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Constitutional Law—Preserving Dignity: The Due Process Restriction on Shackling Criminal Defendants Should Also Apply to Non-Jury Proceedings

Shelby Shelton

CONSTITUTIONAL LAW—PRESERVING DIGNITY: THE DUE PROCESS RESTRICTION ON SHACKLING CRIMINAL DEFENDANTS SHOULD ALSO APPLY TO NON-JURY PROCEEDINGS. *UNITED STATES V. SANCHEZ-GOMEZ*, 859 F.3D 649 (9TH CIR. 2017), *VACATED*, 138 S. CT. 1532 (2018).

I. INTRODUCTION

Imagine a decorated veteran, permanently disabled from combat injuries, visibly in distress from the pain caused by the chains around his feet.[1] Imagine a woman cradling her fractured, handcuffed wrist, or a man with a deep leg wound shackled in ankle chains.[2] Consider a blind man with only one arm freed from shackles to hold his cane, unable to navigate the courtroom without the assistance of two officers.[3] Among these people are Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Morales, and Mark Ring, all of whom were convicted of nonviolent offenses and hardly posed a threat of harm to those inside the courtroom due to their physical injuries and limitations.[4] Nevertheless, the United States District Court for the Southern District of California overruled each of their requests to remove their shackles, deferring to a policy that allows criminal defendants to appear in pretrial proceedings in full five-point restraints[5] without an individualized determination of necessity.[6]

The situation for these defendants is the same as that for many across the country who, despite the lack of necessity for full five-point restraints, must appear in shackles anyway. Some federal courts enforce blanket policies allowing shackling for all defendants appearing in non-jury proceedings without an individualized determination of need.[7] In 2017, the United States Court of Appeals for the Ninth Circuit departed from its sister circuits by

1. Brief for Respondents at 5–6, United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018) (No. 17-312).

2. *Id.* at 7.

3. *Id.*

4. United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1536 (2018).

5. Brief for Respondents, *supra* note 1, at 3. Full five-point restraints include handcuffs, a belly chain, and leg irons. *See* Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 278 (2015).

6. Marouf, *supra* note 5, at 278.

7. *See, e.g.*, United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015); United States v. Davis, 754 F.3d 278, 283 (5th Cir. 2014); United States v. Roderick, 215 F.3d 1313, at *1 (1st Cir. 1998) (per curiam); United States v. Zuber, 118 F.3d 101, 103–04 (2d Cir. 1997); Plank v. Smydon, No. 13-C-1281, 2017 WL 1067770, at *7 (E.D. Wis. Mar. 21, 2017); Perry v. United States, No. 2:08-cv-911, 2010 WL 5931970, at *23 (S.D. Ohio Dec. 21, 2010).

holding that the policy requiring most pretrial detainees to appear in court wearing shackles is unconstitutional and instead requires an individualized determination regarding whether shackling is appropriate.[8] The Supreme Court of the United States, however, vacated the Ninth Circuit's decision, declaring the issue moot because the defendants' cases had already been resolved.[9] The Supreme Court left open the question of whether routine shackling of criminal defendants in non-jury proceedings is unconstitutional.[10] This note argues that the due process restriction on shackling criminal defendants in jury trials should apply to non-jury proceedings because the use of restraints diminishes the dignity of the proceedings, impairs the defendant's ability to defend himself, and violates the notion that a defendant is innocent until proved guilty, therefore requiring the same individualized determination of the need to shackle a defendant that is used in jury trials.

Part II of this note provides an explanation of the historical rationale for prohibiting the use of restraints in criminal jury trials.[11] Part III describes the contemporary justifications for extending this prohibition to pretrial and sentencing proceedings as well as bench trials.[12] Part IV provides a detailed analysis of why due process requires an individualized determination of the need to shackle a criminal defendant in non-jury proceedings.[13] Parts V and VI argue that state and federal courts should: (1) adopt the Ninth Circuit's reasoning in *United States v. Sanchez-Gomez*;[14] (2) hold that shackling criminal defendants in non-jury proceedings violates due process; and (3) adopt a policy that requires individualized determinations of necessity for the use of shackles.[15]

II. HISTORICAL RATIONALE BEHIND PROHIBITING THE USE OF RESTRAINTS

The prohibition of the use of restraints in criminal jury trials is based on strong historical foundations.[16] This section will discuss the common law origins for the prohibition of the use of restraints, which date back to the eighteenth century.[17] Next, it will explore early American courts' rationale

8. United States v. Sanchez-Gomez, 859 F.3d 649, 666 (9th Cir. 2017), *vacated*, 138 S. Ct. 1532, 1542 (2018).

9. *Sanchez-Gomez*, 138 S. Ct. at 1542.

10. *Id.*

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part IV.

14. 859 F.3d 649 (9th Cir. 2017).

15. *See infra* Part V.

