Penn State Law Review

Volume 125 | Issue 1 Article 7

10-1-2020

Judges Judge Too: Analyzing the Shackling of Criminal Defendants in Nonjury Proceedings

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ABSTRACT

In the 2005 decision of *Deck v. Missouri*, the U.S. Supreme Court held that the routine shackling of criminal defendants in jury proceedings is unconstitutional. While in its opinion the Supreme Court emphasized the importance of (1) the presumption of innocence, (2) the Sixth Amendment right to counsel, and (3) the dignity of the courtroom, as well as the adverse impact of juror biases, the Court did not address the constitutionality of routine shackling in nonjury proceedings. Thus, circuit courts are split on whether routinely shackling criminal defendants in nonjury proceedings is constitutional.

At the core of this circuit split are the constitutional rights of criminal defendants, particularly when shackled. The foundation of the U.S. criminal justice system is largely based upon the presumption of innocence of criminal defendants. The Sixth Amendment right to counsel and the Due Process Clauses of the Fifth and Fourteenth Amendments uphold this presumption. However, presenting a shackled criminal defendant to a judge inherently challenges a defendant's presumption of innocence. To remedy this, when deciding whether to shackle defendants in nonjury proceedings, courts should protect the constitutional rights of criminal defendants by accounting for the biases of judges.

This Comment first addresses the importance and precedential value of the Supreme Court's *Deck* opinion addressing shackling in jury proceedings. Next, this Comment discusses the current circuit split and *Deck*'s relevance to each of the three involved circuits. This Comment then examines the impact of bias on judicial decision-making and how

* J.D. Candidate, The Pennsylvania State University, Penn State Law, 2021. I would like to sincerely thank my parents, Judd and Pam, and my brother, Brock, for their unwavering support and encouragement as I pursue my legal passions. I would also like to thank my *Penn State Law Review* colleagues for their endless edits and guidance throughout the Comment writing process. I am eternally grateful to all my fellow *PSLR* members, friends, and family for believing in me every step of the way.

shackles may provoke negative biases in both jurors and judges. This Comment, in part, recommends that courts hold routine shackling in nonjury proceedings unconstitutional. To account for judicial bias, this Comment ultimately recommends that courts determine whether to shackle criminal defendants based on an individualized, case-by-case determination.

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I. INTRODUCTION

The very foundation of the United States criminal justice system is the constitutional right of any person accused of a crime to fair and impartial judicial proceedings.[1] To ensure the fairness of all judicial proceedings, "every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent [person], except as the necessary safety and decorum of the court may otherwise require."[2] Therefore, a defendant who has not been found guilty is presumed to be innocent.[3] The presumption of innocence is of utmost importance to ensure the impartiality of judicial proceedings because a defendant is supposed to be tried and found guilty or not guilty

1. *See* Robert G. Neds, *Criminal Defendants: Maintaining the Appearance of Innocence*, 37 MO. L. REV. 660, 660 (1972).
2. Eaddy v. People, 174 P.2d 717, 719 (Colo. 1946).
3. *See id.*; *see also* Neds, *supra* note 1, at 660.

based upon the facts in a case, nothing else.[4] Unfortunately, a jury or judge may assume a shackled defendant's guilt based on appearance alone, undermining the defendant's presumption of innocence.[5] Thus, when a defendant is presented to the court in a manner that causes a jury or judge to question the defendant's innocence before the presentation of any facts, the presumption of innocence is diminished and becomes vulnerable to negative biases.[6]

Nevertheless, criminal defendants are routinely marched into courtrooms in shackles and chains.[7] The routine use of shackles is often justified as a means to promote courtroom safety and prevent defendants from escaping.[8] However, when defendants are routinely shackled without considering each individual defendant's threat to courtroom safety,[9] shackling becomes unnecessary and serves more of a punitive purpose,[10] despite the presumption of innocence to which defendants are entitled.[11] The presentation of shackled defendants indirectly suggests guilt and may cause judges and jurors to implicitly assume a defendant is dangerous.[12] Since the presence of shackles contradicts the presumption of innocence,[13] a defendant's right to a fair trial is inevitably violated by routine shackling practices in the courtroom.[14] Thus, a tension exists between the constitutional rights of criminal defendants and the practice of routine shackling.

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4. *See* Neds, *supra* note 1, at 660; *see also* Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 258 (2002).

5. *See* Neds, *supra* note 1, at 660–61; *see also* Kitai, *supra* note 4, at 258–60.

6. *See* Neds, *supra* note 1, at 660–61.

7. *See* Jessica Prokop, *The Case for and Against Shackles*, COLUMBIAN (June 18, 2017, 6:02 AM), https://bit.ly/37K1p4u.

8. *See* Royse M. Parr, *Criminal Law: Restraint of the Accused During Trial*, 1 TULSA L. REV. 54, 54 (1964); *see also* Alison L. Smock, *Childbirth in Chains: A Report on the Cruel but Not So Unusual Practice of Shackling Incarcerated Pregnant Females in the U.S.*, 3 TENN. J. RACE, GENDER, & SOC. JUST. 112, 112–14 (2014) ("[S]hackling, specifically, was employed for the purposes of decreasing flight risk and maintaining the safety of the officers and public against the prototypical violent male of offender.").

9. *See* Prokop, *supra* note 7 (noting that defendants with no prior criminal history are often restrained just as much as a violent felon when presented to the court).

10. *See* Maxine Bernstein, *Judges Now Deciding Daily if Inmates Should Wear Shackles in Court*, OREGONIAN (last updated Jan. 9, 2019), https://bit.ly/39Ly4rX ("A presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.").

11. *See* Prokop, *supra* note 7.

12. *See* Bernstein, *supra* note 10 ("Some people need the shackles, but many don't . . . and the handcuffs and leg chains unfairly signal that 'this person is a danger,' [Lane Borg, executive director of Metropolitan Public Defenders Inc.] said.").

13. *See id.* (concluding that "the sight of defendants who are 'marched in like convicts on a chain gang' destroys the presumption of innocence until proven guilty").

14. *See id.*

Routine shackling practices have unfairly impacted countless criminal defendants across the country.[15] For example, a nine-year-old boy from Idaho was chained and shackled for his initial court appearance after stealing a pack of Trident gum worth $1.49.[16] The court did not justify the shackling of the third-grader with concerns of safety or escape, but instead shackled him because it was a routine practice, occurring daily in nonjury proceedings.[17]

In 2005, as a first step in addressing routine courtroom shackling, the Supreme Court examined the tension between shackling practices in jury proceedings and the constitutional rights of defendants.[18] In *Deck v. Missouri*, the Supreme Court held that routine shackling in jury proceedings is unconstitutional, concluding that the practice violates three legal principles: (1) the presumption of innocence, (2) the Sixth Amendment right to counsel, and (3) the dignity and decorum of the courtroom.[19] The Supreme Court also supported its holding by acknowledging the growing body of scientific research on inherent juror biases.[20] The Court recognized that jurors are susceptible to the prejudicial effects shackles create, which may foster negative biases in juror decision making.[21] Consequently, the Court held that routine shackling in jury proceedings is unconstitutional.[22]

While the Court held that routine shackling in jury proceedings is unconstitutional, it left unanswered how courts should address routine shackling in nonjury proceedings.[23] The Second and Eleventh Circuit courts have held that routine shackling in nonjury proceedings is constitutional.[24] Those courts reason that judges, unlike jurors, have the

15. *See* Prokop, *supra* note 7; *see also* United States v. Sanchez-Gomez, 859 F.3d 649, 660–62 (9th Cir. 2017) ("A member of the public who wanders into a criminal courtroom must immediately perceive that it is a place where justice is administered with due regard to individuals whom the law presumes to be innocent. That perception cannot prevail if defendants are marched in like convicts on a chain gang.").

16. *See* Bryan Schatz, *A Court Put a 9-Year-Old in Shackles for Stealing Chewing Gum – an Outrage That Happens Every Single Day*, MOTHERJONES (Feb. 24, 2015), https://bit.ly/2SJGzye. While the judicial proceedings of the juvenile justice system differ from the procedures for adult defendants, the example this article offers illustrates the boundless reach of shackling in the courtroom in all proceedings for all defendants. *See id.*

17. *See id.*

18. *See* Deck v. Missouri, 544 U.S. 622, 624 (2005).

19. *See id.*

20. *See id.* at 629–32; *see also* Neusha Etemad, *To Shackle or Not to Shackle? The Effect of Shackling on Judicial Decision-Making*, 28 S. CAL. REV. L. & SOC. JUST. 349, 350–60 (2019).

21. *See Deck*, 544 U.S. at 629–32.

22. *See id.* at 629.

23. *See id.* at 626–29.

24. *See* United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997); *see also* United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015).

ability to remain unbiased and neutral.[25] The Ninth Circuit, less confident in the impartiality of judges, held that routine shackling in nonjury proceedings is unconstitutional, in part because it reasoned that judges are just as biased as jurors.[26] Thus, a circuit split currently exists as to the constitutionality of routine shackling in nonjury proceedings.[27] Without resolution of this issue, criminal defendants will continue to appear in court shackled during nonjury proceedings.

Part II of this Comment first discusses the precedential value of the Supreme Court's opinion in *Deck*, which addressed routine shackling in jury proceedings.[28] Second, Part II examines the Supreme Court's establishment of the three *Deck* legal principles: (1) the presumption of innocence, (2) the Sixth Amendment right to counsel, and (3) the dignity and decorum of the courtroom.[29] Third, Part II explores the current circuit split regarding the constitutionality of routine shackling in nonjury proceedings.[30] Part II then concludes with a discussion of the presence of judicial bias in the courtroom and the influence negative biases can have upon the proceedings of shackled defendants.[31]

Part III of this Comment applies the three *Deck* legal principles to routine shackling in nonjury proceedings and analyzes the current circuit split.[32] To resolve the circuit split, Part III recommends that lower courts adopt the Ninth Circuit's approach in *United States v. Sanchez-Gomez*, in which the court held that routine shackling in nonjury proceedings is unconstitutional, because like the jurors in *Deck*, judges judge too.[33]

Finally, Part IV of this Comment provides concluding remarks on the issues raised throughout this Comment.[34]

II. BACKGROUND

The United States criminal justice system is grounded on the principle that all criminal defendants are innocent until proven guilty.[35]

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25. *See* United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997); *see also* United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015).

