which we have found it necessary actually to perform the ‘balancing’ analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual’s privacy or even physical interests.”

not made in such an “extraordinary manner” as to violate the Fourth Amendment.<sup>154</sup> The Court could have relied instead on *Graham*,<sup>155</sup> whose three factors weighed heavily in favor of Atwater:<sup>156</sup> severity of the crime, immediate threat to the officer or to others, and active resistance or attempt to escape.<sup>157</sup> It chose not to “in the name of administrative ease”<sup>158</sup> and for fear that ruling otherwise would increase litigation.<sup>159</sup> None of these reasons should be compelling when justice is at stake.<sup>160</sup>

According to *Atwater*, a Fourth Amendment violation may only occur if an arrest is made in an “extraordinary manner, unusually harmful to [the arrestee’s] privacy or ... physical interests.”<sup>161</sup> “Handcuffing is standard practice, everywhere”<sup>162</sup> noted a court. By definition, a routine, ordinary practice such as handcuffing cannot be considered so “extraordinary” as to violate the Fourth Amendment, the test to be met in *Atwater*, and this is what is so pernicious about this decision. “‘You can handcuff anybody,’ says a D.C. detective... ‘You can handcuff a four-year-old child.’”<sup>163</sup> Following the reasoning in *Atwater*, and assuming an officer has probable cause to arrest,<sup>164</sup> the logical and legal conclusion would be that handcuffing a four-year-old child is not so “extraordinary” as to violate the Fourth Amendment. Such a result would run afoul of common sense and common law.

“What about deterrence?” asked Justice Scalia during oral argument in *Atwater*. “Don’t you think people are going to be pretty unlikely to eat french fries on the subway in Washington. ... And maybe in Lago Vista, not to belt up their kids? ... Well is that worth nothing?”<sup>165</sup> Atwater’s counsel quickly (and correctly) replied that it was “confusing punishment with enforcement”<sup>166</sup> and that a police officer may

---

<sup>154</sup> *Atwater*, 532 U.S. at 354.

<sup>155</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>156</sup> Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 *FORDHAM L. REV.* 329, 372 (2002). Atwater was arrested for a minor offense and there was no evidence she posed an immediate safety threat, was actively resisting arrest, or attempted to flee. *Id.*

<sup>157</sup> *Id.* at 396.

<sup>158</sup> *Atwater*, 532 U.S. at 373 (O’Connor, J., dissenting).

<sup>159</sup> *Atwater*, 523 U.S. at 350.

<sup>160</sup> On the fear of increase litigation, see *United States v. Watson*, 423 U.S. 411, 453 n. 19 (1976) (Marshall, J., dissenting) (“Recognition of a constitutional right inevitably results in litigation to enforce that right. We would quickly lose all protection from our Constitution if it could successfully be argued that its guarantees should be ignored because if they were recognized our citizens would begin to enforce them.”). See also Adam Liptak, *Fearing Deluge of Litigation, Supreme Court Works the Floodgates*, *N.Y. TIMES*, Mar. 4, 2013 (“If a legal theory is sound, is it a problem if it produces too much justice?”).

<sup>161</sup> *Atwater*, 532 U.S. at 354.

<sup>162</sup> *LaLonde v. Cnty. of Riverside*, 204 F.3d 947, 964 (9th Cir. 2000) (Trott, J., concurring in part, dissenting in part).

<sup>163</sup> Henry Allen, *Bound to Humiliate; Click! The Helplessness of Being Handcuffed*, *WASH. POST*, Jan. 4, 1994.

<sup>164</sup> See *supra* note 152.

<sup>165</sup> Transcript of Oral Argument at \*22, *Atwater v. City of Lago Vista*, 121 S.Ct. 2540 (2001) (No. 99-1408), available at 2000 WL 1801617.