16. Deck v. Missouri, 544 U.S. 622, 626 (2005) (quoting 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)).

17. *See infra* Section II.A.

for this prohibition.[18] Finally, this section will survey what modern American courts have held regarding the topic and analyze the courts' reasoning.[19]

A. Common Law Origins

The prohibition against shackling defendants in the guilt phase of the trial has deep roots in the common law.[20] Early commentators of English law suggested that a defendant should not appear in court in shackles, stating that shackles would diminish a defendant's manner of reason and might constrain his ability to answer.[21] The common law recognized that restraints might "skew perceptions of the defendant's character."[22] Additionally, early commentary argued that a defendant should be treated with humanity and gentleness, without fear or uneasiness before the court.[23] Therefore, it said that a defendant should not be presented in court in shackles unless some danger of escape existed.[24]

B. Early American Courts

From the late nineteenth century, American courts adhered to the English common law notions regarding the use of shackles in criminal proceedings.[25] The earliest of these decisions, issued by the Supreme Court of Cali-

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18. *See infra* Section II.B.

19. *See infra* Section II.C.

20. *Deck*, 544 U.S. at 626 (quoting 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)).

21. *Id.* at 639 ("[i]t [was] an abuse that prisoners be chained with irons, or put to any pain before they be attained.") (quoting 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 34 (1797) (alterations in original); *id.* at 626 ("A defendant 'must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.'") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)); United States v. Sanchez-Gomez, 859 F.3d 649, 662–63 (9th Cir. 2017) ("[E]very person at the time of his arraignment . . . ought not to be brought to the bar in a contumelious manner; as with his hands tied together, or any other mark of ignominy and reproach; nor even with fetters on his feet, unless there be some danger of a rescous or escape.") (quoting 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 434 (John Curwood, 8th ed. 1824)) (alteration in original).

22. Marouf, *supra* note 5, at 224 (citing 2 HAWKINS, PLEAS OF THE CROWN 434 (8th ed. 1894)).

23. *Id.*

24. *Id.*

25. *See, e.g.*, Parker v. Territory, 52 P. 361, 363 (Ariz. 1898); People v. Harrington, 42 Cal. 165, 167 (1871); Hauser v. People, 71 N.E. 416, 421–22 (Ill. 1904); Blair v. Commonwealth, 188 S.W. 390, 393 (Ky. 1916); State v. Kring, 64 Mo. 591, 592 (1877); State v. McKay, 165 P.2d 389, 405–06 (Nev. 1946); State v. Roberts, 206 A.2d 200, 203 (N.J. Super. Ct. App. Div. 1965); French v. State, 377 P.2d 501, 502–04 (Okla. Crim. App. 1962); State v.

fornia in 1871, acknowledged that shackling imposes a physical burden on the defendant that prejudices his ability to defend himself.[26] Courts also reiterated the idea that a defendant's mental faculties would be diminished if he were required to defend himself in shackles.[27] Early American treatises also relied on common law jurisprudence, concluding that shackles should only be used in extreme instances so that a defendant may have all advantages available for his defense.[28] The common law rationale relied on in early American courts is the basis for modern justifications for the prohibition on shackles in criminal jury trials used today.[29]

C. Modern American Courts

In 1970 in *Illinois v. Allen*, the Supreme Court addressed the constitutionality of the use of shackles for the first time.[30] At issue in the case was whether the trial court infringed on the defendant's right to be present in the courtroom during his proceeding, even though he was particularly disruptive.[31] Although the Court suggested that a trial court bind and gag a defendant to keep him present during proceedings as a solution for how a trial court could deal with such a disruptive defendant, it expressed concern over this practice, explaining that no defendant should be tried while shackled "except as a last resort" because it might affect the jury's feelings about the defendant.[32] Additionally, it cautioned that shackling a defendant might undermine the "dignity and decorum of judicial proceedings that the judge is seeking to uphold" and the defendant's "ability to communicate with his counsel" when he is physically restrained.[33] Ultimately, the Court held that a trial judge may exercise discretion in determining whether to eject the defendant from the courtroom or shackle him to maintain decorum.[34]

A few years later, the Court decided whether it was inherently prejudicial to require a defendant to appear in prison garb, a closely related issue to the use of restraints.[35] It held that "the constant reminder of the accused's

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Smith, 8 P. 343 (Or. 1883); Poe v. State, 78 Tenn. 673, 676–77 (1882); Rainey v. State, 20 Tex. App. 455, 472 (1886); State v. Williams, 50 P. 580, 581 (Wash. 1897).

26. *Harrington*, 42 Cal. at 167.

27. *See, e.g.*, *Roberts*, 206 A.2d at 203; *French*, 377 P.2d at 502–04.

28. Marouf, *supra* note 5, at 224–25 (citing 1 BISHOP, NEW CRIMINAL PROCEDURE § 955, at 572–73 (4th ed. 1895)).

29. *Id.* at 225.

30. Illinois v. Allen, 397 U.S. 337 (1970).

31. *Id.* at 338, 343–44.

32. *Id.* at 344.

33. *Id.*

34. *Id.*

35. Estelle v. Williams, 425 U.S. 501, 502–06 (1976).

condition . . . may affect a juror's judgment."[36] In 1986, the Court, while deciding whether the presence of uniformed officers in the courtroom violated due process, acknowledged again that shackling is inherently prejudicial in the presence of a jury.[37] In light of these decisions, lower courts today uniformly hold that a criminal defendant ought to be free of restraint during a jury trial, unless a justifiable security interest exists.[38]

In *Deck v. Missouri*, the Supreme Court finally addressed in detail the constitutionality of shackling criminal defendants in front of a jury.[39] Deck, who was convicted of murder and robbery, appeared at his sentencing hearing in leg irons, a belly chain, and handcuffs after the trial court overruled his objections to the use of shackles.[40] After being sentenced to death, Deck appealed, claiming that the use of shackles without an individualized court determination violated the Constitution.[41] The Court held that the Constitution does not support the use of shackles during the guilt or penalty phase of a jury trial unless it is justified by an interest, like courtroom security, specific to the defendant on trial.[42] The Court identified three justifications for prohibiting routine shackling: (1) the presumption that a defendant is innocent until proved guilty; (2) the right to counsel and participation in the defense; and (3) the dignity and decorum of judicial proceedings.[43] Additionally, it found that the sight of a defendant in shackles is inherently prejudicial.[44] As in *Illinois v. Allen*, the Court determined that the trial court can order that a defendant be shackled, but any such order must be based on an individualized determination of necessity prior to shackling a defendant.[45]

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36. *Id.* at 504–05.