26. *See* United States v. Sanchez-Gomez, 859 F.3d 649, 665–66 (9th Cir. 2017) (holding that routine shackling of criminal defendants in any proceeding violates a defendant's constitutional rights, and thus cannot be upheld, largely due to the biases of judges that shackling invokes).

27. *See* Tiffany Bryant, *Do the Due Process Restrictions on Shackling Criminal Defendants Apply Equally to Jury and Non-jury Proceedings?*, SUNDAY SPLITS (Mar. 25, 2018), https://bit.ly/34MF0CI.

28. *See infra* Section II.A.

29. *See infra* Section II.A.

30. *See infra* Sections II.B–II.C.

31. *See infra* Section II.D.

32. *See infra* Sections III.A–III.B.

33. *See infra* Section III.C.

34. *See infra* Part IV.

Though this "presumption of innocence" is not explicitly stated in the United States Constitution,[36] courts today view the innocence standard "as an essential component of a fair trial."[37] The Constitution guarantees the presumption of innocence to a criminal defendant through the Due Process Clauses of the Fifth and Fourteenth Amendments "by erecting an obstacle course of legal protections and safeguards."[38] Early case law dating back to the 1800s also supports an innocence presumption, concluding in *Coffin v. United States* that the "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary."[39] However, the question remains whether the routine shackling of criminal defendants in nonjury proceedings contravenes the presumption of innocence.[40]

In the 2005 *Deck v. Missouri* opinion, the U.S. Supreme Court addressed the routine shackling of criminal defendants in jury proceedings.[41] The Court in *Deck* held that routine shackling in jury proceedings is unconstitutional.[42] However, the Court left unanswered how the newly-created rule should apply to *nonjury* proceedings, or if it should extend beyond jury proceedings.[43] This lack of guidance from the Supreme Court has allowed a circuit split to form, leaving the constitutionality of routine shackling of criminal defendants in nonjury proceedings subject to interpretation by the lower courts.[44]

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35. *See* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 338 (1995). The presumption of innocence in the criminal context places the burden of proof upon the prosecution, requiring prosecutors to establish "guilt beyond all reasonable doubt as a condition for conviction and punishment." Kitai, *supra* note 4, at 258.

36. *See* Brandon Garrett, *The Myth of the Presumption of Innocence*, 74 TEX. L. REV. 178, 179 (2016) ("[The] presumption [of innocence] certainly does not translate to anything very specific in our constitutional criminal procedure doctrine. As many have observed, it is a myth that the Constitution affords special protections to the innocent."); *see also Is the Presumption of Innocence in the Constitution?*, LAWINFO BLOG (Dec. 12, 2017), https://bit.ly/36SyLPu.

37. Laufer, *supra* note 35, at 339.

38. *Id.* at 352. The Fifth Amendment states, "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. V. Similarly, the Fourteenth Amendment extends the requirements of due process to states, asserting, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XVI, § 1.

39. Coffin v. United States, 156 U.S. 432, 453 (1895).

40. *See* Bryant, *supra* note 27.

41. *See* Deck v. Missouri, 544 U.S. 622, 624 (2005).

42. *See id.*; *see also* David R. Wallis, *Visibly Shackled: The Supreme Court's Failure to Distinguish between Convicted and Accused at Sentencing for Capital Crimes*, 71 MO. L. REV. 447, 447–48 (2006).

43. *See Deck*, 544 U.S. at 624.

44. *See* United States v. Sanchez-Gomez, 859 F.3d 649, 661 (9th Cir. 2017). *But see* United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015); United States v. Zuber, 118 F.3d 101, 110–11 (2d Cir. 1997).

The Second and Eleventh Circuits have held that routine shackling in nonjury proceedings is constitutional.[45] In contrast, the Ninth Circuit in *United States v. Sanchez-Gomez* applied the rationale of the Court in *Deck* to nonjury proceedings and held that routine shackling is unconstitutional in all proceedings.[46] While the Supreme Court granted certiorari in *Sanchez-Gomez*, the Court vacated and remanded the case to the Ninth Circuit "with instructions to dismiss as moot" the issue of shackling criminal defendants in nonjury proceedings.[47]

With the constitutionality of routine shackling in nonjury proceedings dismissed as moot by the highest court in the country, the issue remains in a state of flux.[48] As a result, lower courts are closely monitoring the circuit split, seeking direction on how to appropriately and constitutionally tackle routine shackling in nonjury proceedings.[49] Thus, the circuit split between the agreeing Second and Eleventh Circuits and the conflicting Ninth Circuit will likely influence how courts rule in the future.[50] In sum, the Supreme Court in *Deck v. Missouri* first addressed shackling in jury proceedings, but its failure to address the issue of shackling in nonjury proceedings led to the current circuit split.[51]

A. Shackling of Criminal Defendants in Jury Proceedings: Deck v. Missouri

In *Deck*, the Court held that routine shackling of criminal defendants in jury proceedings is unconstitutional.[52] The Court reasoned that routine shackling in jury proceedings is a clear violation of the due process guarantees found in the Fifth and Fourteenth Amendments, which "prohibit the use of physical restraints visible to the jury absent a

45. *See Zuber*, 118 F.3d at 102; *see also Lafond*, 783 F.2d at 1225.

46. *See Sanchez-Gomez*, 859 F.3d at 659–60.

47. United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1542 (2018). The Supreme Court granted certiorari to the Ninth Circuit's 2017 decision, *United States v. Sanchez-Gomez*, 859 F.3d 649, to review a policy permitting routine restraints for all in-custody defendants in nonjury proceedings. *See id.* By the time the Supreme Court began reviewing the decision, all defendants' cases had been resolved, thus, they were no longer subject to restraints. *See id.* The Supreme Court vacated and remanded the decision as moot as the issue of shackling was no longer a concern due to the timely resolution of the cases. *See id.* "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. . . . Because we hold this case moot, we take no position on the question." *Id.*

48. *See* United States v. Sanchez-Gomez, No. 13-50561, 2018 U.S. App. LEXIS 18007, at *1–2 (9th Cir. July 2, 2018). The court dismissed the case as moot in compliance with the Supreme Court's decision in *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018). *Id.*

49. *See* Bryant, *supra* note 27.

50. *See id.*

51. *See* Deck v. Missouri, 544 U.S. 622, 624–26 (2005).

52. *See id.* at 624.

trial court determination."[53] The Court attributed the origin for its holding to early English common law, dating back as far as the eighteenth century.[54] The Court relied on the work of William Blackstone, an English judge and legal theorist, who believed that criminal defendants "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape."[55] Despite Blackstone's failure to differentiate between shackling in jury and nonjury proceedings, the Court determined that he intended his statement to concern defendants appearing before a jury.[56] Accordingly, courts were allowed to shackle defendants only at "the time of arraignment," and other similar proceedings before a judge.[57] While U.S. courts have historically shackled criminal defendants in jury proceedings, the Court in *Deck* clarified that courts may shackle defendants in jury proceedings only "if there is a particular reason to do so."[58]

The Court in *Deck* also identified the following three legal principles that lower courts should consider when making shackling determinations in jury proceedings: (1) that the American criminal

53. *Id.* at 629.

54. *See id.* at 626.

55. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 317 (George Sharswood, 2d ed. 1769). William Blackstone was a prominent 1700s English legal theorist and judge. *See* Sara L. Zeigler, *William Blackstone*, THE FIRST AMENDMENT ENCYC., https://bit.ly/36RqZpb, (last visited July 19, 2020). Blackstone published a series of explanatory papers from 1765 to 1769 describing and analyzing English common law. *See* Albert S. Miles et al., *Blackstone and His American Legacy*, 5 AUSTL. & N.Z. J.L. & EDUC. 46, 57–58 (2000). Blackstone's commentary was used by American lawyers and leaders when crafting the United States Declaration of Independence and the United States Constitution, thus intertwining English common law into the foundation of the United States. *See id.* at 46. Because of Blackstone's influence on America's founding, U.S. courts often look to and rely on his writings and English common law when addressing novel issues in the American judiciary. *See id.* at 54. Accordingly, the Supreme Court in *Deck* supported the legal rule it created with Blackstone's commentary and the deep roots of English common law. *See Deck*, 544 U.S. at 626.

56. BLACKSTONE, *supra* note 55, at 317; *see also Deck*, 544 U.S. at 626.

57. BLACKSTONE, *supra* note 55, at 317.

58. *Deck*, 544 U.S. at 627. While *Deck* ultimately created the bright-line rule for shackling defendants in jury proceedings, the Supreme Court had contemplated the issue in previous cases. *See* Holbrook v. Flynn, 475 U.S. 560, 568–69 (1986) ("[T]he sort of inherently prejudicial practice . . . like shackling, should be permitted only where justified by an essential state interest specific to each trial."); Estelle v. Williams, 425 U.S. 501, 503, 505 (1976) (noting that how a defendant is presented in court "may undermine the fairness of the factfinding process" and that compelling an accused to wear jail clothing "furthers no essential state policy"); Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (explaining that, of all the methods available to judges in remedying a disruptive defendant, "shackling and gagging a defendant is surely the least acceptable of them. It also offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law.").

justice system operates on the presumption that defendants are innocent until proven guilty; (2) that criminal defendants have a constitutional right to communicate with counsel under the Sixth Amendment; and (3) that court procedures are a highly respected and dignified aspect of criminal justice which must be upheld through the exercise of discretion by judges.[59] Since *Deck*'s holding was limited to *routine* shackling, judges still have discretion, on a case-by-case basis, to determine if shackling a defendant in jury proceedings is "justified by a state interest specific to a particular trial."[60] The three legal principles from *Deck* offer guidance to lower courts when making shackling determinations.

