

# TO SHACKLE OR NOT TO SHACKLE? THE EFFECT OF SHACKLING ON JUDICIAL DECISION-MAKING

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I. INTRODUCTION

This Note explores the shackling of defendants in the courtroom throughout all phases of the criminal trial and its influence on judicial decision-making. Shackling refers to physically restraining defendants, whether through the use of full restraints or a variation of how much restraint is used. For the purposes of this Note, full restraints, also referred to as five-point restraints, consist of leg shackles and handcuffs connected to a belly band by a chain approximately fifteen inches long.<sup>1</sup>

It is common within legal discourse for jurors to be considered susceptible to bias while judges are not. In fact, most court decisions discussed in this Note mention that the law has long forbidden the use of visible shackles before a jury.<sup>2</sup> For the foregoing reasons, this Note focuses on how shackles influence *judges* in their decision-making. The extent to which judges may be influenced could have implications for felony arraignment, pretrial motions, indictments, bail amounts, sentencing, and other aspects of the criminal process.

This Note begins by providing background on judicial opinions that are relevant to shackling. Although the following court opinions discuss multiple forums, various phases of the criminal justice process, and both

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<sup>1</sup> United States v. Sanchez-Gomez, 798 F.3d 1204, 1206 (9th Cir. 2015), *vacated en banc*, 859 F.3d 649 (9th Cir. 2017), *vacated*, 138 S. Ct. 1532 (2018).

<sup>2</sup> See United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997); Deck v. Missouri, 544 U.S. 622, 626 (2005) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)); United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015) (emphasizing that the “routine use of visible shackles” before a jury “has deep roots in the common law.”).

judges and juries, this Note remains focused on how shackling generally influences judicial decision-making. This Note then debates whether defendants should be shackled based on individualized justifications or uniform policy. To create a discourse, this Note discusses a weighing test intended to juxtapose the need for security and the extent to which shackles infringe on defendants' rights.<sup>3</sup> The need for security will be addressed by discussing the burdensome effect that an individualized shackling policy has on state and federal law enforcement. The infringement on defendants' rights will be measured using a three-part empirical analysis.

This Note then advances the debate by discussing an empirical analysis on law enforcement officials' decisions to arrest victims of domestic violence. Finally, this Note concludes with a summary based on the analysis of judicial decision-making and law enforcement decision-making, calling for the balance of administrative freedom with individual freedom in determining shackling policies before judges, as well as calling for more empirical research in judges' biases towards shackled defendants.

## II. LEGAL BACKGROUND

### A. THE SUPREME COURT IN *BELL V. WOLFISH*

One of the earlier cases that discusses restraining defendants is *Bell v. Wolfish*, a Supreme Court case decided in 1979.<sup>4</sup> *Bell* focused on the pretrial phase, but in the context of a detention facility rather than a courtroom.<sup>5</sup> The Court discussed pretrial conditions and restrictions more generally as opposed to analyzing shackling specifically.<sup>6</sup> In doing so, the decision highlighted three principles that arise when analyzing the rights of pretrial detainees. These three principles are significant in that they have been revisited by courts in the debate over shackling defendants in the courtroom.<sup>7</sup>

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<sup>3</sup> See *United States v. Sanchez-Gomez*, 859 F.3d 649, 666 (9th Cir. 2017) (en banc) (“Courts must decide whether the stated need for security outweighs the infringement on a defendant’s right.”).

<sup>4</sup> *Bell v. Wolfish*, 441 U.S. 520 (1979).

<sup>5</sup> See *id.* (holding that “in determining the constitutionality of conditions of pretrial detention . . . the proper inquiry was whether conditions amounted to punishment because under the Due Process Clause, a detainee could not be punished prior to adjudication”); *Petition for Writ of Certiorari at 24, United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018) (No. 17-312).

<sup>6</sup> See *Bell*, 441 U.S. at 523 (“This case requires us to examine the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge.”).

<sup>7</sup> See *Sanchez-Gomez*, 859 F.3d at 660 (applying the “general framework for pretrial detention that *Bell* [established].”).

First, *Bell* highlights that the presumption of innocence plays an important role in our criminal justice system.<sup>8</sup> Nevertheless, the presumption of innocence does not apply during the pretrial phase because trial has not begun.<sup>9</sup> Second, *Bell* established that courts should defer to corrections officials for pretrial detainment policies.<sup>10</sup> Third, when analyzing the constitutionality of pretrial conditions, the proper inquiry is whether the conditions amount to punishment of the defendant.<sup>11</sup> Through its analysis, the Court held that if a pretrial condition of confinement is reasonably related to a legitimate governmental purpose, it does not amount to punishment.<sup>12</sup> On the contrary, if a condition is arbitrary or purposeless, it may amount to an unconstitutional form of punishment.<sup>13</sup>

#### B. THE SECOND CIRCUIT IN *UNITED STATES V. ZUBER*

While *Bell* focused on the rights of pretrial detainees, *United States v. Zuber*, decided in 1997, specifically addressed shackling during a post-trial sentencing hearing before a judge.<sup>14</sup> The defendant in *Zuber* argued that the district court had violated his due process rights by deferring to the shackling recommendation made by the United States Marshals Service.<sup>15</sup> The U.S. Marshals had recommended that the defendant appear at his sentencing hearing in shackles without an individualized determination of whether shackles were necessary.<sup>16</sup> The Second Circuit held that an independent judicial evaluation is unnecessary when restraining defendants at a non-jury sentencing hearing.<sup>17</sup>

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<sup>8</sup> *Bell*, 441 U.S. at 533. See also Petition for Writ of Certiorari, *supra* note 5, at 24 (citing *Bell*, 441 U.S. at 533) (“[R]eliance on the constitutional ‘presumption’ of innocence to categorically reject the relevance of *Bell* [to the shackling of defendants before a judge during pretrial proceedings] . . . is in tension with *Bell*’s own description of that presumption as primarily confined to the trial setting.”).

<sup>9</sup> *Bell*, 441 U.S. at 533.

<sup>10</sup> *Id.* at 547–48 (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

<sup>11</sup> *Bell*, 441 U.S. at 535.

<sup>12</sup> *Id.* at 539.