37. Holbrook v. Flynn, 475 U.S. 560, 568 (1986) (citing *Illinois v. Allen*, 397 U.S. 337 (1970).

38. *See, e.g.*, United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015); United States v. Zuber, 118 F.3d 101, 103–04 (2d Cir. 1997); People v. Jackson, 1822–30, 18 Cal. Rptr. 2d 586, 588–94 (1993); State v. Tweedy, 594 A.2d 906, 914–15 (Conn. 1991); State v. Crawford, 577 P.2d 1135, 1141–46 (Idaho 1978); People v. Brown, 358 N.E.2d 1362, 1363–64 (Ill. App. Ct. 1977); Hill v. Commonwealth, 125 S.W.3d 221, 233–34 (Ky. 2004); Lovell v. State, 702 A.2d 261, 268–72 (Md. 1997); State v. Shoen, 598 N.W.2d 370, 375–77 (Minn. 1999); State v. Herrick, 2004 MT 323, ¶¶ 4–19, 101 P.3d 755, 757–59 (2004); State v. Tolley, 226 S.E.2d 353, 365–69 (N.C. 1976); Myers v. State, 2000 Okla. Crim. App. 25, ¶ 46, 17 P.3d 1021, 1033; Cooks v. State, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992) (en banc); State v. Turner, 23 P.3d 499, 504–05 (Wash. 2001) (en banc).

39. Deck v. Missouri, 544 U.S. 622, 624 (2005).

40. *Id.* at 625.

41. *Id.*

42. *Id.* at 624.

43. *Id.* at 630–31.

44. *Id.* at 635.

45. *Deck*, 544 U.S. at 629, 633.

Consequently, routine shackling is not permitted.[46] The Court, however, specifically declined to extend this right to non-jury proceedings.[47]

III. MODERN JUSTIFICATION FOR EXTENDING THE PROHIBITION TO NON-JURY PROCEEDINGS

Part III of this note will analyze the modern justifications courts use in extending the prohibition against indiscriminate shackling to non-jury proceedings. First, it will discuss the three state courts that have extended the prohibition and the courts' reasoning.[48] Next, it will explain the Ninth Circuit's departure from its sister circuits by analyzing the court's opinion in *United States v. Sanchez-Gomez*.[49] It will also describe the Supreme Court's reversal of the Ninth Circuit's opinion.[50]

A. State Courts' Application to Non-Jury Proceedings

Some state courts have extended the prohibition on indiscriminate shackling to non-jury proceedings such as arraignments, bench trials, and sentencing hearings.[51] The Supreme Court of California first applied the prohibition to non-jury proceedings, citing the dignity of the defendant and respect for the judicial system as reasons for its unconstitutionality.[52] Over a decade later, the Supreme Court of Illinois also held that restraints are unconstitutional in any proceeding because they hinder a defendant's ability to assist his counsel, contradict a presumption of innocence, and debase the defendant and the proceedings.[53] In 2012, the New York Court of Appeals joined courts in Illinois and California in holding that indiscriminate use of shackles is unconstitutional.[54] The New York Court of Appeals, however, cited an additional reason that the other courts had not discussed, finding that shackles have an unconscious prejudicial effect, even if the proceeding is only taking place before a judge.[55] While other state courts have not is-

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46. *Id.*
47. *Id.* at 626.
48. *See infra* Section III.A.
49. *See infra* Section III.B; 859 F.3d 649 (9th Cir. 2017).
50. *See infra* Section III.B.
51. People v. Best, 979 N.E.2d 1187, 1189 (N.Y. 2012); People v. Allen, 856 N.E.2d 349, 353 (Ill. 2006); People v. Fierro, 821 P.2d 1302, 1321–22 (Cal. 1991).
52. *Fierro*, 821 P.2d at 1321–22.
53. *Allen*, 856 N.E.2d at 53.
54. *Best*, 979 N.E.2d at 1189.
55. *Id.* at 1189 ("Nonetheless, judges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder. Moreover, the psychological impact on the defendant of being continually restrained at the order of the individual who will ultimately determine his or her guilt should not be overlooked.").

sued such opinions, legal scholars urge courts to hold that indiscriminate use of shackles is unconstitutional at least for special cases, such as those involving juveniles or illegal immigrants.[56] Other state courts, however, have yet to extend the prohibition on indiscriminate shackling to such cases.