First, the Court identified an inherent contradiction between routinely shackling criminal defendants in jury trials and the presumption of innocence.[61] The Court reasoned that a jury is biased by the presentation of a shackled defendant because the shackles themselves implicitly suggest that the defendant is dangerous.[62] The Court concluded that presenting a shackled defendant to a jury severely impacts the "fairness of the factfinding process"[63] because a juror's perception of a defendant in shackles "undermines the presumption of innocence."[64] Therefore, to account for the impact of bias, the Court in *Deck* instructed that lower courts must consider what bias jurors have toward a shackled defendant when deciding whether shackling a defendant is appropriate.[65]

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59. *See Deck*, 544 U.S. at 630–32. The three guiding principles identified by the Court in *Deck* strayed from the historical argument against shackles in the courtroom. *See id.* Shackles were traditionally used as a way of inflicting "severe" pain and suffering upon defendants as the shackles were often "heavy and painful." *Id.* at 638–39. However, due to more modern shackling techniques and technology, present-day courts have strayed from the physical pain implications, instead "emphasiz[ing] the importance of giving effect to three fundamental legal principles." *Id.* at 630.

60. *Id.* at 629.

61. *See id.* at 630.

62. *See id.* For a more in-depth analysis of the prejudicial effect of shackles upon defendants when presented to the court, see generally Thushan Sabarantnam, Comment, *Prejudicial Routine Shackling of Defendants Without Proper Judicial Assessment During Pretrial: A Fifth and Fourteenth Amendment Violation*, 52 UIC J. MARSHALL L. REV. 881 (2019). Sabarantnam states in part:

> When [defendants] are marched in with iron shackles, there is nothing to visualize other than the dangerousness of the [defendant] who needs to be restrained with raucous and stringent shackles. The appearance of guilt from shackles is ultimately placing the defendant in an indigent light which makes it more difficult for them to defend themselves. . . . It is the duty of . . . judges to allow [defendants] to maintain the presumption of their innocence. The final say of the judge should be unbiased towards the [defendant] to ensure susceptible righteousness.

Id. at 902–03.

63. *Deck*, 544 U.S. at 630.

64. *Id.*

65. *See id.*

Second, the Court identified the potential negative assumptions a jury must disregard when shackled defendants attempt to communicate with counsel.[66] When a defendant is shackled, normal movements such as standing and writing become more difficult.[67] The severe movement limitations shackles create impede a defendant's ability to communicate with counsel in the courtroom.[68] Shackling also interferes with a defendant's ability to present a meaningful defense by hampering the defendant's ability to "freely [choose] whether to take the witness stand on his own behalf," as shackles hinder one's ability to stand and walk.[69] The purpose of shackling is to restrict movement, but the Court concluded that when shackles interfere with the presentation of a legal defense at trial, they become an unconstitutional infringement upon a defendant's right to counsel and due process.[70] Therefore, the Court in *Deck* instructed that judges must take into consideration the potential interference shackles may impose upon a defendant's Sixth Amendment right to counsel.[71]

Third, the Court identified the need to maintain courtroom decorum and respect for the judicial process.[72] The criminal justice system is a dignified and honest process, relying upon judges to use their discretion in ways that maintain the respectable reputation of the system.[73] Routine shackling of criminal defendants in jury proceedings "undermine[s] these symbolic yet concrete objectives," and thus, the Court in *Deck* concluded that shackling determinations in jury proceedings must be made on an individual, case-by-case basis.[74]

Courts engaging in the case-by-case analysis, according to the Court in *Deck*, must consider (1) the presumption of innocence, (2) the Sixth Amendment right to counsel, and (3) the dignity and decorum of the courtroom when deciding whether a criminal defendant should be shackled in a jury proceeding.[75] If a court determines that a criminal defendant must be shackled, the judge must justify the decision by stating a "particular concern."[76] A particular concern in the context of shackling includes, but is not limited to, a specific defendant's escape risk, special security needs related to the defendant, or the need for

66. *See id.* at 631.
67. *Id.* at 631.
68. *See id.*
69. *Id.*
70. *See id.*
71. *See Deck*, 544 U.S. at 630–32.
72. *See id.*
73. *See id.*
74. *Id.*
75. *See id.* at 630–32.
76. *See id.* at 632–33.

general courtroom safety.[77] Thus, a judge cannot place a defendant in shackles in a jury proceeding without taking into consideration "the circumstances of a particular case" and the demeanor of the individual defendant.[78]

By requiring a specific justification from a judge, a defendant's presumption of innocence and constitutional rights are respected.[79] Correspondingly, judicial discretion is abused when a judge orders the shackling of a criminal defendant in a jury proceeding absent a particular concern.[80] Thus, *Deck*'s "particular concern" requirement also defines the reach of judicial discretion in shackling determinations in jury proceedings.[81] Therefore, *Deck* plainly held that the practice of routine shackling of criminal defendants in jury proceedings is unconstitutional absent a specific justification.[82]

While *Deck* resolved the issue of routine shackling of criminal defendants in jury proceedings, it did not reveal the Court's position on routine shackling in nonjury proceedings.[83] Consequently, a circuit split has emerged.[84]

B. Condoning Routine Shackling in Nonjury Proceedings

The Second, Ninth, and Eleventh Circuits have each addressed routine shackling of criminal defendants in nonjury proceedings and comprise the current circuit split.[85] Of the three circuits, the Second and Eleventh Circuits agree that routine shackling in nonjury proceedings is constitutional.[86]

1. Second Circuit, *United States v. Zuber*

In 1997, the Second Circuit, in *United States v. Zuber*, refused to require "an independent, judicial evaluation of the need to restrain a

77. *Id.* at 633.
78. *Id.* at 632–33.
79. *See id.*
80. *See Deck*, 544 U.S. at 632–34.
81. *See id.*
82. *See id.* at 635.
83. *See* Bryant, *supra* note 27 (describing the emergence of the current circuit split within the U.S. Court of Appeals and the questions left unanswered by *Deck* regarding the issue of routine shackling of criminal defendants in nonjury proceedings).
84. *See id.*; *see also* Howard M. Wasserman, *Opinion Analysis: Constitutional Challenge to Shackling Policy Becomes Moot when Criminal Prosecutions Terminate*, SCOTUS BLOG (May 14, 2018, 8:39 PM), https://bit.ly/2NXOiF9.
85. *See* United States v. Sanchez-Gomez, 859 F.3d 649, 661 (9th Cir. 2017); United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015); United States v. Zuber, 118 F.3d 101, 110–11 (2d Cir. 1997).
86. *See Zuber*, 118 F.3d at 102; *see also Lafond*, 783 F.3d at 1219.

party in court . . . [in] the context of non-jury sentencing proceedings."[87] Consequently, the court held that routine shackling in nonjury proceedings is not a violation of due process and held that the practice is constitutional.[88] The court found it important that there is no jury to bias during a nonjury proceeding.[89] Accordingly, the court reasoned that the absence of a jury negates the need for an independent, judicial evaluation when deciding whether to shackle a defendant, as the purpose of such an evaluation is to minimize the prejudicial effect of shackles upon the jury.[90]

The court reasoned that judges, unlike juries, "are not prejudiced by impermissible factors."[91] The court was confident in judges' ability to set aside and "avoid the influence of inappropriate, irrelevant, or extraneous information" when acting as the factfinder in nonjury proceedings.[92] Therefore, judges in the Second Circuit may routinely shackle criminal defendants in nonjury proceedings without providing a special justification.[93]

While Judge Richard J. Cardamone agreed with the majority's holding that in the case of Defendant Zuber routine shackling was constitutional, he wrote a separate, concurring opinion to express his disagreement with the majority's rationale.[94] Judge Cardamone noted that "a trial judge must make an inquiry regarding the necessity for the restraints – even if no jury is present."[95] Judge Cardamone asserted that shackles may significantly impede a defendant's ability to communicate with counsel, thereby infringing upon a defendant's constitutional

87. *Zuber*, 118 F.3d at 104. *Zuber* was decided prior to *Deck*. *See id.* at 102. Thus, the Second Circuit was unable to decide whether *Deck* can appropriately be extended when considering shackling in nonjury proceedings. Nonetheless, *Zuber* relies upon a string of Second Circuit cases, which collectively held "that a presiding judge may not approve the use of physical restraints, in court, on a party to a jury trial unless the judge has first performed an independent evaluation . . . of the need to restrain the party." *Id.* at 103; *see also* Davidson v. Riley, 44 F.3d 1118, 1123–25 (2d. Cir. 1995); Hameed v. Mann, 57 F.3d 217, 222 (2d. Cir. 1995).

88. *See Zuber*, 118 F.3d at 104.

89. *See id.* at 103–04.

90. *See id.* at 103–05.

91. *Id.* at 104. In fact, the presiding judge in the district court proceedings, Chief Judge John Garvan Murtha, stated, "[t]here 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. It's not going to affect the way I see his sentence." *Id.* at 103 n.1.

92. *Id.* at 104 (quoting United States v. Graham, 72 F.3d 352, 359 (3d Cir. 1995)).

93. *See id.* 103–04.

94. *See id.* at 105 (Cardamone, J., concurring) (agreeing with the outcome of the case but rejecting the majority rationale that an independent shackling evaluation by courts is unnecessary when a jury is not present).

95. *See id.* (Cardamone, J., concurring).

rights.[96] Additionally, Judge Cardamone found that defendants presented to the court in shackles "detract from the dignity and decorum of court proceedings."[97] He emphasized the importance of upholding courtroom dignity and decorum regardless of whether a jury is present, reasoning that "[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."[98] As all of Judge Cardamone's concerns are pertinent "regardless of whether a jury is witness to the physical restraints placed on a defendant," he opined that judges "must make an inquiry regarding the necessity for the restraints" in all proceedings before shackling a defendant.[99] Consequently, Judge Cardamone disagreed with the majority's acceptance of routine shackling and favored individualized inquiry into the necessity of restraints before shackling a defendant in a nonjury proceeding.[100]

2. Eleventh Circuit, *United States v. Lafond*

In 2015, the Eleventh Circuit adopted a nearly equivalent holding to *Zuber* in *United States v. Lafond*.[101] In a strikingly similar opinion, the Eleventh Circuit reasoned that routine shackling is only unconstitutional in jury proceedings due to the great potential for jurors to be biased by the sight of a shackled defendant.[102] Thus, the court concluded that routine shackling is permissible absent a jury, as judges are not adversely influenced by the presence of shackles.[103] The Eleventh Circuit's opinion leaned upon recognized authorities on shackling, such as early English common law and Blackstone's writings, as seen in both *Deck* and *Zuber*.[104]

Similar to the *Deck* and *Zuber* decisions, the Eleventh Circuit also adopted Blackstone's English common law ideals.[105] The court found that Blackstone intended to draw a distinction between a defendant's

96. *See id.* at 106. The Court in *Deck* addressed Judge Cardamone's concern for the potential Sixth Amendment violations and incorporated his concern into its policy rationales. *See* Deck v. Missouri, 544 U.S. 622, 631 (2005).