<sup>166</sup> *Id.* See also *O’Bryan v. County of Saginaw*, 437 F. Supp. 582 (E.D. Mich. 1977) (holding that the “presumption of innocence precludes punishment until such time as an individual is convicted of a crime.”); GILES JACOB, *A NEW LAW-DICTIONARY: CONTAINING THE INTERPRETATION AND DEFINITION OF WORDS AND TERMS USED IN THE LAW* (6th ed., London, 1750) (“The law implies a *Conviction*, before Punishment, though not mentioned in a Statute....”) (alteration in original).

not punish an alleged offender,<sup>167</sup> such power being vested in the judiciary only.<sup>168</sup> The Supreme Court itself recognized that deterrence was one of the “traditional aims of punishment.”<sup>169</sup>

Despite acknowledging that “the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment”<sup>170</sup> and that Atwater suffered “pointless indignity,”<sup>171</sup> the Court nevertheless dismissed her claim. It could have ruled, as these common law courts did, that the unnecessary handcuffing of a woman in public is a “shocking humiliation,”<sup>172</sup> or that the unreasonable handcuffing of a compliant arrestee is an “indignity,”<sup>173</sup> or that “handcuffing is an act against all norms of decency.”<sup>174</sup> Being led away in handcuffs is a demeaning and humiliating experience,<sup>175</sup> even more so when the suspect ends up being cleared of all charges.

There is widespread indignation over the needless handcuffing of compliant arrestees.<sup>176</sup> The use of handcuffs by the police is “one of the most frequent and repeated citizen complaints”<sup>177</sup> noted a public safety auditor. “Outraged,”<sup>178</sup> “humiliated,”<sup>179</sup> these are the most common reactions. And yet such complaints are met by an almost universally indifferent judiciary.

Because presumptively innocent arrestees must be treated in accord with their status, it is unlawful for police officers to subject arrestees to “any more restraint than

---

<sup>167</sup> See, e.g., *Skidmore v. State*, 2 Tex. App. 20, 1877 WL 8337 (1877); *Burns v. State*, 80 Ga. 544, 7 S.E. 88 (1888) (holding that a police officer, acting as minister of the law, cannot “take the administration of punishment . . . into his own hands.”).

<sup>168</sup> CAHALANE, *supra* note 85. See also John Kleinig, *Legitimate and Illegitimate Uses of Police Force*, 33 CRIM. J. ETHICS 83, 95 (2014) (noting an “usurpation of the punitive function” by the police).

<sup>169</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

<sup>170</sup> *Atwater*, 532 U.S. at 346-47.

<sup>171</sup> *Id.* at 347.

<sup>172</sup> *The Queen v. Wong Choi-fung*, [1977] H.K.L.R. (H.C.).

<sup>173</sup> *Bibby v. Chief of Constable of Essex*, [2000] 164 J.P. 297 (Eng.).

<sup>174</sup> *Gupta v. State of Madhya Pradesh*, [1990] 3 S.C.C. 119 (India).

<sup>175</sup> See, e.g., John Kleinig, *Handcuffing and Humiliation in New York*, 13 LAW ENFORCEMENT 8 (1987); Henry Allen, *Bound to Humiliate; Click! The Helplessness of Being Handcuffed*, *supra* note 163; Ruben Castaneda, *Handcuffed Man Says He Felt ‘Worthless,’* WASH. POST, Mar. 30, 2000, at B01.

<sup>176</sup> See, e.g., *Metro Sued for Arresting Juvenile Snacker*, WASH. TIMES, Apr. 10, 2001 (“After public outcry, Metro changed its policy in February and transit police began issuing written warnings to juveniles caught eating and drinking in Metro facilities.”); Michelle Reardon, Letter to the Editor, *8-Year-Old Handcuffed*, BANGOR DAILY NEWS, Sept. 13, 2003, at A10; *Police Revise Policies After Outcry Over 97-Year-Old Woman’s Handcuffing, Arrest*, AP ONLINE, May 14, 2004 (“The department was inundated with e-mails and calls from around the country after the April 22 arrest of Dolly Kelton.”); *Shackled for...Skateboarding: Lawman Arrests Shocked Buddies Playing on Street*, BOSTON HERALD, Aug. 11, 2004, at 5; Peter Hermann, *Four Children Arrested, Handcuffed After Playground Fight*, THE BALTIMORE SUN, Mar. 30, 2012; Maxine Bernstein, *9-Year-Old Led Away in Handcuffs by Portland Police Prompts Outrage, Push for Policy Changes*, OREGON LIVE, May 5, 2014.

<sup>177</sup> *Handcuff Policy Questioned: Police Auditor Looking At How Often, Why Suspects Are Handcuffed*, TheOmahaChannel.com, Feb. 9, 2005.