B. The Ninth Circuit's Departure from Its Sister Circuits

Although a small number of state courts have held that the prohibition against indiscriminate shackling applies to non-jury proceedings, by 2017, every federal circuit court to decide the issue uniformly held that the prohibition against indiscriminate shackling did not apply to non-jury proceedings.[57] In 2013, the United States District Court for the Southern District of California adopted a policy allowing the United States Marshals Service to "produce all in-custody defendants in full restraints for most non-jury proceedings."[58] On the first day of the policy's implementation, the Federal Defenders of San Diego objected to each use of restraints and requested that each defendant's shackles be removed, including those of Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Isabel Morales, and Mark Ring.[59] The district judges routinely denied all the objections, and the four defendants consolidated their cases to appeal the decisions.[60]

On appeal, the Ninth Circuit departed from its sister circuits by holding that the district court's policy of indiscriminately shackling criminal defendants in non-jury proceedings is unconstitutional under the Fifth Amendment's Due Process Clause.[61] It first justified its holding by reasoning that the presumption of innocence until proved guilty did not support the use of unwarranted restraints.[62] Additionally, it held that the dignity of proceedings cannot be upheld if defendants are routinely shackled.[63] Because the court recognized the right to be free from unnecessary shackles as a fundamental

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56. Marouf, *supra* note 5, at 217 (asserting that "procedural due process requires an individualized judicial determination of the need for restraints in removal proceedings based on the same rationales underlying this prohibition in the criminal context."); Anita Nabha, *Shuffling to Justice: Why Children Should Not Be Shackled in Court*, 73 BROOK. L. REV. 1549, 1551–52 (2008) (arguing that "routine and indiscriminate use of shackles on juveniles is contrary to the juvenile justice system" because the notions of fairness and justice are disrupted).

57. United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015); United States v. Davis, 754 F.3d 278, 283 (5th Cir. 2014); United States v. Roderick, 215 F.3d 1313 (1st Cir. 1998) (unpublished) (per curiam); United States v. Zuber, 118 F.3d 101, 103–04 (2d Cir. 1997).

58. United States v. Sanchez-Gomez, 859 F.3d 649, 653 (9th Cir. 2017).

59. *Id.* at 654.

60. *Id.*

61. *Id.* at 661.

62. *Id.*

63. *Id.* at 662.

right, it required that shackling be supported by a "compelling government purpose."[64] Therefore, the Ninth Circuit departed from its sister circuits with its unique take on the concepts of due process and dignity, illuminating the issue at a national level.[65]

Five judges dissented, however, arguing that the case should not be heard at all because the issue was moot.[66] Nevertheless, the dissent asserted that even if the appeals had not been moot, Supreme Court precedent dictated that the prohibition on the use of restraints did not apply in pretrial proceedings or proceedings before a judge.[67] By creating a "blanket constitutional rule," the dissent stated that the majority created an unnecessary circuit split and put federal courts at risk due to lower courtroom security.[68]

In February of 2018, the Supreme Court vacated the Ninth Circuit's opinion, agreeing with the dissent that the case was moot.[69] By the time the defendants' appeal reached the Ninth Circuit, the underlying criminal cases had come to an end.[70] The Ninth Circuit, however, concluded that their claims were not moot because the claims resembled a class-action, and due to Supreme Court precedent on class action lawsuits, a live controversy remained although the defendants were no longer subject to the challenged policy.[71] The Supreme Court rejected this interpretation, stating that no "freestanding exception to mootness outside the class action context" exists.[72] It also rejected the Ninth Circuit's conclusion that because it was "like" a class action, it could be heard as such.[73] While the Court vacated the

64. *Sanchez-Gomez*, 859 F.3d at 661.

65. *Constitutional Law—Substantive Due Process—Ninth Circuit Deems Unconstitutional Routine Shackling in Pretrial Proceedings*, 131 HARV. L. REV. 1163, 1164, 1167 (2018).

66. *Sanchez-Gomez*, 859 F.3d at 666–69 (Ikuta, J., dissenting) ("Because Morales, Sanchez-Gomez, Patricio-Guzman, and Ring have no ongoing interest in the purely prospective relief they seek, see Maj. op. at 657–58, their appeals are moot unless some exception to the ordinary rules of mootness applies . . . The majority implicitly concedes as much by contriving a new exception—the "functional class action," *id.* at 657–58—in order to rescue these appeals from mootness. Because this theory is inconsistent with Supreme Court precedent and incompatible with Article III's case-or-controversy requirement, the majority's creative effort to sidestep mootness should be rejected.").

67. *Id.* at 677–78 ("Instead, *Deck* explained that the rule 'was meant to protect defendants appearing at trial before a jury.' . . . In other words, there is no rule regarding restraints on pretrial detainees in non-jury proceedings that has 'deep roots in the common law.' . . . The majority dismisses this conclusion as 'undoubtedly dictum' and 'contradicted by the very sources on which the Supreme Court relied.' . . . These rationalizations do not hold water.") (quoting Deck v. Missouri, 544 U.S. 622, 626 (2005)).

68. *Id.* at 680, 683.

69. United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1542 (2018).

70. *Id.* at 1536.

71. *Sanchez-Gomez*, 859 F.3d at 659.

72. *Sanchez-Gomez*, 138 S. Ct. at 1538.

73. *Id.* at 1539 ("Courts may not . . . 'create . . . class actions at will.'").