<sup>13</sup> *Id.*

<sup>14</sup> *United States v. Zuber*, 118 F.3d 101, 102 (2d Cir. 1997).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

The court then proceeded to distinguish *Zuber* from cases<sup>18</sup> in which defendants were required to appear before the jury in shackles.<sup>19</sup> Courts have found that shackling a defendant before a jury causes bias due to the implication that the defendant is dangerous.<sup>20</sup> The potential for juror bias led to the holding in *Davidson v. Riley*, a Second Circuit case decided two years prior to *Zuber*, that physical restraints are forbidden during jury trials unless the judge makes an independent evaluation and decides that restraints are necessary.<sup>21</sup> In the case of *United States v. Zuber*, however, the point of concern for the defendant's due process claim was the resulting bias on the sentencing judge.<sup>22</sup>

The court ultimately declined to extend the rule set forth in *Davidson* to non-jury sentencing proceedings, partly due to the traditional assumption that judges, unlike juries, are not biased by extraneous factors.<sup>23</sup> In its analysis, the court drew upon multiple cases arguing that a judge conducting a bench trial can hear inadmissible evidence without experiencing bias in making a verdict.<sup>24</sup>

### C. THE SUPREME COURT IN *DECK V. MISSOURI* AND *ILLINOIS V. ALLEN*

In 2005, eight years after *United States v. Zuber* was decided by the Second Circuit, *Deck v. Missouri*<sup>25</sup> was decided by the Supreme Court. *Deck* differs from *Zuber* in that *Zuber* discussed shackling of criminal defendants at non-jury sentencing hearings, while *Deck* considered shackling at the penalty phase before a jury.<sup>26</sup> Here, the Supreme Court considered the

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<sup>18</sup> See *Illinois v. Allen*, 397 U.S. 337, 344 (1970); *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993); *Tyars v. Finner*, 709 F.2d 1274, 1284–85 (9th Cir. 1983) (all addressing the prejudice inherent in placing a shackled defendant before a jury).

<sup>19</sup> *Zuber*, 118 F.3d at 103.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 102.

<sup>22</sup> *Id.* at 104.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting *Anderson v. Smith*, 751 F.2d 96, 106 (2d Cir. 1984)).

<sup>25</sup> *Deck v. Missouri*, 544 U.S. 622 (2005).

<sup>26</sup> *Id.* at 630; *Zuber*, 118 F.3d at 101. The penalty phase is specific to a capital proceeding. See MICH. STATE UNIV. & DEATH PENALTY INFO. CTR., THE DEATH PENALTY: HIGH SCHOOL CURRICULUM (2000), <https://deathpenaltycurriculum.org/student/c/about/stages/stages.PDF> (outlining the stages in a capital case, a proceeding in which the jury must ultimately decide whether a defendant should be put to death if found guilty). The penalty phase occurs after the guilt phase of trial, which is when a jury decides whether a defendant's guilt has been proven beyond a reasonable doubt. *Id.* at 2–3. The penalty phase includes aggravating circumstances, or facts that make a crime worse; mitigating circumstances, or facts that reduce the penalty; victim impact statements; jury sentence recommendations, or when the jury considers the aggravating and mitigating circumstances and returns with a sentence; and sentencing by a judge. *Id.* at 3–4.

specific question of whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution.<sup>27</sup>

Both *Zuber* and *Deck* emphasized that the law on shackling is clear during the guilt phase of a trial: the law generally forbids the use of shackles unless there is a special need for their use.<sup>28</sup> The *Deck* Court relied on the fact that its ruling against shackling before a jury has “deep roots in the common law.”<sup>29</sup> Williams Blackstone’s *Commentaries on the Laws of England* served as evidence of this ruling’s early history.<sup>30</sup> According to the *Deck* court, Blackstone established that the rule against shackling does not apply at the time of arraignment or similar proceedings before a judge.<sup>31</sup>

In 1970, thirty-five years prior to *Deck*, the Supreme Court in *Illinois v. Allen* identified three reasons restraints should remain a “last resort” in the court room.<sup>32</sup> In *Allen*, a case about shackling at trial, the Supreme Court considered whether a criminal defendant can enforce the right to remain in the courtroom despite engaging in disruptive conduct.<sup>33</sup> The Court identified the constitutionally permissible ways a trial judge can handle disruptive defendants without denying them their Sixth Amendment rights.<sup>34</sup> One of the potential methods was the use of restraints, prompting the Court to analyze three different problems that shackling presents in a courtroom.<sup>35</sup> First, the sight of the shackles may interfere with juror bias.<sup>36</sup> Second, the technique of shackling undermines the dignity and decorum of the courtroom.<sup>37</sup> Third, physical restraints reduce the defendant’s ability to communicate with counsel.<sup>38</sup>

Similar factors were analyzed in *Deck*.<sup>39</sup> *Deck*, however, explored whether the change in context from the guilt phase to the capital penalty

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<sup>27</sup> *Deck*, 544 U.S. at 624.

<sup>28</sup> *Id.* at 626.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)); *United States v. Sanchez-Gomez*, 798 F.3d 1204, 1207 (9th Cir. 2015) (citing *Deck*, 544 U.S. at 626), *vacated en banc*, 859 F.3d 649 (9th Cir. 2017), *vacated*, 138 S. Ct. 1532 (2018).

<sup>32</sup> *Illinois v. Allen*, 397 U.S. 337, 344 (1970).

<sup>33</sup> *Id.* at 338.

<sup>34</sup> *Id.* at 343.

<sup>35</sup> *Id.* at 343–44.

<sup>36</sup> *Id.* at 344.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *See Deck v. Missouri*, 544 U.S. 622, 630 (2005) (“First, the criminal process presumes that the defendant is innocent until proved guilty.” “Second, the Constitution, in order to help the accused

phase established a constitutional difference warranting an opposite ruling.<sup>40</sup> The Court analyzed the considerations that prevent the use of shackling before a jury during the guilt phase,<sup>41</sup> and its decision ultimately turned on whether the *Allen* factors also applied to penalty proceedings in capital cases.<sup>42</sup> The *Deck* Court mirrored the *Allen* Court in framing its reasoning with three fundamental legal principles: the presumption of innocence, the right to counsel, and the right to a dignified judicial process.<sup>43</sup> Visible shackles can suggest to a jury that the court found it necessary to separate the defendant from the community; the resulting bias of jurors undermines the presumption of innocence.<sup>44</sup> The use of shackles hinders a defendant's ability to secure a meaningful defense because physical restraints hinder attorney-client communication.<sup>45</sup> Maintaining dignified proceedings in the courtroom reflects both the respectful treatment of defendants and the importance of the matter at issue: guilt versus innocence.<sup>46</sup>

Although the presumption of innocence applies during guilt phase proceedings, the Court admitted that this factor is less applicable during the penalty phase because the defendant has already been convicted.<sup>47</sup> Regardless, shackling at the penalty phase does raise concerns similar to shackling at trial.<sup>48</sup> The similarity of concerns stems from the fact that in the penalty phase of a capital case, the jury is still making a decision that is both severe and final: the decision about life versus death rather than guilt versus

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secure a meaningful defense, provides him with a right to counsel.” “Third, judges must seek to maintain a judicial process that is a dignified process.”).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Compare id.* at 630–31 (stating that the Court's decisions on the constitutionality of shackling give effect to the “three fundamental legal principles” of the presumption of innocence, the right to counsel, and a dignified judicial process) *with* *Illinois v. Allen*, 397 U.S. 337, 344 (1970) (“Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings . . . [m]oreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.”).