97. *Zuber*, 118 F.3d at 105–06 (citing Illinois v. Allen, 397 U.S. 337, 344 (1970)). The Court in *Deck* also adopted Judge Cardamone's concern for the significance of courtroom dignity as the third policy rationale. *See Deck*, 544 U.S. at 631.

98. *Zuber*, 118 F.3d at 106 (Cardamone, J., concurring).

99. *Id.* at 105 (Cardamone, J., concurring).

100. *See id.* at 105–06 (Cardamone, J., concurring).

101. *See* United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015).

102. *See id.*

103. *See id.*

104. *See id.*; *see also* Deck v. Missouri, 544 U.S. 622, 624 (2005); *Zuber*, 118 F.3d at 102.

105. *See Lafond*, 783 F.2d at 1225.

right to be free from restraints when presented to a jury, as opposed to when only presented to a judge.[106] The court was further convinced by the *Zuber* rationale that shackling a criminal defendant when there is no jury present does not create a risk of a substantial prejudice.[107] Hence, the Eleventh Circuit determined that *Deck* is limited to "protect defendants appearing at trial before a jury," and should not be extended to nonjury proceedings.[108]

While the Second and Eleventh Circuits limited *Deck* to jury proceedings, not all circuits have followed suit.[109] In 2017, the Ninth Circuit diverged from the opinions of the Second and Eleventh Circuits.[110] When presented with the issue of whether routinely shackling criminal defendants in nonjury proceedings is constitutional, the Ninth Circuit found *Deck*'s rationale applicable.[111] Courts in the Ninth Circuit are thus required to state a particular concern before shackling a defendant in any proceeding.[112] In departing from the holdings of *Zuber* and *Lafond*, the Ninth Circuit created a circuit split that remains today.[113]

C. Denouncing Routine Shackling in Nonjury Proceedings

In *United States v. Sanchez-Gomez*, the Ninth Circuit held that a policy permitting courts to shackle all in-custody defendants who appear in nonjury proceedings was unconstitutional.[114] The court extended the rationale of *Deck* to nonjury proceedings, establishing a fundamental constitutional right of defendants "to be free from unwarranted restraints" in all proceedings in the Ninth Circuit.[115] Thus, to constitutionally shackle a defendant in both jury and nonjury proceedings, a court sitting in the Ninth Circuit must justify the shackling by stating a particular concern.[116]

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106. *See id.*

107. *See id.* (citing United States v. Zuber, 118 F.3d 101, 102 (2d Cir. 1997)).

108. *Lafond*, 783 F.3d at 102 (quoting Deck v. Missouri, 544 U.S. 622, 626 (2005) (citing King v. Waite, 168 Eng. Rep. 117, 120 (K.B. 1743))).

109. *See* United States v. Sanchez-Gomez, 859 F.3d 649, 659–60 (9th Cir. 2017); *see also* Bryant, *supra* note 27.

110. *See Sanchez-Gomez*, 859 F.3d at 659–60; *see also* Bryant, *supra* note 27.

111. *See Sanchez-Gomez*, 859 F.3d at 659–65.

112. *See id.* at 659–60.

113. *See id.*; *see also* Case Comment, *Constitutional Law – Substantive Due Process – Ninth Circuit Deems Unconstitutional Routine Shackling in Pretrial Proceedings* – United States v. Sanchez-Gomez, 131 HARV. L. REV. 1163, 1164 (2018).

114. *See Sanchez-Gomez*, 859 F.3d at 659–60.

115. *Id.* at 666; *see also* Deck v. Missouri, 544 U.S. 622, 629–30 (2005).

116. *See Sanchez-Gomez*, 859 F.3d at 659–60; *see also Deck*, 544 U.S. at 629–30. The Court in *Deck* held that the Constitution "prohibit[s] the use of physical restraints visible to the jury absent a trial court determination." *Deck*, 544 U.S. at 629; *see also supra* Section II.A. Thus, to uphold the guaranteed constitutional protections of defendants in jury proceedings, a trial court must state "an essential state interest" to

Similar to the Second and Eleventh Circuits, the Ninth Circuit analyzed English common law when reaching its conclusion.[117] The court agreed with *Deck* that English common law supports the notion of freedom from shackles in jury proceedings.[118] However, unlike the Court in *Deck*, the Ninth Circuit concluded that English common law also supports freedom from shackles in nonjury proceedings.[119] The Ninth Circuit observed that Blackstone and other English commentators from the time period did not draw a "bright line between trial and arraignment" in discussing the permissibility of shackles, as the Court in *Deck* argued.[120] Rather, the Ninth Circuit concluded that Blackstone's writings relied upon a 1722 case, *The Trial of Christopher Layer*.[121] The Ninth Circuit noted that the Court in *Deck* failed to consider *The Trial of Christopher Layer*, and thus, neither analyzed nor interpreted Blackstone's writings accurately.[122] Due to *Deck*'s faulty analysis, the Ninth Circuit concluded that *Deck*'s interpretation of Blackstone's writings was unfounded and rested upon dicta rather than English common law precedent.[123] Thus, the Ninth Circuit concluded that the English common law[124] the Court relied on in *Deck* to hold routine

justify a determination to shackle. *Deck*, 544 U.S. at 624 (quoting Holbrook v. Flynn, 475 U.S. at 568–69). Such state interests may include, but are not limited to, courtroom security and escape risk of the defendant. *See Deck*, 544 U.S. at 627–29. *Deck* further established three constitutional policy rationales for the right of defendants to be free from shackles in jury proceedings. *See Deck*, 544 U.S. at 630–32; *see also supra* Section II.A. Because the constitutional policy rationales set forth in *Deck* are equally applicable to the nonjury context, the Ninth Circuit concluded that a defendant has a constitutional right to be free from shackles in nonjury proceedings too. *See Sanchez-Gomez*, 859 F.3d at 659–61. Thus, the Ninth Circuit held that a defendant's constitutional rights would be violated if said defendant were shackled without justification by an essential state interest in both jury and nonjury proceedings. *See Sanchez-Gomez*, 859 F.3d at 659–62.

117. *See Sanchez-Gomez*, 859 F.3d at 659–60.

118. *See id.* at 662–65.

119. *See id.*

120. *Id.* at 662–63; *see also Deck*, 544 U.S. at 626.

121. *See Sanchez-Gomez*, 859 F.3d at 663–64. The Ninth Circuit analyzed the 1722 English case of *The Trial of Christopher Layer, esq.; at the King's-Bench for the High-Treason*, Nov. 21, 1722, the case on which Blackstone based his writings. *See id.* at 663. The defendant in *Layer* objected to shackling at his arraignment. *See id.* at 663–64. While the judge overruled the objection due to Layer's prior escape attempts, thus allowing Layer to be shackled, the case demonstrates the case-by-case approach early English courts took to issues of shackling. *See id.* Notably, shackling in nonjury proceedings, such as the arraignment in Layer's case, was not standard, or even permissible practice without a justified state interest. *See id.* at 664. The judge offered Layer's escape risk as a justification for the shackling. *See id.* at 663–64. Because the Court in *Deck* failed to analyze Layer's case and the Judge's rationale, despite using Blackstone's writings referring to the case, the Court's reliance upon Blackstone and early English common law is unfounded. *See id.* at 663–65.

122. *See Sanchez-Gomez*, 859 F.3d at 664–65.

123. *See id.* at 663–65.

124. *See supra* notes 56–60 and accompanying text.

shackling unconstitutional in jury proceedings is equally relevant to nonjury proceedings.[125]

Further, having analyzed *The Trial of Christopher Layer*, the Ninth Circuit reasoned that Blackstone's writings should be interpreted to mean that "[s]hackles at arraignment and pretrial proceedings are acceptable only in situations of escape or danger."[126] The Ninth Circuit also explained that the criminal justice system has a "tradition . . . that defendants will appear in court . . . as free men with their heads held high."[127] Therefore, the Ninth Circuit concluded that *Deck*'s rationale falls short of adequately explaining why routine shackling is constitutional in some proceedings, but not others.[128] Further, the Ninth Circuit noted that *Deck* failed to meaningfully distinguish between the biases present in jury proceedings versus nonjury proceedings.[129] The Ninth Circuit accordingly held that routine shackling is unconstitutional in all proceedings.[130] The Ninth Circuit also concluded that Blackstone's writings and early English common law support requiring an articulated state interest to shackle a defendant in any proceeding.[131]

The Ninth Circuit went on to emphasize the basic, yet fundamental constitutional "right to be free from unwarranted restraints."[132] As previously stated by the Supreme Court, "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[133] The Ninth Circuit thus reasoned that allowing routine shackling of criminal

125. *See Sanchez-Gomez*, 859 F.3d at 663–65.

126. *Id.* at 663.

127. *Id.* at 665.

128. *See id.* at 663–64.

129. *See id.*

130. *See Sanchez-Gomez*, 859 F.3d at 663–64. This is not the first time arguments against routine shackling in nonjury proceedings had been made. Defense counsel in *Lafond* argued that the district court abused its discretion by allowing routine shackling in a nonjury proceeding, but the court was unconvinced. *See* United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015). Defense counsel argued that despite the lack of a jury, courtroom dignity was negatively impacted by the use of restraints as "shackling is 'inherently prejudicial.'" *Id.* Further, defense counsel argued that the shackles impeded the defendant's ability to write during the sentencing proceeding, therefore interfering with the constitutional right to counsel. *See id.* Despite these arguments, which were also crucial to the three legal principles established in *Deck*, the Eleventh Circuit concluded that the "argument fails," relying on the reasoning of Blackstone and the Second Circuit in *Zuber*. *Id. But see* Deck v. Missouri, 544 U.S. 622, 630–32 (2005). So, while arguments opposing the Second and Eleventh Circuits' rationale had previously been made, it was not until the Ninth Circuit's *Sanchez-Gomez* opinion that these arguments were recognized as valid by a circuit court. *See Sanchez-Gomez*, 859 F.3d at 663–64.