Ninth Circuit's opinion, it acknowledged that those wishing to challenge the use of physical restraints have other avenues of relief.[74] Because the Court held this particular case moot, it took no position on the issue, therefore leaving the question open yet again.[75]

IV. DUE PROCESS REQUIRES AN INDIVIDUALIZED DETERMINATION OF NECESSITY

Under the Fifth Amendment Due Process Clause, no person shall be "deprived of life, liberty, or property, without due process of law."[76] The Supreme Court has continually reiterated that freedom from restraint has always been the "core of the liberty protected by the Due Process Clause from arbitrary governmental action."[77] This freedom from restraint includes freedom from shackles in the courtroom.[78] When determining whether a government action violates procedural due process, a court generally considers three factors.[79] First, a court must consider the private interest that will be affected by the official action.[80] Second, it must evaluate the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of any procedural safeguards.[81] Third, a court must consider the government's interest, including the function involved and any burdens that the procedural safeguards would entail.[82]

A. The Private Interest Affected

The Supreme Court has discussed three different ways that the use of shackles in a jury trial disturbs a defendant's interest in liberty.[83] First, the use of shackles might undermine the dignity of the proceedings.[84] Second, a defendant might be prevented from participating fully in his defense.[85] Third, the presumption of innocence could be tainted with bias if the de-

74. *Id.* at 1542 ("None of this is to say that those who wish to challenge the use of full physical restraints in the Southern District lack any avenue for relief. In the course of this litigation the parties have touched upon several possible options. See, *e.g.*, Tr. of Oral Arg. 12 (indicating circumstances under which detainees could bring civil suit).").

75. *Id.*

76. U.S. CONST. amend. V.

77. United States v. Sanchez-Gomez, 859 F.3d 649, 660 (9th Cir. 2017) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

78. Deck v. Missouri, 544 U.S. 622, 629 (2005).

79. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Deck*, 544 U.S. at 630–31.

84. *Id.* at 630.

85. *Id.* at 631.

fendant appears in shackles.[86] Because these interests are similarly disturbed when a defendant appears in shackles in non-jury proceedings, the same analysis that applies to jury proceedings should also apply to non-jury proceedings.[87]

1. The Interest in a Dignified Proceeding

The use of shackles in criminal proceedings undermines the dignity and decorum of the courtroom.[88] Regardless of the type of proceeding, a criminal defendant has an interest in the right to be treated with dignity and respect.[89] In the words of Judge Richard Cardamone of the United States Court of Appeals for the Second Circuit, "[t]he fact that the proceeding is non-jury does not diminish the degradation a prisoner suffers when needlessly paraded about a courtroom, like a dancing bear on a lead, wearing belly chains and manacles."[90] Additionally, a judge in the Seventh Circuit likened a restrained defendant with the appearance of a "mad dog."[91] Not only does the use of shackles diminish the dignity and respect of a defendant, it also affects the dignity and decorum of the courtroom.[92] The dignity of a courtroom reflects the gravity of the matter at issue and the potential deprivation of an individual's liberty through a criminal prosecution.[93] Courtrooms are "palaces of justice, imbued with a majesty that reflects the gravity of proceedings designed to deprive a person of liberty or even life."[94] The interest in a dignified proceeding will not prevail if defendants are "marched like convicts on a gang chain."[95] The defendant and the court itself have interests in a dignified proceeding, and, therefore, indiscriminate shackling cannot be permitted.[96] A person, even if charged with a crime, deserves to enter a courtroom with his "head held high" to preserve dignity.[97]

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86. *Id.*
87. United States v. Sanchez-Gomez, 859 F.3d 649, 661 (9th Cir. 2017).
88. *Id.* at 661, 666.
89. *Id.* at 666.
90. United States v. Zuber, 118 F.3d 101, 106 (2d Cir. 1997) (Cardamone, J., concurring).
91. Maus v. Baker, 747 F.3d 926, 927 (7th Cir. 2014). The effects of this breach of dignity on a defendant are discussed in Part V.
92. *Sanchez-Gomez*, 859 F.3d at 662.
93. *Id.* (citing Deck v. Missouri, 544 U.S. 622, 631 (2005)).
94. *Sanchez-Gomez*, 859 F.3d at 662.
95. *Id.*
96. *Id.*
97. *Id.* at 666.

2. The Interest in Participating in One's Own Defense

Not only does a defendant have an interest in a dignified proceeding, but also a constitutional right to present a full defense.[98] Restraints can interfere with a defendant's ability to participate in his own defense by impeding his communication with counsel, impairing his mental faculties, and causing physical pain.[99] Historically, the idea that shackles affect a defendant's mental faculties was a common belief.[100] Early commentary opined that defendants should appear in court without shackles "so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will."[101] Modern cases tend to follow the same reasoning. For example, the Ninth Circuit recognized the physical and psychological impact shackles can have on a defendant in *Spain v. Rushen*, which involved a defendant who was restrained during his seventeen-month trial.[102] In this case, the defendant expressed to the court that he could not concentrate as easily while restrained.[103] The court acknowledged that the shackles consumed the defendant's attention and impaired his ability to prepare his defense.[104]