<sup>44</sup> *Deck*, 544 U.S. at 630 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986)).

<sup>45</sup> *Deck*, 544 U.S. at 631 (listing examples of shackles interfering with attorney-client communication, such as its interference with the ability of defendants to “freely [choose] whether to take the witness stand on [their] own behalf.”) (quoting *Illinois v. Allen*, 397 U.S. 337, 334 (1970)).

<sup>46</sup> *Deck*, 544 U.S. at 631.

<sup>47</sup> *Id.* at 632.

<sup>48</sup> *Id.*

innocence.<sup>49</sup> The Court framed its analysis of juror bias by stressing the need for accuracy in decisions about the death penalty.<sup>50</sup> Juror bias affects accuracy because shackles can imply to the jury that the defendant is a danger to the community.<sup>51</sup> The Court's analysis therefore reveals that biasing the jury against the defendant undermines the presumption of innocence and the fairness of the fact-finding process.<sup>52</sup> Undermining the jury's abilities at the guilt phase is problematic at the sentencing phase because the former may increase the likelihood of the death penalty at the latter.<sup>53</sup> In weighing the three fundamental principles, the *Deck* Court held that the Constitution forbids the use of visible shackles during the penalty phase of a capital case unless restraints are necessary in furthering an essential state interest.<sup>54</sup>

#### D. THE NINTH CIRCUIT IN *UNITED STATES V. HOWARD*

*United States v. Howard* was decided two years after *Deck* in 2007 and was referred to by the Ninth Circuit as the only case involving pretrial shackling within the context of the courtroom.<sup>55</sup> *Howard* considered a blanket policy involving leg shackling for purposes of initial arraignment.<sup>56</sup> The Ninth Circuit upheld the leg shackling policy because of adequate justification for its necessity,<sup>57</sup> which stemmed from the heightened security concerns associated with multi-defendant proceedings in an unsecured courtroom.<sup>58</sup>

#### E. THE ELEVENTH CIRCUIT IN *UNITED STATES V. LAFOND*

In 2015, eight years after *Howard*, the Eleventh Circuit decided *United States v. LaFond* and reached a decision falling in line with the Second

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 632–33. See also Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 228 (2015) (noting that the Court stressed its need for accuracy regarding death penalty decisions).

<sup>51</sup> *Deck*, 544 U.S. at 656.

<sup>52</sup> Marouf, *supra* note 50, at 238.

<sup>53</sup> *Deck*, 544 U.S. at 633 (quoting *Sochor v. Florida*, 504 U.S. 527, 532 (1992)).

<sup>54</sup> *Id.* at 624 (quoting *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986)).

<sup>55</sup> *United States v. Howard*, 480 F.3d 1005 (9th Cir. 2007), *overruled by* *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017) (en banc); *United States v. Sanchez-Gomez*, 798 F.3d 1204, 1207 (9th Cir. 2015), *vacated en banc*, 859 F.3d 649 (9th Cir. 2017), *vacated*, 138 S. Ct. 1532 (2018).

<sup>56</sup> *Howard*, 480 F.3d at 1008.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*



Circuit's decision in *United States v. Zuber*.<sup>59</sup> The question presented was whether shackling is permitted during the sentencing phase before a district judge<sup>60</sup> when a jury is not present.

The Eleventh Circuit in *LaFond* echoed the Supreme Court in *Deck* by stating that Blackstone distinguished court proceedings that occur before a judge versus a jury.<sup>61</sup> The court did, however, go further than *Zuber* in stating that the rule against shackling applies only to a jury trial and not a sentencing hearing before a district judge.<sup>62</sup>

#### F. *UNITED STATES V. SANCHEZ-GOMEZ*

Although the Supreme Court did not ultimately take a position, the most recent development in the debate over shackling defendants is its decision in *United States v. Sanchez Gomez*.<sup>63</sup> The case was first decided by the United States Court of Appeals for the Ninth Circuit in 2015, was then decided again after a rehearing en banc in 2017, and was ultimately vacated as moot in 2018 by the United States Supreme Court because the defendants' criminal cases had ended.<sup>64</sup> Although neither the 2015 nor the 2017 Ninth Circuit decisions are binding, both analyze past court decisions' stances on shackling defendants, thus offering a useful perspective on the issue.

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<sup>59</sup> *United States v. LaFond*, 783 F.3d 1216, 1225 (11th Cir. 2015).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1225; *United States v. Sanchez-Gomez*, 859 F.3d 649, 661 n.8 (9th Cir. 2017) (en banc), vacated, 138 S. Ct. 1532 (2018).

<sup>63</sup> See *United States v. Sanchez-Gomez*, 798 F.3d 1204 (9th Cir. 2015), vacated en banc, 859 F.3d 649 (9th Cir. 2017), vacated, 138 S. Ct. 1532 (2018).

<sup>64</sup> *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018) (holding that the Ninth Circuit en banc decision was vacated as moot). The four respondents in *Sanchez-Gomez* challenged the use of restraints "in their respective cases and the restraint policy as a whole." *Id.* at 1534. Before the Ninth Circuit could issue a decision, all respondents' cases terminated. *Id.* The Ninth Circuit viewed the case as a "'functional class action' involving 'class-like claims seeking 'class-like relief'" and held that the Supreme Court's "civil class action precedents saved the case from mootness." *Id.* (quoting *United States v. Sanchez-Gomez*, 859 F.3d 649, 655, 657-58 (9th Cir. 2017) (en banc), vacated, 138 S. Ct. 1532 (2018)). The Supreme Court disagreed with the en banc decision, stating that the Ninth Circuit's reliance on the Supreme Court's class action precedents was "misplaced." *Id.* The ruling law was that "the federal judiciary may "adjudicate only 'actual and concrete' disputes, the resolutions of which have direct consequences on the parties involved." *Id.* (quoting *Genesis HealthCare Corp. v. Symczyk*, 569 U. S. 66, 71). A case like *Sanchez-Gomez*, which became moot during the proceedings due to all four respondents' criminal cases ending, "is thus outside the jurisdiction of the federal courts." *Id.* The Supreme Court also reasoned that the Federal Rules of Criminal Procedure do not establish a "vehicle comparable to civil class action," which is why the Court has never "permitted criminal defendants to band together to seek prospective relief in their individual cases on behalf of a class." *Id.* at 1535.