131. *See Sanchez-Gomez*, 859 F.3d at 664–65.

132. *Id.* at 660.

133. *Id.* (quoting Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

defendants in nonjury proceedings would infringe the right to be free from restraints, as well as the constitutional right to Due Process.[134]

To protect the constitutional rights of criminal defendants, the Ninth Circuit analyzed the three legal principles identified by the Court in *Deck*.[135] Particularly, the Ninth Circuit highlighted that the right to be free from shackles in proceedings, with or without a jury, upholds the "foundational principle that defendants are innocent until proven guilty."[136] Thus, to justify shackling in a nonjury proceeding, "the court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom."[137] Therefore, courts cannot routinely shackle criminal defendants in nonjury proceedings, as doing so "reflects a presumption that shackles are necessary in every case."[138] Rather, the Ninth Circuit instructed that courts must conduct a case-by-case analysis and cannot routinely and unjustifiably shackle defendants in nonjury proceedings.[139]

In addition to its holding, the Ninth Circuit made a broad policy assertion against routine shackling in all proceedings.[140] The court contended that marching criminals into a courtroom "like convicts on a chain gang" violates the presumption of innocence.[141] Further, the Ninth Circuit cautioned that, because incarceration is a possible outcome in criminal trials, procedures within the criminal justice system warrant a more skeptical examination.[142] Therefore, "[p]ractices like routine shackling and 'perp walks' are inconsistent with [the Court's] constitutional presumption that people who have not been convicted of a crime are innocent until proven otherwise."[143] The Ninth Circuit concluded that criminal defendants have a constitutional right to be free from restraints in all proceedings unless a court provides adequate justification to support placing a criminal defendant in restraints.[144] In mandating a justification for shackling, the rule carves out an exception

134. *See id.* at 666.

135. *See id.* at 660. The Ninth Circuit refers to the three legal principles established by *Deck* as "constitutional anchors." *Id.*; *see also supra* Section II.A.

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

137. *Id.*

138. *Id.*

139. *See id.*

140. *See id.* at 662.

141. *Id.* Note the similarities between the *United States v. Sanchez-Gomez* majority's rationale and Judge Cardamone's concurring opinion in *United States v. Zuber*, which both drew negatively-associated analogies to describe shackled defendants. *See supra* Section II.B.

142. *See Sanchez-Gomez*, 859 F.3d at 662.

143. *Id.*

144. *See id.* at 666.

when the need for security outweighs the infringement of a defendant's constitutional right to be free from shackles.[145]

Based upon a differing analysis of English common law, application of the three *Deck* legal principles, and public policy concerns, the Ninth Circuit diverged from other circuit courts by holding that routine shackling of criminal defendants in nonjury proceedings is unconstitutional.[146] The Ninth Circuit made clear that this rule and analysis applies to jury and non-jury proceedings, including "pretrial, trial, or sentencing proceeding[s]."[147] Thus, the Ninth Circuit departed from the Second and Eleventh Circuits by recognizing a fundamental constitutional right to be free of shackles in all proceedings absent a specific justification.[148]

While the three circuits confronted with the issue of routine shackling in nonjury proceedings have come to conflicting outcomes, the courts collectively found, and partially based their holdings on, individual biases present in the courtroom.[149] The Second and Eleventh Circuits found juror biases particularly concerning, as opposed to the Ninth Circuit, which found that both jurors and judges have inherent biases that must be addressed.[150] As jurors are more easily influenced than judges,[151] courts must strive in all proceedings to minimize the prejudicial effect of juror biases.[152] However, while biases of judges have previously been acknowledged, the extent of judicial bias's influence on proceedings is less clear.[153]

145. *See id.* at 665–66.

146. *See id.*

147. *Id.*

148. *See id.* at 659–60.

149. *See id.*; United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015); United States v. Zuber, 118 F.3d 101, 102 (2d Cir. 1997).

150. *See Sanchez-Gomez*, 859 F.3d at 659–60; *Lafond*, 783 F.2d at 1225; *Zuber*, 118 F.3d at 102.

151. *See* Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 835–38 (2012).

152. *See id.* Juror bias is prevalent enough to have previously warranted the attention of the United States Supreme Court. *See id.*; *see also* Turner v. Murray, 476 U.S. 28, 42 (1986); Crawford v. United States, 212 U.S. 183, 196 (1909). The Supreme Court has acknowledged juror bias and its "potential to affect" courtroom proceedings. *See* Roberts, *supra* note 151, at 836.

153. *See* Roberts, *supra* note 151, at 835–38; *see also* United States v. Clemmons, 892 F.2d 1153, 1162 (1989) (describing an instance in which a prosecutor and judge coincidentally shared similar implicit biases, likely influencing the outcome of the case).

D. Both Jurors and Judges Exercise Biases in the Courtroom

An individual's lifestyle, culture, trauma, background, and other experiences create biases that are difficult, if not impossible, to ignore.[154] While biases present themselves in many different ways, not all biases are inherently negative.[155] For example, some biases allow people to more quickly understand and interpret information.[156] However, when biases lead individuals to make "poor decisions and bad judgments," the outcome can be devastating.[157]

Individuals express bias explicitly and implicitly.[158] Explicit biases refer to "the attitudes and beliefs we have about a person or group on a conscious level."[159] When expressed consciously and deliberately, explicit biases may present as "discrimination, hate speech, etc."[160] Due to the consciousness of explicit biases, those types of biases are generally more apparent and easier to identify and address than implicit biases.[161] Implicit biases, on the other hand, manifest through "the process of associating stereotypes or attitudes toward categories of people without our conscious awareness."[162] A lack of conscious awareness means that individuals might not realize their own prejudices, which makes limiting the effects of implicit biases difficult.[163] Implicit biases do not depend on whether the person holding the bias actually endorses the biased belief.[164]

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154. *See* Kendra Cherry, *How Cognitive Biases Influence How You Think and Act*, VERYWELL MIND (Sept. 7, 2019), https://bit.ly/2pPZb41.

155. *See id.*

156. *See id.* For example, a consumer who is repeatedly exposed to a brand's image and/or message is more likely to remember the brand, have trust in the brand, and give the brand business. *See* Jerod Morris, *5 Cognitive Biases You Need to Put to Work . . . Without Being Evil*, COPYBLOGGER (Feb. 8, 2017), https://bit.ly/30GS7X7.

157. Cherry, *supra* note 154.

158. *See id.*

159. *Explicit Bias Explained*, PERCEPTION INSTITUTE (Oct. 17, 2019, 6:50 AM), https://bit.ly/2vf7eJJ.

160. *Id.*

161. Jill Leibold, *Part I: Implicit and Explicit Effects of Bias in the Courtroom*, LITIGATION INSIGHTS (July 31, 2009), https://bit.ly/2K7cCn1.

162. American Bar Association Commission on Disability Rights, *Implicit Bias Guide: Implicit Biases & People with Disabilities*, ABA (Jan. 7, 2019), https://bit.ly/2Q2jNAB.

163. *See* Leibold, *supra* note 161; *see also* Rachel D. Godsil et al., *Addressing Implicit Bias, Racial Anxiety, and Stereotype in Education and Health Care*, 1 THE SCI. OF EQUALITY – THE PERCEPTION INST., Nov. 2014, 1, at 3–4, 22, 25–26, https://bit.ly/32Btatu; American Bar Association Commission on Disability Rights, *supra* note 162.

164. *See* Stanley P. Williams, Jr., *Double-Blind Justice: A Scientific Solution to Criminal Bias in the Courtroom*, 6 IND. J.L. & SOC. EQUALITY 48, 49 (2018). A common example of an implicit bias is "white people . . . frequently associat[ing] criminality with black people without even realizing they're doing it." *Implicit Bias Explained*, PERCEPTION INSTITUTE (Oct. 17, 2019, 6:50 AM), https://bit.ly/36qlHzt.

Consequently, implicit biases are often unknowingly exercised.[165] Since jurors and judges are not immune from biases, the influences of explicit and implicit biases are actively present in the courtroom.[166] When implicit biases are unknowingly exercised by judges, the effects most heavily and negatively impact criminal defendants.[167] Thus, the implications of unaddressed implicit biases can produce devastating results for criminal defendants.[168]

Both judges and jurors view defendants "through the lens of their attitudes and beliefs."[169] As a result, biases inherently impact the impartiality of the criminal justice system and negatively impact defendants' right to a fair trial.[170] Implicit biases are difficult to identify as "so many people are reluctant to admit, and are often even unaware of, their biases."[171] However, even with difficulties, researchers are confident in categorizing implicit biases as "a universal phenomenon, not limited by race, gender, or even country of origin," and impacting all individuals.[172] Thus, jurors and judges alike hold biases which are inherently carried into the courtroom and seep into judicial decision-making.[173]

Due to the known presence of juror bias, legal professionals and the judicial system as a whole embrace any method of minimizing juror biases.[174] Further, the Federal Rules of Evidence, which govern the introduction of evidence in federal courts, are strictly enforced by judges in the courtroom.[175] These rules were created to ensure a fair trial for all

165. *See* Williams, *supra* note 164, at 49–50.

166. *See* Leibold, *supra* note 161.

167. *See* Williams, *supra* note 164, at 49–50.

168. *See* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1146 (2012).

169. Leibold, *supra* note 161.

170. *See id.*

171. Calvin Lai & Clara Wilkins, *Understanding Your Biases*, PSYCHOLOGICAL & BRAIN SCIS., WASH. UNIV. ST. LOUIS (Apr. 25, 2019), https://bit.ly/2TVZ0Rd.

172. *See Implicit Bias Explained*, *supra* note 164.

173. *See* Kang, *supra* note 168, at 1146. The criminal justice system attempts to minimize juror bias by screening jurors for potential biases, allowing preemptory challenges, and enforcing the Rules of Evidence, to name a few methods. *See Eliminating Bias in the Criminal Courtroom: Interview with Stanley P. Williams*, SCHOLASTICA (Sept. 11, 2018), https://bit.ly/3e2SVJX.