<sup>178</sup> Thomas C. Tobin and Graham Brink, *Handcuffs on 13-Year-Old ‘Excessive,’ Parents Say*, ST. PETERSBURG TIMES, Nov. 30, 2005.

<sup>179</sup> Joelle Farrell, *75-Cent Toll Glitch Buys Cuffs*, CONCORD MONITOR, Jan. 23, 2008.

is necessary,<sup>180</sup> or to use “unnecessary or unreasonable force”<sup>181</sup> in making the arrest, or to “abuse”<sup>182</sup> or treat arrestees with “unnecessary rigor.”<sup>183</sup> The fact that officers have probable cause to arrest does not exempt them from treating arrestees properly,<sup>184</sup> a traditional mandate of the law of arrest.<sup>185</sup> The U.S. Department of Justice itself has concluded that “[l]aw enforcement agencies must recognize and respect the value and dignity of every person.”<sup>186</sup> Probable cause is not a license to strip presumptively innocent arrestees of their dignity.

Citing *Graham*,<sup>187</sup> many courts have justified the use of handcuffs on compliant arrestees on the ground that “the right to make an arrest ... necessarily carries with it the right to use some degree of physical coercion.”<sup>188</sup> In doing so, they conveniently rewrote the law of arrest by omitting one important point: an arrest does not necessarily involve an actual restraint of the person, but may be effected by the submission to the custody of an officer, a time-honored common law principle<sup>189</sup> reiterated by *Graham* itself, which refers to the “right to use some degree of physical coercion or threat thereof”<sup>190</sup> to effect the arrest. It is worth repeating: a proper arrest does not necessarily warrant the use of handcuffs and holding otherwise is an incorrect reading of the law.<sup>191</sup>

In *Soares*, the Second Circuit rejected defendant’s invitation to adopt a *per se* rule that handcuffing arrestees is always reasonable, “[g]iven *Graham*’s teaching that each case be decided on its own facts.”<sup>192</sup> Other courts have since adopted the same

---

<sup>180</sup> ALASKA STAT. § 12.25.070; CAL. PEN. CODE ANN. § 835; IDAHO CODE ANN. § 19-602; MINN. STAT. ANN. § 629.32; NEV. REV. STAT. ANN. § 171.22; OKLA. STAT. ANN. 22 § 191; S.D. CODIFIED LAWS § 23A-3-5; TEX. CRIM. PROC. CODE ANN. § 15.24; UTAH CODE ANN. § 77-7-1; V.I. CODE ANN. § 3565.

<sup>181</sup> ARIZ. REV. STAT. ANN. § 13-3881; ARK. CODE ANN. § 16-81-107; IOWA CODE § 804.8; KY. REV. STAT. ANN. § 431.025; N.D. CENT. CODE §29-06-10; R.I. GEN. LAWS § 12-7-8; AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE § 19(2) (1930).

<sup>182</sup> GA. CONST. art. I, § 1, para. XVII.

<sup>183</sup> IND. CONST. art. I, § 15; OR. CONST. art. I, § 13; TENN. CONST. art. I, § 13; UTAH CONST. art. I, § 9; WYO. CONST. art. I, § 16. *See generally* Caroline Davidson, *State Constitutions and the Human Treatment of Arrestees and Pretrial Detainees*, 19 BERKELEY J. CRIM. L. 1 (2014).

<sup>184</sup> *Wheeler v. Thomas*, No. 96-249-P-C (De. Me. 1997) (“The fact that [an officer] had probable cause to arrest the plaintiff does not immunize him from claims that the use of handcuffs was unnecessary or that handcuffs were applied with excessive force.”).

<sup>185</sup> *See supra* note 54.

<sup>186</sup> PRINCIPLES FOR PROMOTING POLICE INTEGRITY: EXAMPLES OF PROMISING POLICE PRACTICES AND POLICIES 3 (U.S. Department of Justice, 2001).

<sup>187</sup> *Graham v. Connor*, 490 U.S. 386, 396 (1989).