In 2015, the Ninth Circuit analyzed the shackling policy implemented by the Southern District of California.<sup>65</sup> The policy required that defendants be produced in full restraints for all non-jury proceedings apart from guilty pleas and sentencing hearings.<sup>66</sup> The *Sanchez-Gomez* decision is the consolidation of four defendants' challenges to this policy, following the denial of their requests to be unshackled.<sup>67</sup>

The first Ninth Circuit decision acknowledged the significance of the three *Deck* factors: the presumption of innocence, the right to counsel, and the need for a dignified judicial process.<sup>68</sup> The court then distinguished the case from *Deck* and *LaFond* by taking an opposing view of shackling under the common law.<sup>69</sup> Both *Deck* and *LaFond* mentioned that the common law view of shackling distinguished proceedings before a judge as opposed to a jury.<sup>70</sup> In holding that the Southern District of California's blanket pretrial shackling policy was unconstitutional,<sup>71</sup> the Ninth Circuit reasoned that regardless of the common law distinction between jury and non-jury proceedings, it does not follow that shackles may routinely be used before a judge without justification.<sup>72</sup>

In 2017, the Ninth Circuit sitting en banc echoed the panel by stating that the Supreme Court's dictum on pretrial proceedings in *Deck* did not control the case.<sup>73</sup> The en banc court also pointed out that the Eleventh Circuit in *LaFond* failed to acknowledge the *Deck* factors,<sup>74</sup> and in so doing, disregarded the constitutional protections "from unwarranted shackles in the courtroom regardless of the presence of a jury."<sup>75</sup>

The 2015 decision discussed the Ninth Circuit's prior decision in *Howard*.<sup>76</sup> The government in *Sanchez-Gomez* argued that *Howard* permitted the blanket shackling policy of the Southern District of

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<sup>65</sup> *Sanchez-Gomez*, 798 F.3d at 1206.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> *Id.* at 1207 (citing *Deck v. Missouri*, 544 U.S. 622, 630–31 (2005)).

<sup>69</sup> *Sanchez-Gomez*, 798 F.3d at 1207 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)).

<sup>70</sup> *Deck*, 544 U.S. at 626; *LaFond*, 783 F.3d at 1225.

<sup>71</sup> *Id.* at 1209.

<sup>72</sup> *Id.* at 1207.

<sup>73</sup> *United States v. Sanchez-Gomez*, 859 F.3d 649, 663 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

<sup>74</sup> *Id.* at 661 n.8.

<sup>75</sup> *Id.*

<sup>76</sup> *Sanchez-Gomez*, 798 F.3d at 1207.

California.<sup>77</sup> The Ninth Circuit panel responded with three reasons why *Howard* was distinguishable.<sup>78</sup> First, the panel noted that the “policy in *Howard* authorized only leg shackles,” rather than five-point shackles.<sup>79</sup> Second, the policy in *Howard* applied before magistrate judges only, while the District policy applied to “proceedings before both magistrate and district judges.”<sup>80</sup> Last, *Howard* was decided in the context of a particular courthouse with exceptional security concerns.<sup>81</sup> Based on the panel’s reasoning, the en banc Ninth Circuit overruled *Howard* to the extent that it held that a routine shackling policy was constitutional.<sup>82</sup>

The Ninth Circuit also stated that its 2015 holding fell in line with *Zuber* because “*Zuber* did not involve a blanket pretrial policy of shackling all defendants”—it “approved limited deference to the Marshals” shackling decisions for sentencing hearings.<sup>83</sup> In analyzing *Bell v. Wolfish*, the en banc Ninth Circuit immediately distinguished *Bell* from the Southern District of California’s policy by differentiating a detention facility from a courtroom because a courtroom should not be depicted as “[a place] of restraint or punishment.”<sup>84</sup>

In sum, the Ninth Circuit panel’s 2015 analysis of court precedent led to the holding that a full restraint policy must be justified by a legitimate need.<sup>85</sup> The en banc Ninth Circuit reaffirmed that the Southern District court’s shackling policy was unconstitutional.<sup>86</sup> The en banc court clarified that the right to be free of unwarranted restraints applies whether the proceeding is pretrial, trial, or sentencing, regardless of whether a jury is present.<sup>87</sup> As a result, if the government decides to shackle a defendant, it must justify doing so based on individualized security concerns.<sup>88</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1208.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *United States v. Sanchez-Gomez*, 859 F.3d 649, 661 n.10 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

<sup>83</sup> *Sanchez-Gomez*, 798 F.3d at 1209.

<sup>84</sup> *Sanchez-Gomez*, 859 F.3d at 665 n.14.

<sup>85</sup> *Sanchez-Gomez*, 798 F.3d at 1209.

<sup>86</sup> *Sanchez-Gomez*, 859 F.3d at 666.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

Following the en banc decision, the United States filed a petition for writ of certiorari that was granted by the Supreme Court.<sup>89</sup> However, the Court, holding the case as moot,<sup>90</sup> vacated the en banc decision and remanded the case without assessing the question of physical restraints.<sup>91</sup>

### III. FRAMING A LEGAL RULE

To analyze infringement on a defendants' rights, this Note will analyze the effects of sympathetic litigants on judges' decisions, defendant dress and supervision on judgments of simulated jurors, and facial tattoos on measures of guilt and punishment to discuss how shackles influence judicial decision-making. The decision to shackle ultimately requires balancing an individualized need for security and the infringement on a defendants' rights.<sup>92</sup> Arizona Senator Jeff Flake and various sheriffs' organizations' amici curiae brief to the Supreme Court in support of the United States in *Sanchez-Gomez*, discussed below, offers perspective on the need for security by considering the administrative burdens that arise from individualized decisions to shackle defendants.<sup>93</sup> It is used in this Note as an example of the reasons why some government employees have defended the use of pretrial shackling. The brief argues against the 9th Circuit's en banc *Sanchez-Gomez* decision, which held that individualized justifications for shackling are necessary at all phases of the criminal process, and takes the position that holding pretrial shackling unconstitutional will hamper law enforcement and border security efforts.<sup>94</sup>

#### A. SECURITY RATIONALE FOR SHACKLING DEFENDANTS

Flake et al. argued that the new rule against shackling would strain law enforcement resources in Arizona and prevent effective border enforcement.<sup>95</sup>

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<sup>89</sup> Petition for Writ of Certiorari, *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018) (No. 17-312).