While the idea that restraints negatively affect a defendant's mental faculties has been acknowledged for centuries, it is usually not supported by evidence.[105] Recent research into the field of "embodied cognition," however, has confirmed this idea.[106] This research examines the influence that a person's bodily state can have over his mental processes.[107] In one study, test subjects who were placed in constricted postures proved to be quicker to develop a learned helplessness and perform lower on tasks involving abstract thinking.[108] When constrictive posture is coupled with actual restraint, the psychological impact on a person is even more severe.[109] The common restraints used in a courtroom, such as handcuffs and chains, are accompanied with distinct physical sensations that are permeated with symbolism.[110] Physically, defendants see, feel, and hear metal restraints from their hands to

98. Washington v. Texas, 388 U.S. 14, 19 (1967).
99. United States v. Zuber, 118 F.3d 101, 106 (2d Cir. 1997) (Cardamone, J., concurring).
100. Deck v. Missouri, 544 U.S. 622, 631 (2005).
101. *Id.* at 626 (quoting 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 34 (1797)).
102. Spain v. Rushen, 883 F.2d 712, 723 (9th Cir. 1989).
103. *Id.* at 722.
104. *Id.*
105. Marouf, *supra* note 5, at 258.
106. *Id.*
107. *Id.* at 259.
108. *Id.* at 260.
109. *Id.* at 261–62; Nabha, *supra* note 56, at 1577 (noting that shackles can "exacerbate feelings of isolation and hopelessness.").
110. Marouf, *supra* note 5, at 263.

their feet.[111] Mentally, metal restraints symbolize criminality, oppression, submission, and powerlessness.[112] When the physical effects are coupled with the mental effects, the gravity of the impact that needless restraints have on defendants, not yet proved to be guilty, is apparent. Additionally, physical restraints can impair the defendant's body language, movement around the courtroom, and ability to take notes.[113] A defendant can be affected by restraints in many ways, some of which might infringe on his constitutional right to freely participating in his defense.[114]

3. The Interest in Maintaining the Presumption of Innocence

Some courts assume that judges are immune to the potential bias that the sight of a defendant in shackles might present because they are "uniquely capable" of making an objective determination regardless of the presence of irrelevant factors.[115] The possibility that a decisionmaker might be prejudiced by the sight of a defendant in shackles does not dissipate when the decisionmaker is a judge rather than a jury.[116] In fact, a variety of studies suggest that judges are overconfident regarding the fairness and accuracy of their decisions, which in turn makes them increasingly susceptible to unconscious bias.[117] Furthermore, judges are not immune because of their "representativeness" bias, a concept that legal scholars have developed referring to how people might base their judgments regarding whether someone fits into a specific category on how representative a person is of that category.[118] In 2001, a study conducted with 167 federal magistrate judges discovered that judges exhibit representativeness bias, among other forms of heuristic biases.[119] The study found that even though judges exhibited representativeness bias, they still scored higher than other professions on the test designed to detect bias.[120] While jurors might be impacted more by prejudice, this study

111. *Id.* at 263–64.

112. *Id.* at 264.

113. Brooksany Barrowes, Comment, *The Permissibility of Shackling or Gagging Pro Se Defendants*, 1998 U. CHI. LEGAL F. 349, 364.

114. *See supra* Section II.A.

115. United States v. LaFond, 783 F.3d 1126, 1221 (11th Cir. 2015) (". . . restraints would 'have no impact at all on [its] sentencing decision.'") (alteration in original); United States v. Zuber, 118 F.3d 101, 103 & n.1 (2d Cir. 1997) ("There is no jury or any other person here who is going to . . . be swayed. I am not swayed by the fact that he is or isn't in restraints."); People v. Best, 979 N.E.2d 1187, 1189 (N.Y. App. 2012).

116. *Best*, 979 N.E.2d at 1189.

117. Marouf, *supra* note 5, at 269; Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172–73 (2012).

118. Marouf, *supra* note 5, at 270.

119. *Id.* at 271–72.

120. *Id.*

asserts that judges still might be susceptible to bias.[121] Judges are human and could be unconsciously influenced by the sight of a defendant in shackles.[122] Ultimately, the impact of the use of shackles on judges substantially harms a defendant's interest in a fair and unbiased proceeding, which is an interest that is not outweighed by the interest of the government.[123]

B. The Government's Interest

Next, a court must evaluate the government's interest at stake.[124] The government's interest in courtroom security must be balanced against a defendant's liberty interests. The government has an interest in maintaining the security and safety of those in the courtroom, especially because security has become an increasingly important issue.[125] Traditionally, the need for security sometimes outweighed the right to be free from shackles.[126] In *Deck v. Missouri*, the Supreme Court held that the Constitution forbids the use of visible shackles in the guilt and penalty phase unless the use is justified by an essential state interest, like courtroom security.[127] According to a 2012 article, the United States Marshals Service reported that judicial threat investigations at the federal level increased from 592 in fiscal year 2003 to 1,238 in fiscal year 2011.[128] Additionally, the number of violent incidents in state courts has increased every year since 1970.[129] With security breaches on the rise, the government certainly has an interest in maintaining courtroom security. The interest in security, however, can still be protected through individualized determinations.[130]

Even if there is concern over courtroom security, the notion that indiscriminate shackling is the best way to maintain courtroom security is unfounded. In 2014, only 2.1% of all arrests for federal offenses were for violent offenses.[131] Additionally, between 2001 and 2007, of all persons

121. *Id.*

122. People v. Best, 979 N.E.2d 1187, 1189 (N.Y. App. 2012).

123. Marouf, *supra* note 5, at 277.

124. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

125. Marouf, *supra* note 5, at 245.

126. Deck v. Missouri, 544 U.S. 622, 626, 629 (2005) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)) (holding that a defendant should not be shackled "unless there be evident danger of an escape.").