<sup>188</sup> *See, e.g.*, *McPherson v. Auger*, 842 F. Supp. 25, 30 (D. Maine 1994); *Frazier v. City of Philadelphia*, 927 F. Supp. 881 (E.D. Pa. 1996); *Caron v. Hester*, 2001 DNH 206, 2001 WL 1568761 (D. N.H. 2001); *McDermott v. Town of Windham*, 204 F. Supp. 2d 54, 65 (D. Maine 2002); *Otero v. Town of Southampton*, 194 F. Supp. 2d 167, 180 (E.D.N.Y. 2002); *Brown v. Gilmore*, 278 F.3d 362 (4th Cir. 2002); *Durruthy v. Pastor*, 351 F.3d 1080, 1094 (11th Cir. 2003); *Grant v. City of New York*, 500 F. Supp. 2d 211 (S.D.N.Y. 2007); *Lunsford v. Howard and City of Clovis*, No. Civ. 11-0169 LH/LAM (D. New Mexico 2012).

<sup>189</sup> *See supra* note 80.

<sup>190</sup> *Graham*, 490 U.S. at 396.

<sup>191</sup> *Sein v. The Crown*, 8 BURMA L. REP. 134 (Rangoon, 1902) (Court of Lower Burma, 1902) (“[H]is action shows that he considered handcuffing an accused the only way of making an arrest. This erroneous impression may be prevalent amongst the subordinate police....”).

<sup>192</sup> *Soares v. State of Conn.*, 8 F.3d 917, 919 (2d Cir. 1993).

view,<sup>193</sup> but they overwhelmingly grant qualified immunity to the officers, as did the court in *Soares*, on the ground that it is not clearly established that handcuffing *per se* could be unconstitutional.<sup>194</sup> Most courts today require evidence of severe physical injury caused by the handcuffs to establish excessive force.<sup>195</sup> This injury-based jurisprudence should be abandoned. It pre-dates *Graham* and is inconsistent with its “objectively reasonable” standard.

The Ninth Circuit has recently abandoned it, and other courts, including the Supreme Court, should follow this return to a reasonableness standard. The case involved a sixth-grader with attention-deficit and hyperactivity disorder who refused to leave the school playground and was taken into temporary custody<sup>196</sup> by the police. Vindicating the district judge’s astute observation that “[e]ven minor uses of force may be unreasonable where the circumstances do not warrant any use of force,”<sup>197</sup> the Court ruled that the “use of handcuffs on a calm, compliant, but nonresponsive 11-year-old child was unreasonable,”<sup>198</sup> and denied qualified immunity to the officers on the ground that “none of the *Graham* factors even remotely justified keeping C.B. handcuffed for approximately thirty minutes in the back seat of a safety-locked vehicle.”<sup>199</sup> “‘Anything is possible’ is not a sufficient basis to handcuff a child who poses no likely threat of any kind”<sup>200</sup> added the Court. The Court offered a textbook application of *Graham*: the 80 pounds, 4’8” tall sixth-grader had committed no crime, was not an immediate threat to the officers or to others, and did not resist or attempt to escape; therefore the handcuffing was unreasonable. The ruling is significant for at least two reasons. First, it departs from other circuits holding that handcuffing is *per se* reasonable absent evidence of injury.<sup>201</sup> Second, it reiterates that “in an obvious

---

<sup>193</sup> See, e.g., *Kostrzewa v. City of Troy*, 247 F.3d 633, 644 (6th Cir. 2001) (“[F]or the district court to make a blanket statement that the use of handcuffs on detainees is, in all cases, objectively reasonable is at odds with the Supreme Court’s holding in *Graham* that the particular facts of each case be examined when making a determination of the reasonableness of the force used.”); *Warner v. Gyle*, No. 3:09-CV-199 (RNC), 2010 WL 3925211 (D. Conn. 2010) (“[H]andcuffing to effectuate an arrest is not necessarily reasonable....”).

<sup>194</sup> See, e.g., *Warner v. Gyle*, *supra*; *Bolanos v. Bain*, 696 So.2d 478 (Fla. Dist. Ct. App. 1997); *McCart v. Village of Mount Morris*, No. 09-CV-6472 (W.D.N.Y. 2011).

<sup>195</sup> Tight handcuffing is not enough. Excessively tight handcuffing, however, or handcuffing causing contusions, lacerations, or permanent severe damage to the wrist may constitute excessive force. See, e.g., *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir. 2004), *cert. denied*, 125 S.Ct. 463 (2004); *DeVille v. Marcantel*, 567 F.3d 156, 168-69 (5th Cir. 2009).