<sup>90</sup> See *supra* note 64 and accompanying text.

<sup>91</sup> *Sanchez-Gomez*, 138 S. Ct. at 1542 (2018).

<sup>92</sup> *United States v. Sanchez-Gomez*, 859 F.3d 649, 666 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

<sup>93</sup> Brief of Amici Curiae Senator Jeff Flake et al. in Support of Petitioner, *United States v. Sanchez Gomez*, 138 S. Ct. 1532 (2018) (No. 17-312).

<sup>94</sup> *Id.* at 3. This section will continue to refer to the new shackling policy requiring individualized determinations of shackling defendants as "the *Sanchez-Gomez* policy."

<sup>95</sup> *Id.* at 8, 13.

Prior to the Ninth Circuit en banc decision, appropriate courtroom security was assessed by local police in Arizona courts and by U.S. Marshals in federal courts.<sup>96</sup> The new standards, however, required federal and state court security to refrain from making their own assessments and defer to the *Sanchez-Gomez* policy, which were burdensome on U.S. Marshals for several reasons.<sup>97</sup> Before a defendant could be brought into court, the Marshals were required to present the accused before a judge to make an individualized determination whether shackles were necessary and, if so, what level of restraint was appropriate.<sup>98</sup> To demonstrate potential safety concerns, the Marshals were required to provide the judge with “notations” from the U.S. Marshal Service (“USMS”) database.<sup>99</sup> “Once the judge has made an individualized determination . . . the Marshals must record that information . . . on the USMS database and produce each detainee” at his or her appropriate restraint level.<sup>100</sup>

Law enforcement was further burdened when a judge reconsidered a defendant’s restraint level.<sup>101</sup> If the judge decided to modify the restraint level, that could entail a modification from full restraints to no restraints.<sup>102</sup> “Due to the high safety risks involved,” more Marshals and more time were expended during the alteration.<sup>103</sup> Furthermore, “[r]estrained and unrestrained detainees [were] generally not permitted to appear in the same court proceeding.”<sup>104</sup> A judge’s alteration could have required additional staffing from the Marshals to adjust the restraints and remove the detainee from the courtroom entirely.<sup>105</sup>

Senator Flake et al. also pointed out that after the Ninth Circuit reheard *Sanchez-Gomez*, more of the Marshals’ time was spent on administrative functions instead of security concerns.<sup>106</sup> This was problematic because at the time the amici curiae brief was filed, the District of Arizona “[had] one of the busiest dockets in the country,” behind just the Southern and Western Districts of Texas.<sup>107</sup> According to the brief, the District of Arizona was

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<sup>96</sup> *Id.* at 8.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 9.

<sup>99</sup> *Id.*

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

<sup>101</sup> *Id.* at 10.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

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

<sup>107</sup> *Id.* at 10–11.

faced with 6,665 criminal filings from June 2015 to June 2016, which “represents 193% more criminal filings than the Southern District of California and over 110% more filings than all of California combined.”<sup>108</sup>

The brief describes challenges that arose in Arizona’s counties and argues that the *Sanchez-Gomez* policy has also affected state and local government.<sup>109</sup> At the Yavapai County Jail, for example, the “Sheriff’s Office transports [sixty to seventy] inmates with different safety classifications over [forty] miles from the detention center . . . to the courthouse.”<sup>110</sup> This results in personnel supervising “up to thirty inmates at a time in a given courtroom—all with different safety classifications.”<sup>111</sup> Managing this situation without restraints would have required the Sheriff’s Office to “transport individual prisoners to court only when ready to appear before their respective judge.”<sup>112</sup> This courtroom-safety plan requires extensive law-enforcement resources, which is burdensome for local governments.<sup>113</sup> Local governments are less prepared than the federal government because they often do not have specialized court security like the U.S. Marshals.<sup>114</sup> Instead, local governments are forced to reassign Sheriffs from their general law-enforcement and public safety tasks.<sup>115</sup> The brief concluded that the *Sanchez-Gomez* policy was an overall loss for law enforcement—a choice between putting themselves in danger or risking the threat of costly litigation.<sup>116</sup>

The brief then discusses the *Sanchez-Gomez* policy’s hindering effect on Operation Streamline (“OSL”), a border-control program.<sup>117</sup> OSL “achieves its goals by adopting a ‘zero-tolerance’ approach to illegal border entry by prosecuting [undocumented] border crossers criminally.”<sup>118</sup> One of the program’s biggest accomplishments is effectively controlling the Border Patrol Yuma Sector, which experienced a “95% decrease in crossings” following adoption of the program.<sup>119</sup> The brief explains that in 2005, before

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<sup>108</sup> *Id.* at 11.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 12.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 13.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

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

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 14.

OSL was implemented, there were 140,000 apprehensions in the Yuma Sector of the southern border, which was reduced to 7,142 in 2015.<sup>120</sup>

OSL maintains its success by allowing most illegal entrants to enter into plea agreements with federal prosecutors.<sup>121</sup> In order for courts to efficiently process the pleas, “OSL defendants enter their pleas in open court together in large groups.”<sup>122</sup> For example, in 2017 the average monthly number of illegal entrants present for OSL hearings in Tucson, Arizona, was about forty-five.<sup>123</sup> The court manages these numbers by slowly processing the entrants in small groups, while also using restraints.<sup>124</sup> However, “[i]t is simply not clear that Tucson [would have] the courtroom space, personnel, or hours in the day to implement [OSL],” as well as the ability to maintain the safety of “illegal entrants and courtroom staff,” if made to conform to the *Sanchez-Gomez* policy.<sup>125</sup>

#### B. EMPIRICAL ANALYSIS: SHACKLING INFLUENCING JUDICIAL DECISION-MAKING

When analyzing whether the need for security outweighs the infringement on a defendant’s rights, it is necessary to determine the extent to which a defendant’s rights are violated.<sup>126</sup> One method of doing so is engaging in empirical analysis, although there is not yet sufficient research that examines whether or to what extent judges are biased by the sight of restraints.<sup>127</sup> This Note will use the findings from three different studies to ultimately argue that judges are influenced in their decision-making by the sight of shackles in the courtroom.