174. *See* Kang, *supra* note 168, at 1146.

175. *See id.* For example, attorneys may not interfere with or influence the jury process before the conclusion of the proceeding. *See* Catholic University Law Review, Comment, *After the Verdict: May Counsel Interrogate Jurors?*, 17 CATH. U. L. REV. 465, 467–68. If an attorney is found to have unfairly influenced a juror or jury (for example, an attorney personally contacting a juror to persuade the juror to vote for a guilty verdict), a judge will likely declare a mistrial. *See id.*

defendants, in part by addressing and limiting juror bias.[176] Therefore, judges and trial attorneys have a host of tools to address and limit juror bias in the courtroom.[177] While juror bias can never be entirely removed from the courtroom, the criminal justice system seems to be constantly attempting to adequately address juror biases and ensure fair trials for all criminal defendants.[178]

In contrast, defendants have few, if any, options to rectify judicial bias in nonjury proceedings.[179] In nonjury proceedings, unlike in jury proceedings, the judge is the sole decisionmaker.[180] Further, judges are the enforcers of courtroom procedure and discretion, inherently creating a conflict of interest if the judge also exhibits implicit biases.[181] Despite the well-accepted idea that all individuals possess unique biases, judges, unlike juries, are presumed to have the ability to exclude their personal biases and opinions from the courtroom.[182] However, this assumption of neutrality withers in the light of objective evidence suggesting "that implicit attitudes may be influencing judges' behavior."[183] While a few jurisdictions require judges to complete implicit bias training, most jurisdictions do not have such requirements.[184] The criminal justice system relies upon a judge's extensive education, work experience, and compliance with continuing legal education requirements to remain unbiased.[185] However, due to a lack of uniformity across jurisdictions in

176. *See* Kang, *supra* note 168 at 1142–48. *See generally* FED. R. EVID. 102 (noting that the purposes of the Federal Rules of Evidence are "to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination").

177. *See* Kang, *supra* note 168, at 1142–46. Judges and trial attorneys have access to a multitude of tools such as jury selection, preemptory challenges, evidentiary rules and objections, sidebars, and other litigation strategies to minimize the effects of juror bias in the courtroom. *See id.*

178. *See id.*; *see also* Leibold, *supra note* 161.

179. *See* Kang, *supra* note 168, at 1146–48.

180. *See id.*

181. *See id.*

182. *See* Brian H. Borstein, *Judges vs. Juries*, SOC. SCI. RES. FOR (AND IN) THE CTS., n.d., 56, at 56–58, https://bit.ly/34UrnBD; *see also* United States v. Zuber, 118 F.3d at 104.

183. *See* Borstein, *supra* note 182; Kang, *supra* note 168, at 1148; *see also* James M. Redwine, *You're Biased, I'm Biased. So What Are We Judges Going To Do About It?*, NAT'L JUD. COLL. (June 25, 2018), https://bit.ly/3aIEdGJ ("All sentient humans have learned, implicit biases, all judges are sentient human beings, ergo, all judges have implicit biases. The issue is not whether judges are biased. The issue is how judges can guard the people affected by the judge from her/his particular biases.").

184. *See* Joyce C. Cutler, *Implicit Bias Training May Be Required for Calif. Judges, Lawyers*, BIG BUS. L. (May 14, 2019, 12:59 PM), https://bit.ly/33Bej3K; *see also* Debra Cassens Weiss, *State Orders Training for Judges After Rape Comment Controversies; 'Good Family' Judge Resigns*, ABA J. (July 18, 2019, 2:30 PM), https://bit.ly/3fKyYIK.

185. *See* Melissa Berger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1041–43 (2019).

the areas of education, work, continuing education, and implicit bias training requirements, judicial bias is difficult to measure and address.[186] But regardless of jurisdiction, modern research and studies show that judicial bias exists alongside juror bias.[187] Judges "can be influenced by feelings about litigants, [despite] best efforts to resist it."[188] Thus, "although judges may be less susceptible than jurors, they are not immune" to the influences of biases and prejudices.[189]

Nonetheless, accurately assessing judicial bias to any degree is extremely difficult.[190] Consequently, it is nearly—if not totally—impossible to accurately measure the direct effects of judicial bias upon a shackled criminal defendant.[191] However, the general, well-known presence of judicial bias within the courtroom suggests that shackled defendants are impacted by judicial biases.[192] Hence, the almost-certain presence of judicial bias can appropriately be examined within the context of shackling in nonjury proceedings.[193] Just like jurors, judges judge too, and their implicit biases may cause them to unknowingly assume a shackled defendant is dangerous.[194]

III. ANALYSIS

Courts across the country are struggling to determine the constitutionality of policies that routinely shackle criminal defendants in nonjury proceedings.[195] However, with guidance from the *Deck* opinion, courts should hold routine shackling of criminal defendants in nonjury

186. *See id.*

187. *See id.*

188. Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855, 911 (2015).

189. *Id.* at 900; *see also* Norman Reimer, *Racism in the U.S. Criminal Justice System: An Uncomfortable Truth for All of Us*, MEDIUM (Oct. 3, 2017), https://bit.ly/3hsMfXx ("[A]cross the criminal justice landscape, the evidence of bias is plain.").

190. "There have been relatively few systematic studies of judicial decision making, perhaps because of difficulties in recruiting judges as research participants and the complexity of what judges do." Borstein, *supra* note 182. Thus, while biases are difficult to study in any context, the lack of participants to study and the intricacies of the judiciary present another level of difficulty, explaining, in part, the lack of research on judicial bias. *See id.*

191. *See* Berger, *supra* note 185, at 1062–63.

192. *See id.* Other influential factors may also exacerbate implicit biases. *See id.* These include, but are not limited to, race, gender, sexuality, socioeconomic status, age, disability, and others. *See id.*

193. *See id.*

194. *See id.*

195. *See* United States v. Sanchez-Gomez, 859 F.3d 649, 659–61 (9th Cir. 2017); *see also supra* Sections II.B–II.C. *But see* United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015); United States v. Zuber, 118 F.3d 101, 103–05 (2d Cir. 1997).

proceedings to be unconstitutional.[196] Applying the three legal principles established in *Deck*, routine shackling in nonjury proceedings is unconstitutional because it (1) violates the presumption of innocence, (2) infringes on the Sixth Amendment right to counsel, and (3) erodes the dignity and decorum of the courtroom.[197]

Furthermore, judges, like jurors, have implicit and explicit biases that influence their decisions.[198] The Second and Eleventh Circuits' holdings misinterpreted the Constitution, as both courts failed to consider the *Deck* legal principles and the impact of judicial bias in nonjury proceedings.[199] The Ninth Circuit, in its *Sanchez-Gomez* opinion, is the only court to have adequately analyzed the three *Deck* legal principles while also acknowledging judicial bias.[200] Therefore, the Ninth Circuit's holding should be adopted universally to resolve the circuit split.[201] In *Sanchez-Gomez*, the Ninth Circuit held that routine shackling in all proceedings is unconstitutional and required courts to make an individualized shackling determination in nonjury proceedings before shackling criminal defendants.[202]

A. Deck *Applied to Nonjury Proceedings*

In *Deck*, the Court held that routine shackling of criminal defendants in jury proceedings is unconstitutional after considering (1) the presumption of innocence, (2) the Sixth Amendment right to counsel, and (3) the dignity and decorum of the courtroom.[203] But because *Deck* did not involve nonjury proceedings, the Court left unanswered how the opinion should apply to nonjury proceedings.[204] However, when the Ninth Circuit addressed the issue of routine shackling in nonjury proceedings in *Sanchez-Gomez*, it found the three *Deck* legal principles equally applicable to nonjury proceedings.[205] After analyzing the *Deck* principles, the Ninth Circuit held that, without "an individualized showing of need," criminal defendants "may not be shackled at any point in the courtroom," regardless of whether or not a jury is present.[206] Thereby, the Ninth Circuit logically extended the rationale of *Deck* to

196. *See* Deck v. Missouri, 544 U.S. 622, 630–32 (2005); *see also supra* Section II.A.
197. *See Sanchez-Gomez*, 859 F.3d 659–66.
198. *See supra* Section II.D.
199. *See supra* Sections II.B.1–II.B.2.
200. *See Sanchez-Gomez*, 859 F.3d 659–66.
201. *See Sanchez-Gomez*, 859 F.3d at 659–66; *see also supra* Section II.C.
202. *See Sanchez-Gomez*, 859 F.3d at 659–66; *see also supra* Section II.C.
203. *See* Deck v. Missouri, 544 U.S. 622, 624 (2005).
204. *See id.* at 630–34.
205. *See Sanchez-Gomez*, 859 F.3d at 659–65.
206. *Id.* at 662.

nonjury proceedings, as *Deck*'s three legal principles are relevant in all proceedings.[207]

1. Presumption of Innocence

In considering the presumption of innocence, like the Court in *Deck*, the Ninth Circuit found that defendants cannot possibly be perceived as innocent until proven guilty when "marched in like convicts" in shackles and chains.[208] The sight of shackles implicitly suggests to a judge or to a jury that a defendant requires restraint.[209] This suggestion may lead judges and jurors to assume the defendant is dangerous.[210] A judge's or juror's assumption that a defendant is dangerous, prior to the presentation of facts, may undermine the defendant's right to be presumed innocent and the judicial decision-making process.[211] A defendant who is perceived as dangerous merely because of how the defendant is presented to the courtroom is not afforded the presumption of innocence.[212]

The Ninth Circuit recognized that a defendant is not truly presumed innocent when the defendant's presence alone leads jurors and judges to assume the defendant is dangerous.[213] Thus, the Ninth Circuit logically concluded that because *Deck* found jurors to be biased against a defendant in shackles, and because judges similarly possess implicit biases, judges may also be biased against a defendant in shackles.[214] To conclude that judges are better able to control their biases than jurors, despite the lack of evidence to support this, would inherently weaken the presumption of innocence.[215]

To protect the presumption of innocence, the Ninth Circuit ruled that criminal defendants cannot be routinely shackled in any proceeding, including nonjury proceedings.[216] By ruling as such, the Ninth Circuit properly extended the first *Deck* legal principle, thereby maintaining the presumption of innocence and accounting for the effects of judicial bias.[217]

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207. *See id.*

208. *Id.* at 662; *see Deck*, 544 U.S. at 630.