<sup>196</sup> The Supreme Court of California ruled there was no meaningful difference between a “temporary custody” and an “arrest.” See *In re Thierry S.*, 19 Cal.3d 727, 734 fn. 6 (1977).

<sup>197</sup> *C.B. v. Sonora School District*, No. 1:09-cv-00285-OWW-SMS (E.D. Cal. 2011) (Wanger, J.). See also *Headwaters Forest Def. v. County of Humboldt*, 211 F.3d 1121, 1133 (9th Cir. 2000) (“[W]here there is no need for force, any force used is constitutionally unreasonable.”).

<sup>198</sup> *C.B. v. City of Sonora*, No. 11-17454 (9th Cir. 2014) (en banc).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See, e.g., *Neague v. Cynkar*, 258 F.3d 504, 508 (6th Cir. 2001) (holding that handcuffing a seventh-grader did not violate the Fourth Amendment absent allegation of physical injury); *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (holding that handcuffing too tightly, without more, does not constitute excessive force); *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (holding that handcuffing is appropriate in “nearly every situation where an arrest is authorized” absent evidence of a “non-de minimis injury.”). See generally MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES §3.12 (2014).

case,”<sup>202</sup> *Graham* alone offers a basis for a decision without the need to find precedents on point.<sup>203</sup>

The realities of police work may well justify the use of handcuffs “in many, if not most arrest situations”<sup>204</sup> as stated in *Soares*. The mere fact that the arrest is for a minor offense does not, by itself, preclude officers from handcuffing the arrestee.<sup>205</sup> It could be late at night in an unsafe environment, or the officer could honestly believe that the arrestee poses a threat or risk of escape. Good reason for handcuffing may include the safety of the officers or the protection of arrestees from themselves or others.<sup>206</sup> Every arrest involves some risk and courts have expressed unease at second-guessing the work of officers in the field.<sup>207</sup> The same unease can be found in nineteenth-century handcuffing jurisprudence,<sup>208</sup> but common law courts then, as now,<sup>209</sup> never went so far as condoning a blanket policy of handcuffing all arrestees regardless of the circumstances, stressing that doing so would be abdicating their responsibility.<sup>210</sup>

Police officers themselves have questioned the practice of handcuffing all arrestees, recognizing the potential for abuse. In an article published in *The Police Chief* in 1993, Gary Buchanan, then chief of police in Fort Stockton, Texas, argued that policies mandating the handcuffing of all arrestees were inconsistent with *Graham*’s “objectively reasonable” standard: “The assumption seems to be that each arrestee is an escape risk, simply on the basis of the fact that enforcement action has occurred. ... Action based solely on a generalization is not supportable within [*Graham*’s] standard.”<sup>211</sup> Some police departments have since adopted handcuffing

---

<sup>202</sup> C.B. v. City of Sonora, No. 11-17454 (9th Cir. 2014) (en banc).

<sup>203</sup> *Id.*

<sup>204</sup> *Soares v. State of Conn.*, 8 F.3d 917, 921 (2d Cir. 1993).

<sup>205</sup> EDWARD C. FISHER, *LAWS OF ARREST* §145 (1967).

<sup>206</sup> Lois Pilant, *Handcuffs and Restraints*, 63 (1) *THE POLICE CHIEF* 47 (1996).

<sup>207</sup> *See, e.g.*, *Sassower v. City of New Rochelle*, 1980 WL 4673 (S.D.N.Y. 1980) (Sand, J.) (“A court should not lightly criticize the police, suddenly confronted with the problem of protecting themselves and possibly others, for taking the precaution of placing an arrested person in handcuffs while transporting that person to the police station.”); *Limbort v. Twin Falls County*, 955 P.2d 1123, 1127 (Idaho Ct. App. 1998) (Perry, J.) (“Even the most meek-appearing and fragile suspect may have the ability to place the officer, the public and the suspect at great risk.”).

<sup>208</sup> *Thurston v. Lipscomb*, 8 *THE COUNTY CTS. CHRON.* 147 (London, 1855) (County Court of Monmouthshire, 1855) (“If handcuffs were necessary at all for the purpose of the safe custody of a prisoner, I think the court ought not to attempt to define, with over-minute exactness, the time when the necessity for resorting to their use arises, and to visit the constable with a harsh judgment if he only puts them on a little too soon.”).