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

<sup>121</sup> *See id.* at 15 (explaining that OSL defendants with prior removals avoid years of imprisonment by entering into plea agreements with a sentencing range of one to six months in prison).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 16.

<sup>124</sup> *Id.* at 15–16.

<sup>125</sup> *Id.*

<sup>126</sup> *United States v. Sanchez-Gomez*, 859 F.3d 649, 666 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

<sup>127</sup> *See Marouf, supra* note 50, at 277 (stating that empirical studies of implicit bias, “which traditionally have not been utilized in the procedural due process analysis, are actually highly relevant in the context of restraints. Future research that specifically examines whether—or to what extent—judges are susceptible to prejudice by the sight of restraints would be extremely helpful.”).

### 1. The Effect of Sympathetic Litigants on Judges' Decisions

A 2015 study by Magistrate Judge Andrew Wistrich and law professors Jeffrey J. Rachlinski and Chris Guthrie tested whether emotions can influence judicial decision-making.<sup>128</sup> The study used six different scenarios involving illegal immigration, medical marijuana, a strip-search, credit card debt, a narcotics search, and environmental pollution.<sup>129</sup> This Note will discuss the first four scenarios listed to argue that just as judges are influenced by their emotions while evaluating the following cases, they may also be influenced by the sight of shackles in the courtroom. The study required judges to respond to a written questionnaire containing hypothetical cases.<sup>130</sup> Within each scenario, one factor was varied to create two versions of a hypothetical case.<sup>131</sup>

#### a. *Illegal Immigration*

In this scenario, the judges were told that they were “presiding over the prosecution of an illegal immigrant.”<sup>132</sup> The participants included trial judges and appellate judges at both the state and federal level.<sup>133</sup> The question presented in the immigration case was “whether pasting a false United States entry visa into a genuine foreign passport constitutes ‘forging an identification card.’”<sup>134</sup> For half of the judges, the materials indicated that the defendant entered the U.S. to locate someone who stole money from a drug cartel.<sup>135</sup> The other half of the judges were given materials indicating that the defendant was a father who entered the U.S. to earn more money to pay for his young daughter’s life-saving operation.<sup>136</sup> Only 44% of judges who reviewed the “father” version ruled that the act constituted forgery, compared to 60% of the judges reviewing the “killer” version.<sup>137</sup>

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<sup>128</sup> Andrew J. Wistrich et al., *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015).

<sup>129</sup> *Id.* at 875.

<sup>130</sup> *Id.* at 874.

<sup>131</sup> *Id.* at 875.

<sup>132</sup> *Id.* at 877.

<sup>133</sup> *Id.* at 876–77.

<sup>134</sup> *Id.* at 877.

<sup>135</sup> *Id.* This hypothetical was referred to as the “killer” version.

<sup>136</sup> *Id.* at 877–78. This hypothetical was referred to as the “father” version.

<sup>137</sup> *Id.*



b. *Medical Marijuana*

In this scenario, the judges were told that they were “presiding over the prosecution of a defendant charged with marijuana possession.”<sup>138</sup> The participants included trial judges from U.S. criminal courts, Canadian judges specializing in criminal trials, and non-specialist Canadian judges.<sup>139</sup> The question presented in the medical marijuana case was one of statutory interpretation.<sup>140</sup> About half of the judges read about a nineteen-year-old defendant being treated for mild seizures but who was also “currently unemployed, on probation for beating his girlfriend, and had a juvenile record for drug possession and drug dealing.”<sup>141</sup> The other half read about a fifty-five-year-old defendant dying from bone cancer, who is married with three children, works as an accountant, and has no criminal record.<sup>142</sup> For both defendants, the materials stated that marijuana was effective for patients suffering from similar symptoms.<sup>143</sup> 54% of the judges dismissed the charges against the nineteen-year-old defendant, while 84% of the judges dismissed the charges against the fifty-five-year-old defendant.<sup>144</sup> Paralleling the results from the immigration hypothetical, the judges interpreted the law more favorably depending on the defendant’s circumstances.<sup>145</sup>

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<sup>138</sup> *Id.* at 880.

<sup>139</sup> *Id.*

<sup>140</sup> *See id.* at 880–81.

The fictional statute provides that an individual should not be arrested for possession or use of no more than 2.5 ounces of marijuana if he or she holds a valid medical-marijuana registration card. It further provides that individuals who have not obtained such a card may raise an affirmative defense if a “physician has stated in an affidavit or otherwise under oath . . . that the person is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the person’s serious or debilitating medical condition or symptoms.” . . . The materials indicated that the defendant was caught with the maximum amount of marijuana allowed by statute . . . and was arrested because he lacked a valid medical-marijuana registration card. The judges were informed that the defendant had filed a motion to dismiss the charges because he had obtained an affidavit from a physician after his arrest. The issue raised by the motion to dismiss was whether a physician’s affidavit containing the testimony required by the statute, but obtained after the defendant has been arrested, satisfies the “has stated” requirement under the statute.

<sup>141</sup> *Id.* at 881.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 882.

<sup>145</sup> Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L. SOC. SCI. 203, 218 (2017) (“[J]udges interpreted a medical

c. *Strip Search*

In this scenario, the judges were told they were presiding over a case involving a facial constitutional challenge to a blanket strip-search policy of arrestees entering the general population of a jail.<sup>146</sup> The participants were Minnesota judges, the “overwhelming majority” of whom were trial court judges.<sup>147</sup> The issue was whether the strip-search policy was reasonable under court precedent.<sup>148</sup> If the policy was reasonable, the defendant’s motion for summary judgment would be granted and the plaintiff’s motion would be denied (and vice versa).<sup>149</sup> One group of judges read that the plaintiff was a male arrested for murder and armed robbery.<sup>150</sup> The other group read that the plaintiff was a female arrested for trespassing at a protest.<sup>151</sup> In each scenario, “[t]he plaintiff had been arrested, forcibly strip searched by an officer of the same gender in the jail hallway, and then kept naked in a cold room for two hours, where he or she was regularly viewed by other officers of the same gender.”<sup>152</sup> 84% of judges granted the female plaintiff’s motion for summary judgement, while only 50% of the judges granted the male plaintiff’s motion.<sup>153</sup>

d. *Credit Card Debt*

In this scenario, bankruptcy judges were instructed to assume that a “single, twenty-nine-year-old female who had struggled with debt for much of her adult life” requested that all of her debt be discharged, “including the balance on a new credit card.”<sup>154</sup> Half of the judges read that the credit card debt was incurred during a social vacation to Florida for spring break,<sup>155</sup> while the other half of the judges read that the debt was incurred to help

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marijuana statute more favorably for a defendant who was dying from bone cancer than for a 19-year-old defendant who was suffering from seizures . . . [and] interpreted the law on forgery more favorably for an undocumented immigrant who had entered the United States to earn money for a sick daughter than for an undocumented immigrant who had entered the United States to hunt down a rogue member of a drug cartel.”).