127. *Id.* at 629.

128. Timm Fautsko, Steve Berson, & Steve Swenson, *Courthouse Security Incidents Trending Upward: The Challenges Facing State Courts Today*, NATIONAL CENTER FOR STATE COURTS (2012), https://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/better-courts/1-1-courthouse-security-incidents.aspx.

129. *Id.*

130. Marouf, *supra* note 5, at 246.

131. Mark Motivans, *Federal Justice Statistics, 2014 – Statistical Tables*, BUREAU OF JUST. STAT. (2017), https://www.bjs.gov/content/pub/pdf/fjs14st.pdf.

charged with criminal offenses in federal courts, only 2% had previously escaped from custody.[132] While the government has an interest in maintaining security, evidence suggests that only a small fraction of criminal defendants pose a security risk.[133] Therefore, the government's interest in maintaining security is often outweighed by a defendant's interest in being free from indiscriminate shackles.

C. The Risk of Erroneous Deprivation of the Private Interest

1. The Government's Interest in Security Does Not Justify the Deprivation of a Defendant's Liberty Interests in Being Free from Indiscriminate Shackling

Under the *Mathews* test, the risk of an erroneous deprivation of private interests by the procedures used must be examined, as well as any procedural safeguards.[134] Because most defendants do not pose a safety or escape risk, indiscriminate shackling poses a high risk of erroneous deprivation of the private interests at stake.[135] To illustrate, when the United States District Court for the Southern District of California adopted the blanket policy of shackling all defendants in nonjury proceedings, it cited "two serious incidents—an assault and a stabbing" that occurred in the district's courtrooms.[136] The district court deferred to the United States Marshals Service's request to adopt this policy because "more than 44,000" detainees had moved through their custody in the previous year.[137] These numbers, however, provide an incident-to-detainee ratio of less than .005%.[138] Security should not justify blanket deprivation of fundamental rights.[139] Courts have acknowledged that "a 'once bitten, twice shy' rationale" is inappropriate in the context of shackling.[140] A relatively small number of incidents of security breaches and disorder in the courtroom do not justify the use of indiscriminate shackling. Therefore, if special security risks are present, a court

132. Marie VanNostrand, Gena Keebler, & Luminosity Inc., *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROBATION (2009), http://www.uscourts.gov/sites/default/files/73_2_1_0.pdf.

133. *Id.*

134. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

135. *See* cases cited, *supra* notes 98–99.

136. Brief for National Ass'n of Federal Defenders as Amicus Curiae Supporting Respondents, *supra* note 1, at 14.

137. *Id.*

138. *Id.*

139. Jones v. Edwards, 770 F.2d 739, 742 (8th Cir. 1985).

140. United States v. Baker, 432 F.3d 1189, 1245 (11th Cir. 2005); *see also* Davis v. State, 195 S.W.3d 311, 314–16 (Tex. App. 2006) (holding that a judge erred when imposing a shackling policy based on a violent incident that occurred in a courtroom in another state).

should apply the same rationale used in jury trials in deciding whether to shackle a defendant.[141]

2. *The Decision to Shackle a Defendant Should Be Made by a Court Rather Than the Executive Branch to Avoid the Risk of Erroneously Depriving a Defendant of His Liberty Interests*

The notion that the government's interest in maintaining security allows a court to delegate its decision to those who maintain security, such as the United States Marshals Service, fails the procedural due process test.[142] If courts delegate the decision to shackle a defendant to individuals who provide security, an erroneous deprivation of an individual's liberty occurs.[143] In *Sanchez-Gomez*, the Ninth Circuit rejected the idea that courtrooms can be maintained like prisons because of safety concerns.[144] Traditionally, law enforcement officers have no authority over the treatment of individuals appearing in a courtroom.[145] The court emphasized that "law enforcement officers have no business proposing policies for the treatment of parties as a class."[146] Furthermore, if law enforcement officers, who could be seen as adversarial, are the ones determining the need for shackling, an inherent risk of error exists.[147] Law enforcement officers have a motive to restrain defendants to ease their burden of maintaining security.[148] Courts have described the decision to delegate the determination for need for restraints as an abuse of discretion rather than an exercise of discretion.[149] Therefore, to avoid an erroneous deprivation of a defendant's interests, it is imperative that judges make the determination rather than deferring to law enforcement.

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141. Deck v. Missouri, 544 U.S. 622, 633 (2005) ("Any [shackling] determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.").

142. United States v. Sanchez-Gomez, 859 F.3d 649, 666 (9th Cir. 2017).

143. *Id.*

144. *Id.* at 665.

145. *Id.*

146. *Id.*

147. Marouf, *supra* note 5, at 251.

148. *Id.*

149. Davidson v. Riley, 44 F.3d 1118, 1125 (2d Cir. 1995); *see also* Hameed v. Mann, 57 F.3d 217, 222 (2d Cir. 1995); Lemons v. Skidmore, 985 F.2d 354, 356 (7th Cir. 1993) (A judge "abused his discretion by relying on the self-serving opinion of fellow penal officers of the defendants and not holding a hearing to determine what, if any, restraints were necessary.").