<sup>209</sup> *See supra*, note 75.

<sup>210</sup> *Sein v. The Crown*, 8 *BURMA L. REP.* 134 (Rangoon, 1902) (Court of Lower Burma, 1902) (“It is obvious that the abuse of the use of handcuffs may be made the means of very great oppression by unscrupulous officers and consequently any such abuse calls for condemnation and action by the Magistracy.”); *Babappu v. de Silva*, 1 *CEYLON SUP. CT. REP.* 166 (Colombo, 1893) (Supreme Court of Ceylon, 1892) (holding that handcuffing a person arrested for non-payment of a road tax reflects “discredit on the law and its administration; and it is for courts of justice to be watchful to protect the liberty of the subject from like proceedings.”).

<sup>211</sup> Buchanan, *supra* note 14. *See also* Michael A. Brave and John G. Peters, Jr., *Liability Constraints on Human Restraints*, 60 (3) *THE POLICE CHIEF* 35 (1993) (“The mandatory policy ... opens the department up to criticism when an officer handcuffs a 55-year-old nun to transport her to the station to post bond for a speeding ticket.”).

policies providing that the intent is not “to create an atmosphere that in order to avoid risk, a deputy should handcuff all persons regardless of the circumstances.”<sup>212</sup>

As intimated by *Graham*, police officers should point to specific, articulable facts that justify handcuffing arrestees, and “the need for handcuffing and the threat to officer safety must not be imagined or objectively unreasonable under the particular circumstances.”<sup>213</sup> An arrest for a minor offense would weigh against the reasonableness of using handcuffs, absent special circumstances.<sup>214</sup>

Four years after *Atwater*, Justice Kennedy wrote in *Muehler v. Mena*, a case upholding the handcuffing of a suspect at her home during a search for weapons and a wanted gang member, that “the use of handcuffs is the use of force, and such force must be objectively reasonable under the circumstances.”<sup>215</sup> Absent any factual basis that a person arrested for a minor offense poses an immediate threat to the officers or to others, or resists, or attempts to escape, the handcuffing incident to arrest must be ruled illegal, notwithstanding that the arrest itself is constitutional or that the handcuffs do not cause any injury. Any other ruling is a denial of justice.

## Conclusion

Since the nineteenth century, the common law has consistently held that arrestees cannot be handcuffed absent special circumstances, acknowledging that presumptively innocent arrestees must be treated in accord with their status. Even though a certain degree of discretion was given to the officers, common law courts never sanctioned the unvarying use of handcuffs on all arrestees regardless of the circumstances.

U.S. courts embraced a similar principle until at least the middle of the twentieth century. But as officers began to routinely handcuff arrestees, the courts lost their way, concerned that recognizing a right to be free from handcuffs upon arrest would impede the work of the police and increase litigation.

Police officers have largely been given carte blanche to handcuff arrestees. Not surprisingly, the number of persons handcuffed has increased dramatically. No one is immune from being handcuffed, not even children or elders arrested for the most trivial offenses.

This must change. Courts must draw the line on handcuffing, particularly when arrestees are compliant or of extreme ages. The Ninth Circuit has begun the return to a reasonable standard by holding that handcuffing a compliant sixth-grader violates the Fourth Amendment. Other courts, including the Supreme Court, must now acknowledge that the use of handcuffs in some arrest situations is simply not warranted.

---

<sup>212</sup> See, e.g., SONOMA COUNTY SHERIFF’S HANDCUFF POLICY §354.2.

<sup>213</sup> *Baldwin v. State*, 278 S.W.3d 367, 374 (Tex. Crim. App. 2009) (Cochran, J., concurring) (refusing to uphold the officer’s routine handcuffing procedure during a *Terry* stop). See also *Bennett v. City of Eastpointe*, 410 F.3d 810, 837 (6th Cir. 2005) (holding that “the use of handcuffs during a *Terry* stop may be permissible so long as the circumstances warrant the restraint.”).

<sup>214</sup> *Arum v. Miller*, 331 F. Supp.2d 99, 110 (E.D.N.Y. 2004).

<sup>215</sup> *Muehler v. Mena*, 125 S. Ct. 1465, 1472 (2005) (Kennedy, J., concurring).