209. *See* Bernstein, *supra* note 10 and accompanying text.

210. *See id.*

211. *See* Thea Amidov, *Implicit Bias Leads to Explicit Danger*, PSYCHCENTRAL, https://bit.ly/2V2bMOz (last updated Oct. 8, 2018), ("Pre-existing bias and fear . . . makes a person with a certain look and behavior appear dangerous a priori.").

212. *See Bernstein*, *supra* note 10; Neds, *supra* note 1, at 660–61; *see also Sanchez-Gomez*, 859 F.3d at 659–63.

213. *See Sanchez-Gomez*, 859 F.3d at 661–63.

214. *See id.* at 659–66; *see also supra* Section II.D.

215. *See Bernstein*, *supra* note 10; *see also Sanchez-Gomez*, 859 F.3d at 665–66.

216. *See Sanchez-Gomez*, 859 F.3d at 665–66.

217. *See id.* at 659–66.

2. Sixth Amendment Right to Counsel

In addition to the presumption of innocence, all criminal defendants are afforded the Sixth Amendment right to counsel, which applies in both jury and nonjury proceedings.[218] However, shackles "interfere with a defendant's ability to communicate with counsel," a potential violation of the Sixth Amendment.[219] The Court in *Deck* explained that, in jury proceedings, shackles "impose physical burdens" and may "prejudicially affect [a defendant's] constitutional rights."[220] And as astutely noted by the Ninth Circuit, shackles interfere with a defendant's ability to communicate with counsel regardless of who is present in the courtroom.[221] Consequently, the potential for a Sixth Amendment violation exists in jury and nonjury proceedings.[222] Proponents of routine shackling in any proceeding overlook the possibility of routine Sixth Amendment violations.[223] Therefore, to protect the right to counsel, as guaranteed by the Sixth Amendment, criminal defendants must be able to communicate with counsel free of the interference caused by shackles.[224] Thus, in holding routine shackling unconstitutional, the Ninth Circuit logically extended the second *Deck* legal principle to nonjury proceedings and respected the Sixth Amendment.[225]

3. Dignity and Decorum of the Courtroom

Similar to the other *Deck* legal principles, the dignity and decorum of the courtroom is equally important in nonjury proceedings as in jury proceedings.[226] The Court in *Deck* concluded that "[t]he courtroom's formal dignity . . . includes the respectful treatment of defendants," and routine use of shackles undermines the "symbolic yet concrete objectives" of the criminal justice system.[227] The Ninth Circuit expanded *Deck*'s rationale, stating that, "the most visible and public manifestation of our criminal justice system is the courtroom."[228] Since the courtroom hosts both jury and nonjury proceedings, the dignity and decorum of

218. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.").

219. *Sanchez-Gomez*, 859 F.3d at 660. *See* Illinois v. Allen, 397 U.S. 337, 344 (1970).

220. Deck v. Missouri, 544 U.S. 622, 631 (2005) (quoting People v. Harrington, 42 Cal. 165, 168 (1871)).

221. *See Sanchez-Gomez*, 859 F.3d at 660.

222. *See id.* at 660–66.

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.*

227. Deck v. Missouri, 544 U.S. 622, 631 (2005).

228. *Sanchez-Gomez*, 859 F.3d at 662.

judicial processes must be upheld in all proceedings, not just jury proceedings.[229] Therefore, the Ninth Circuit properly extended the third *Deck* principle of courtroom dignity and decorum to nonjury proceedings.[230]

In considering the three *Deck* legal principles and the influence of judicial bias, the Ninth Circuit concluded that all the concerns expressed in *Deck* "apply regardless of a jury's presence or whether it is a pretrial, trial or sentencing proceedings."[231] Thus, while the Court in *Deck* only addressed the issue of routine shackling in jury proceedings, the Ninth Circuit properly extended *Deck*'s holding and legal principles to nonjury proceedings.[232]

B. Shortcomings of the Second and Eleventh Circuits

The Second and Eleventh Circuits held that routine shackling of criminal defendants in nonjury proceedings is constitutional.[233] While the Second Circuit's *Zuber* opinion was decided prior to the *Deck* decision, the concurring opinion by Judge Cardamone in *Zuber* essentially outlines the three *Deck* legal principles and criticizes the majority for failing to consider such pertinent rationale.[234] In *Lafond*, decided after *Deck*, the court simply failed to apply the *Deck* legal principles to nonjury proceedings, creating a weak basis for condoning routine shackling in nonjury proceedings.[235] In addition to disregarding the *Deck* legal principles, the Second and Eleventh Circuits dismissed the impact of judicial bias in the courtroom during nonjury proceedings.[236] The circuits' failure to consider the relevant legal principles and impact of judicial bias leads to a rule that violates defendants' constitutional rights.[237] Thus, the holdings of the Second and Eleventh Circuits have severe shortcomings and should not be followed.

In fact, the Second Circuit's majority *Zuber* opinion does not once mention the presumption of innocence, the Sixth Amendment, or the

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229. *See id.* at 662–64.

230. *See id.* at 662–66.

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

232. *See Deck*, 544 U.S. at 624; *see also Sanchez-Gomez*, 859 F.3d 649 at 659–66.

233. *See* United States v. Zuber, 118 F.3d 101, 102 (2d Cir. 1997); *see also* United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015).

234. *See Zuber*, 118 F.3d at 104, 105–06 (Cardamone, J., concurring).

235. *See Lafond*, 783 F.3d at 1225.

236. *See Zuber*, 118 F.3d at 103–05; *see also Lafond*, 783 F.3d at 1225.

237. *See Zuber*, 118 F.3d at 103–05; *see also Lafond*, 783 F.3d at 1225. *But see Sanchez-Gomez*, 859 F.3d at 661, n. 8 ("[T]he Eleventh Circuit disregarded the common law rule embodied in our Constitution that protects an individual from unwarranted shackles in the courtroom, regardless of the presence of the jury. Moreover, it failed to consider the three essential interests that *Deck* identified for deciding shackling cases.").

dignity of the courtroom.[238] The first mention of any language resembling the *Deck* legal principles in *Zuber* is found in the concurring opinion by Judge Cardamone.[239] By establishing the three legal principles, the Court in *Deck* seemingly adopted Judge Cardamone's rationale.[240] Judge Cardamone concluded that a defendant's constitutional rights may be "implicated regardless of whether a jury is witness to the physical restraints placed on a defendant," and argued that the majority failed to consider the implications of routine shackling in any proceeding.[241] Because the *Deck* legal principles appear to echo Judge Cardamone's concurrence, it follows that the *Deck* legal principles should also govern nonjury proceedings, as Judge Cardamone argued.[242] Thus, the Second Circuit's majority opinion, which held routine shackling in nonjury proceedings to be constitutional, lacks foundation in light of *Deck*.

The Eleventh Circuit in *Lafond* also failed to consider the three *Deck* legal principles.[243] In its one-page-long rationale summarily condoning routine shackling in nonjury proceedings, the Eleventh Circuit simply cited the Second Circuit's *Zuber* opinion to justify the constitutionality of routine shackling in nonjury proceedings.[244] Because the court in *Zuber* failed to consider the presumption of innocence, the Sixth Amendment right to counsel, and the dignity of the courtroom in the nonjury context, the Eleventh Circuit's post-*Deck Lafond* opinion relied on precarious legal precedent.[245] The Second and Eleventh Circuits' failure to consider and apply the three *Deck* legal principles overlooks the constitutional rights of criminal defendants.[246]

Furthermore, the Second and Eleventh Circuits failed to account for judicial bias in nonjury proceedings.[247] Neither opinion acknowledged

238. *See Zuber*, 118 F.3d at 102–04.

239. *See id.* at 105–06 (Cardamone, J., concurring).

240. *Compare* Deck v. Missouri, 544 U.S. 622, 630–32 (2005) (establishing the three legal principles that should be considered by courts in shackling determinations: (1) the presumption of innocence, (2) the Sixth Amendment right to counsel, and (3) dignity and decorum of the courtroom), *with Zuber*, 118 F.3d at 105–06 (Cardamone, J., concurring) (describing the importance in recognizing judicial prejudices against a shackled defendant, the impediment shackles cause a defendant in communicating with counsel, and how "physical restrains detract from the dignity and decorum of court proceedings").

241. *Zuber*, 118 F.3d at 105–06 (Cardamone, J., concurring).

242. *See Zuber*, 118 F.3d at 105–06 (Cardamone, J., concurring); *see also Deck*, 544 U.S. at 630–32.

243. *See* United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015).

244. *See id.*

245. *See id.*; *see also* United States v. Sanchez-Gomez, 859 F.3d 649, 661 n.8 (9th Cir. 2017).

246. *See Sanchez-Gomez*, 859 F.3d at 661 n.8.

247. *See supra* Section II.D.

that judges and jurors alike exhibit biases and that such biases are, though often unintentionally, brought into the courtroom.[248] Instead, the Second Circuit grounded the constitutionality of routine shackling in a reliance on judges as impartial decision makers who are unaffected by personal biases and extraneous factors like shackles.[249] However, biases are well-known to exist in all persons, including judges.[250] Thus, the reasoning presented in *Zuber* is untrue and fails to justify the Second and Eleventh Circuit holdings.[251]

Moreover, the criminal justice system is increasingly acknowledging juror biases, and opinions like *Deck* attempt to limit the impact of juror biases on criminal defendants.[252] More recently, judicial bias is receiving recognition, but there has been little attempt to limit its effects on criminal defendants.[253] The criminal justice system thereby contradicts itself by acknowledging the biases of both jurors and judges, but still analyzing shackling differently depending on whether a jury is present.[254]

Recognizing this contradiction in the circuit split at issue in this Comment, the *Sanchez-Gomez* holding is the most logical resolution, as only the Ninth Circuit directly acknowledges the biases of both jurors and judges when addressing the routine shackling of criminal defendants in nonjury proceedings.[255] Judicial bias must be accounted for because it may uniquely and directly impact criminal defendants.[256] To combat the potentially far-reaching effects of judicial bias upon criminal defendants, the Ninth Circuit's approach must be accepted as the appropriate analysis for shackling determinations in nonjury proceedings.[257]

C. Recommendation to Resolve the Circuit Split

At the foundation of all criminal proceedings are the constitutional rights and protections of the accused.[258] However, allowing routine shackling in nonjury proceedings, as the Second and Eleventh Circuits condone, would ignore blatant violations of a defendant's right to due process under the Fifth and Fourteenth Amendments.[259] Additionally, the

248. *See supra* Section II.D.
249. *See* United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997).
250. *See supra* Section II.D.
251. *See supra* Section II.D; *see also Sanchez-Gomez*, 859 F.3d at 666; *Berger*, *supra* note 185, at 1041–43.
252. *See supra* Section II.D; *see also Kang*, *supra* note 168, at 1146.
253. *See supra Section* II.D; *see also Kang*, *supra* note 168, at 1146.
254. *See Sanchez-Gomez*, 859 F.3d at 661.
255. *See id.* at 659–60.
256. *See id.* at 659–61.
257. *See id.*
258. *See id.* at 659–66.
259. *See supra* Section III.B.