V. RECOMMENDATIONS

Courts should adopt the Ninth Circuit's reasoning in *United States v. Sanchez-Gomez* and hold that the indiscriminate shackling of criminal defendants violates due process.[150] In *Sanchez-Gomez*, the Ninth Circuit began its reasoning by emphasizing the fundamental right to be free from unwarranted restraints.[151] The court then clarified the scope of that right by explaining the need for dignity and the need for a defendant to have the full capability to defend himself.[152] The Ninth Circuit rejected the Supreme Court's idea that the common law drew a distinction between trial and pretrial proceedings when applying the right.[153] Finally, the court criticized the notion that a court should delegate the decision of whether to shackle a defendant to law enforcement.[154] Ultimately, the Ninth Circuit found the policy of indiscriminate shackling unconstitutional, and courts should adopt its reasoning and hold the same.[155]

Second, courts should adopt a detailed policy requiring an individualized determination of the need for the use of shackles in non-jury proceedings. Judges currently have the discretion to decide whether to shackle a defendant based on the circumstances of each case.[156] While trial judges enjoy this discretion, implementing standard practices in evaluating whether to shackle a defendant would promote uniformity, efficiency, and fairness in the process of making these individualized determinations.[157] In the interest of efficiency, there need not be a hearing for every defendant, but courts should still make an individualized decision as a matter of record regarding the need for shackles.[158] Some courts make determinations ahead of the daily court schedule through a review of the defendant's background and a recommendation from the United States Marshals Service.[159] Upon making the

150. *See Sanchez-Gomez*, 859 F.3d at 666.

151. *Id.* at 660.

152. *Id.* at 661–62.

153. *Id.* at 663–64 ("The Supreme Court's dictum on pretrial proceedings in *Deck* doesn't control this case because it's contradicted by the very sources on which the Supreme Court relied.").

154. *Id.* at 665.

155. *Id.* at 666.

156. Barrowes, *supra* note 113, at 369.

157. *Id.*

158. Jacqueline A. Connor, *Security Concerns in the Courtroom*, DAILY J., https://www.dailyjournal.com/mcle/132-security-concerns-in-the-courtroom (last visited Sept. 1, 2019).

159. Maxine Bernstein, *Judges Now Deciding Daily If Inmates Should Wear Shackles in Court*, THE OREGONIAN (Oct. 8, 2017), https://www.oregonlive.com/portland/index.ssf/2017/10/judges_now_deciding_daily_if_i.html.

determination, defense attorneys will have the opportunity to object to the decision before the defendants are brought into the courtroom.[160]

An example of a successful protocol is the District of Arizona's protocol for the application of individualized discretion to shackling determinations.[161] According to the protocol, before a detainee's first hearing, the presiding judge should make an individualized determination of the need for restraints by assessing all available information, such as charging documents, pretrial services reports, criminal history, and notations in the Marshals Service detainee database.[162] The Marshals Service then inputs the judge's determination into its detainee database.[163] During the first hearing, the judge notes his determination and allows for its review.[164] If the judge ever modifies the restraint level, the Marshals Service will adjust the level in the detainee database and produce the defendant in the modified restraint level at future hearings.[165] This protocol has proved to be successful for the District of Arizona as it has had no incidents of violence since it became effective in August of 2017.[166] While a court's protocol need not be identical to this one, an assessment of similar information and following a similar process will ensure that a court enacts a successful, efficient protocol to make individualized determinations of the need for shackles.

VI. CONCLUSION

For hundreds of years, the notion of the right to be free from unnecessary restraint has been fundamental to individual liberty.[167] Courts are reluctant, however, to explicitly extend this right to defendants in non-jury proceedings.[168] The Ninth Circuit attempted to become the first federal court to extend the right to defendants in non-jury proceedings, but the Supreme Court vacated the decision for other reasons.[169] By understanding the historical and modern rationales for prohibiting the indiscriminate use of shackles, however, it can be understood that this right is not only of the utmost importance in jury proceedings, but other types of proceedings as well. A thorough due process analysis proves that the indiscriminate use of shackling

160. *Id.*
161. Brief for National Ass'n of Federal Defenders as Amicus Curiae Supporting Respondents, *supra* note 1, at 17.
162. *Id.* at 17–18.
163. *Id.* at 18.
164. *Id.*
165. *Id.*
166. *Id.*
167. *See supra* Part II.
168. *See supra* Part II.
169. United States v. Sanchez-Gomez, 859 F.3d 649, 666 (9th Cir. 2017), *vacated*, 138 S. Ct. 1532, 1542 (2018).

impermissibly infringes on a defendant's interest to be free from bodily restraint.[170] Additionally, the use of restraints without need negatively affects a defendant and impairs a judge's ability to be objective.[171] Therefore, courts should adopt the Ninth Circuit's reasoning in *United States v. Sanchez-Gomez* and hold that the indiscriminate use of shackling criminal defendants in non-jury proceedings violates due process, thereby requiring an individualized determination of the need for shackles in each case.

*Shelby Shelton**

170. *See supra* Part IV.

171. *See supra* Part V.

* J.D. Candidate 2020, University of Arkansas at Little Rock William H. Bowen School of Law; Bachelor of Arts in Criminal Justice, University of Arkansas at Little Rock, 2017. I would like to extend my sincerest appreciation to Professor Terrence Cain for his guidance and support throughout the process of writing this note.