<sup>146</sup> Wistrich et al., *supra* note 128, at 883.

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

<sup>148</sup> *Id.* at 884.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 885.

<sup>152</sup> *Id.* at 883–84.

<sup>153</sup> *Id.* at 885.

<sup>154</sup> *Id.* at 887–88.

<sup>155</sup> *Id.* at 888.

care for the debtor's mother, who was battling cancer.<sup>156</sup> 32% of the judges with the spring break version discharged the debt, compared to 52% of the judges with the sick-mother version.<sup>157</sup>

e. *Other Studies*

Professor Rachlinski and Judge Wistrich's 2017 article, published subsequent to the aforementioned study, summarizes the available research on judges, confirming that emotion may influence judicial decision-making.<sup>158</sup> For example, the article examines a 2016 study by law professors Holger Spamann and Lars Klöhn,<sup>159</sup> in which federal judges were asked to review a statutory interpretation issue.<sup>160</sup> One of the cases involved a sympathetic litigant who was a victim of a war crime, while the other involved an unsympathetic war criminal.<sup>161</sup> The precedent provided to assist in deciding the case either favored or opposed the litigant.<sup>162</sup> The results demonstrated that precedent had no effect on the decision; instead, the litigant's identity heavily influenced the judges.<sup>163</sup>

Even physical attractiveness has been shown to have an influence on judicial decision-making.<sup>164</sup> A study based on in-court observations found that attractive defendants received shorter sentences and were less likely to be incarcerated than unattractive defendants.<sup>165</sup> Another study found that when charged with a misdemeanor, attractive defendants were required to post lower bonds than unattractive defendants.<sup>166</sup> The discrepancy between

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 889.

<sup>158</sup> Rachlinski & Wistrich, *supra* note 145, at 218.

<sup>159</sup> Holger Spamann & Lars Klöhn, *Justice is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255 (2016).

<sup>160</sup> Rachlinski & Wistrich, *supra* note 145, at 218 (citing Spamann & Klöhn, *supra* note 159).

<sup>161</sup> *Cf.* Spamann & Klöhn, *supra* note 159, at 265–66; Rachlinski & Wistrich, *supra* note 145, at 219.

<sup>162</sup> Spamann & Klöhn, *supra* note 159, at 256.

<sup>163</sup> *Id.* at 268–72.

<sup>164</sup> Rachlinski & Wistrich, *supra* note 145, at 219.

<sup>165</sup> *Id.* (citing John E. Stewart, II, *Defendant's Attractiveness as a Factor in the Outcome of Criminal Trials: An Observational Study*, 10 J. APPLIED SOC. PSYCHOL. 348 (1980); John E. Stewart, II, *Appearance and Punishment: The Attraction-Leniency Effect in the Courtroom*, 125 J. SOC. PSYCHOL. 373 (1985)).

<sup>166</sup> Rachlinski & Wistrich, *supra* note 145, at 219 (citing A. Chris Downs & Phillip M. Lyons, *Natural Observations of the Links Between Attractiveness and Initial Legal Judgments*, 17 PERS. & SOC. PSYCHOL. BULL. 541 (1991)).

attractive defendants and unattractive defendants was even found to exist in small-claims court, outside of the criminal context.<sup>167</sup>

f. *Judges' Biases in General*

As with all studies, there are limitations, including the fact that judges have more information in real cases than the one-page hypotheticals used in Wistrich et al.'s study.<sup>168</sup> The hypotheticals also used extreme contrasts between the sympathetic and unsympathetic litigants.<sup>169</sup> Even so, Wistrich et al. explain that the contrasting hypotheticals “placed judges in a dilemma between ‘heart’ and ‘head,’ requiring them to choose between faithfully applying the law and reaching an unjust result . . . or bending the law to achieve justice.”<sup>170</sup> Wistrich et al. also point out the experiment’s indication that judges react similarly to jurors, although judges may “require a stronger affective influence.”<sup>171</sup> In other words, “although judges may be less susceptible [to bias] than jurors, they are not immune” from the problem.<sup>172</sup>

Wistrich et al.'s 2015 study is not directly related to shackling because it involves circumstantial differences as opposed to physical appearance. The study does show, however, that judges are comparable to jurors in that both are susceptible to influence from external factors.<sup>173</sup> This Note will now explore two other studies that are relevant to the analysis but are lower in ecological validity for purposes of analyzing shackling and its influence on judicial decision-making.

2. The Effects of Defendant Dress and Supervision on Judgments of Simulated Jurors

Two studies from 1978 explored the biasing effect that defendant dress and supervision has on jurors.<sup>174</sup> The first study used university

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<sup>167</sup> Rachlinski & Wistrich, *supra* note 145, at 219 (citing Leslie A. Zebrowitz & Susan M. McDonald, *The Impact of Litigants' Baby-Facedness and Attractiveness on Adjudications in Small Claims Courts*, 15 L. & HUMAN BEHAVIOR 603 (1991)).

<sup>168</sup> *Cf.* Wistrich et al., *supra* note 128, at 900.

<sup>169</sup> *Id.* at 902.

<sup>170</sup> *Id.* at 899.

<sup>171</sup> *Id.* at 857, 900 (citing HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 217 (1966) (finding that in roughly 20% of criminal cases in which judges and juries disagreed on verdicts, the source of disagreement was juror sympathy)).

<sup>172</sup> Wistrich et al., *supra* note 128, at 900.

<sup>173</sup> *Id.* at 900.