Second and Eleventh Circuits fail to account for the concerns embodied by the three *Deck* legal principles.[260] Thus, to uphold the constitutional rights of criminal defendants in nonjury proceedings, the Ninth Circuit approach should be adopted universally, with all courts holding routine shackling in nonjury proceedings unconstitutional.[261]

When routine shackling is permitted in nonjury proceedings, criminal defendants are subjected to the prejudicial effects shackles inject into the judicial decision-making process.[262] The Fifth and Fourteenth Amendments guarantee a criminal defendant the right to due process, or "an assurance that all levels of American government must operate within the law . . . and provide fair procedures."[263] To ensure such constitutional guarantees, the Ninth Circuit held that there is a fundamental constitutional "right to be free of unwarranted restraints," in all proceedings.[264] Universal recognition of the Ninth Circuit's right to be free from unwarranted restraints would resolve the current circuit split and uphold the constitutional rights of criminal defendants.[265]

Nevertheless, the legal recognition of a fundamental right should not be taken lightly as it may also have adverse effects.[266] Primarily, the Ninth Circuit's holding imposes a burden on the judicial system and courtroom security[267] to make individualized shackling determinations

260. *See supra* Section III.B (describing *Deck*'s three legal principles: (1) the presumption of innocence, (2) the Sixth Amendment right to counsel, and (3) the dignity and decorum of the courtroom).

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

262. *See supra* Section III.A.1.

263. Peter Strauss, *Due Process*, CORNELL L. SCH.: LEGAL INFO. INST., https://bit.ly/3aGLPJM (last visited June 14, 2020); *see also* U.S. CONST. amend. V; U.S. CONST. amend. XVI, § 1.

264. *Sanchez-Gomez*, 859 F.3d at 659–60.

265. *See id.*

266. *See* Brief for Senator Jeff Flake et al. as Amici Curiae Supporting Petitioner, United States v. Sanchez-Gomez 859 F.3d 649 (9th Cir. 2017) (No. 17-312), at 3 [hereinafter *Brief for Senator Jeff Flake*]. *See generally* Christian P. Ogata, Comment, *Unshackled: The Post-*Sanchez-Gomez *Scrutiny and Security Conundrum*, 20 NEV. L.J. 374, 398 (2019) ("While the Ninth Circuit correctly applied the presumptions established in *Deck* to all proceedings regardless of jury presence, it left many questions unanswered.").

267. The reference to the potential burden upon courtroom security refers to the possibly of courts seeking an increase in security (for example, more bailiffs, police, Marshals, etc.) when presented with unshackled defendants. *See Brief for Senator Jeff Flake*, *supra* note 266, at 3–5. Courts may assume that unshackled defendants inherently create a security risk and a greater potential for a mishap to occur, therefore warranting more courtroom security and safety. *See id.* at 12 ("The obvious effect of *Sanchez-Gomez*, then, will be to require more officers to maintain an expected level of courtroom security over an ever-increasing number of prisoners with less certain safety for the public."). An increase in courtroom personnel and security has the potential to create a burden on courts in terms of employment, training, funding, and the like. *See id.* ("[T]here is serious concern that law enforcement now faces unreasonable new burdens.").

for each criminal defendant.[268] However, judges already make a host of pretrial determinations.[269] A shackling determination would become just another part of those pretrial determinations.[270] Additionally, when weighing the infringement of a defendant's constitutional rights against the potential burden placed upon the judiciary and individuals responsible for courtroom security, the protection of fundamental constitutional rights must prevail.[271] In all respects, "by definition, preservation of fundamental rights is essential to the society."[272]

Even if the Ninth Circuit's rule imposes an additional burden on the judicial system, the Ninth Circuit created an exception to the fundamental right to be free from shackles to counterbalance the burden.[273] If shackling a defendant is sought in nonjury proceedings, "the government . . . must first justify the infringement with specific security needs as to that particular defendant."[274] As in *Deck*, the Ninth Circuit recognized that some defendants may present an escape risk, risk of attack, or other legitimate concerns for courtroom security for which shackling a defendant is deemed necessary.[275] Thus, if the government states a specific security concern, courts must then "decide whether the stated need for security outweighs the infringement on a defendant's right."[276] By creating a procedurally-protected exception to the fundamental right to be free from restraints, the Ninth Circuit's approach recognizes and balances the concerns of the government while upholding the constitutional rights of all criminal defendants.[277] Accordingly, the Ninth Circuit's rule necessarily preserves a defendant's many constitutional rights in finding routine shackling unconstitutional in nonjury proceedings.[278]

The Ninth Circuit's approach holds routine shackling in nonjury proceedings unconstitutional in light of the three *Deck* legal principles

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268. *See id.* at 5, 11–12.

269. *See* William F. Dressel & Barry Mahoney, *Pretrial Justice in Criminal Cases: Judges' Perspectives on Key Issues and Opportunities for Improvement*, NAT'L JUD. COLL., May 2013, 1, at 4–9, https://bit.ly/2CiYAy0.

270. *See id.* Judicial pretrial determinations and considerations may include options for release, bail, bond, overcrowding, community safety, and many other concerns. *See id. See also Sanchez-Gomez*, 859 F.3d at 666.

271. *See* Dmytro Taranovsky, *Fundamental Rights*, MASS. INSTIT. OF TECH.: MY COLLECTED WORKS – DMYTRO TARANOVSKY, https://bit.ly/36wE59Q (last modified May 7, 2003).

272. *See id.*

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

274. *Id.*

275. *See* Deck v. Missouri, 544 U.S. 622, 632 (2005); *see also Sanchez-Gomez*, 859 F.3d at 665–66.

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

277. *See id.* at 665–66.

278. *See supra* Section III.A; *see also Sanchez-Gomez*, 859 F.3d at 666.

and the presence of judicial bias.[279] However, the rule carves out an exception for legitimate security concerns that outweigh a defendant's constitutional right to be free from shackles.[280] The Ninth Circuit's approach, when compared to the Second and Eleventh Circuits', is the only approach that values the constitutional rights of defendants while still permitting the exercise of judicial discretion on a case-by-case basis.[281] Therefore, universal adoption of the Ninth Circuit's approach would adequately resolve the current circuit split on the constitutionality of routinely shackling criminal defendants in nonjury proceedings.

IV. CONCLUSION

To ensure all criminal defendants are treated fairly throughout the judicial process, the current circuit split regarding routine shackling in nonjury proceedings should be resolved as soon as possible.[282] Judges, unlike jurors, are involved in every step of the criminal justice process, from early pretrial hearings on motions to subsequent sentencing hearings.[283] With growing research and knowledge about the presence of bias in the courtroom, the impact of judicial bias in all proceedings can no longer be ignored.[284] Unfortunately, defendants presented to the court in shackles are vulnerable to the consequences of such judicial bias.[285] Yet despite the dangers of judicial bias, some courts still rely on judges' ability to remain unbiased. Ignoring the fact that judges, like everyone, are susceptible to acting based on explicit and implicit biases fails to protect the constitutional rights of criminal defendants.[286] Thus, a circuit split persists regarding the constitutionality of routine shackling in nonjury proceedings.[287]

To resolve the circuit split, the Ninth Circuit's approach should be adopted universally. All courts should hold that routine shackling of criminal defendants in nonjury proceedings is unconstitutional, as such shackling not only ignores judicial biases, but also (1) violates the presumption of innocence, (2) impedes a defendant's Sixth Amendment right to counsel, and (3) contradicts the dignity and decorum of the courtroom.[288]

279. *See supra* Section III.A.
280. *See Sanchez-Gomez*, 859 F.3d at 665–66.
281. *See supra* Sections III.A–III.B.
282. *See supra* Section III.C.
283. *See supra* Section III.C.
284. *See supra* Section II.D.
285. *See supra* Section II.D; *see also supra* Section III.A.1.
286. *See supra* Sections II.B.1–II.B.2.
287. *See supra* Sections II.B–II.C.
288. *See supra* Sections III.A.1–III.A.3.

As acknowledged by the Ninth Circuit in *Sanchez-Gomez*, criminal defendants have a fundamental constitutional right to be free from unwarranted shackling.[289] Thus, for a court in the Ninth Circuit to shackle a defendant, the judge must determine that a particularly serious concern exists such that shackling is necessary to protect the court.[290] The Ninth Circuit's approach prioritizes protecting criminal defendants' constitutional guarantees and recognizes that case-by-case shackling determinations are the most effective means of doing so.[291]

By extending the three *Deck* legal principles to nonjury proceedings and also accounting for judicial bias in the courtroom, the Ninth Circuit is the only court to wholly consider the impacts of routine shackling on criminal defendants in nonjury proceedings.[292] Courts across the country should adopt the Ninth Circuit's approach, thereby recognizing a fundamental constitutional right of all criminal defendants to be free from unwarranted shackles in all proceedings. After all, judges judge too.[293]

289. *See* United States v. Sanchez-Gomez, 859 F.3d 649, 659–60 (9th Cir. 2017).
290. *See id.* at 665–66.
291. *See supra* Section III.C.
292. *See supra* Section III.C.
293. *See supra* Section III.C.