<sup>174</sup> Gary Fontaine & Rick Kiger, *The Effects on Defendant Dress and Supervision on Judgments of Simulated Jurors: An Exploratory Study*, 2 L. & HUMAN BEHAVIOR 63 (1978).

undergraduates, and the second study used “volunteers randomly drawn from voter registration lists in Jackson County, Missouri.”<sup>175</sup> The second study used the same population “from which jurors in Jackson County are selected,” a population more suited to studying the courtroom setting.<sup>176</sup>

Both studies used almost identical methodology, beginning with a video presenting trial proceedings.<sup>177</sup> Whenever a witness or the defendant was testifying, a picture of the defendant was shown on the video monitor.<sup>178</sup> The photograph included the defendant in either personal dress—which included a sport coat, a tie, and slacks—or institutional dress—which included drab jail pants and a shirt.<sup>179</sup> The photos also varied in showing either the defendant with just his attorney or with both his attorney and an armed, uniformed guard.<sup>180</sup> Following the viewing of the trial, the participants were asked to rank the likelihood of the defendant’s guilt for first-degree murder, second-degree murder, and manslaughter.<sup>181</sup> Participants “then recommended a specific [prison] sentence,” ranging from zero to thirty years or life.<sup>182</sup> Lastly, the participants were asked if they thought the defendant was able to post bail, and whether they thought the defendant came to trial directly from jail or from home.<sup>183</sup>

Despite the difference in participants, the studies yielded similar results.<sup>184</sup> Both studies revealed that institutional dress rather than personal dress, and armed supervision rather than no supervision, led subjects to make two assumptions: that the defendant was unable to post bail and was coming to the courtroom directly from jail.<sup>185</sup> In Study One, “defendants wearing personal dress with supervision and wearing institutional dress without supervision were judged more guilty of second-degree murder than manslaughter.”<sup>186</sup> “[D]efendants wearing personal dress without supervision and wearing institutional dress with supervision were” more often found guilty of the lesser offense of manslaughter rather than second-

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<sup>175</sup> *Id.* at 65, 68.

<sup>176</sup> *Id.* at 68.

<sup>177</sup> *Id.* at 65, 68.

<sup>178</sup> *Id.* at 65.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 66.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 68.

<sup>185</sup> *Id.* at 66, 68.

<sup>186</sup> *Id.* at 67.

degree murder.<sup>187</sup> Study Two similarly “reveal[ed] that institutional dress with no supervision or personal dress with supervision led to” more guilty verdicts compared to institutional dress with supervision and personal dress with no supervision.<sup>188</sup> In Study Two, however, the effect was higher across criminal charges involving second-degree murder and manslaughter than first-degree murder,<sup>189</sup> showing that the supervision and dress of the defendant, rather than the severity of the charge, was correlated with guilty verdicts.

In sum, the study shows that defendants who are thought to have been in “custody prior to trial receive more severe verdicts and sentences.”<sup>190</sup> This means that even if information about bail or custody is not presented to a decision-maker during trial, bias may result from inferences about the defendant’s dress and supervision.<sup>191</sup> This study is comparable to shackling defendants because it focused on biases stemming from institutional aspects of the courtroom that signify criminality.<sup>192</sup>

As mentioned, the courts in *Zuber*, *Deck*, and *LaFond* differentiated judges from jurors due to the traditional assumption that judges are impartial.<sup>193</sup> However, judges may not be as far removed from jurors as we may think. The following study refutes the ideal of maintaining impartiality despite a person’s physical appearance.

### 3. The Effect of Facial Tattoos on Guilt and Punishment

A final study analyzing the connection between tattoos and sentencing rates serves as a basis for whether criminal appearance can create bias towards a defendant.<sup>194</sup> The research is comprised of three different studies and was completed by Friederike Funk and Alexander Todorov of Princeton University.<sup>195</sup>

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 69.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 70.

<sup>191</sup> *Id.* at 71.

<sup>192</sup> *See id.* at 64 (“Cues of defendant dress and supervision leading to inferences that the defendant is in custody might lead to the assumption that the defendant is guilty, an assumption not so strongly attached to a defendant released prior to trial.”).

<sup>193</sup> *United States v. Zuber*, 118 F.3d 101, 104 (2d Cir. 1997); *Deck v. Missouri*, 544 U.S. 622, 626 (2005) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)); *United States v. LaFond*, 783 F.3d 1216, 1225 (11th Cir. 2015).

<sup>194</sup> Friederike Funk & Alexander Todorov, *Criminal Stereotypes in the Courtroom: Facial Tattoos Affect Guilt and Punishment Differently*, 19 PSYCHOL., PUB. POL’Y, & L. 466, 466 (2013).

<sup>195</sup> *Id.*

Study One “examined the effect of facial tattoos . . . on guilt judgments.”<sup>196</sup> The study began by asking participants to “imagine they were at a court hearing.”<sup>197</sup> Participants were then introduced to Jack, the defendant who was accused of either assault or tax fraud.<sup>198</sup> Each participant was given a photo of Jack, with some participants receiving a photo which included a facial tattoo.<sup>199</sup> Below the photo was a short synopsis of the type of crime of which Jack was accused.<sup>200</sup> The participants were asked to decide whether Jack was guilty and to rate the likelihood of Jack reoffending in the future.<sup>201</sup>

The results of Study One indicated that participants were more likely to find that Jack was guilty when he had a facial tattoo than when he did not.<sup>202</sup> Specifically, 53% of participants in the no-tattoo condition decided Jack was guilty, as opposed to 65% of participants in the tattoo condition, which translated to a 1.2 times higher risk of Jack being found guilty when he had a facial tattoo.<sup>203</sup> The presence of a facial tattoo affected participants’ decision on whether Jack was guilty regardless of whether they received the assault or tax fraud scenario.<sup>204</sup> Jack was also rated as more likely to reoffend when he had a facial tattoo.<sup>205</sup>

Study Two tested whether the presence of a facial tattoo leads to more severe punishment.<sup>206</sup> Just as in Study One, participants were asked to imagine being at a court hearing, and they were introduced to Jack, who was

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<sup>196</sup> *Id.* at 467.

<sup>197</sup> *Id.* at 468.

<sup>198</sup> *Id.*

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

<sup>200</sup> *Id.* The wording of the tax fraud scenario was as follows:

In the course of the last few years, Jack has underpaid his taxes by \$18,000. The prosecutor assumes that Jack deliberately underreported his earnings and overreported his expenses to pay fewer taxes. Jack himself says that he didn’t intend to do so but that he misinterpreted how to report his taxes.”

*Id.* The wording of the assault scenario was as follows:

Jack was at a bar. He bumped into another man while going to get a drink, causing the other man to spill his drink. Jack states that this happened accidentally. The other man began to scream obscenities at Jack. According to the prosecutor, Jack then punched the man, breaking his jaw. Jack himself says that the other man tried to beat him up but lost balance and fell, knocking his jaw on the counter.

*Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 469.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 470.

accused of either assault or tax fraud.<sup>207</sup> Like in Study One, each participant was given a photo of Jack, with some participants receiving a photo which included a facial tattoo.<sup>208</sup> Below the picture was a description of a scenario, both of which indicated that Jack was guilty.<sup>209</sup> Participants were asked to indicate the strength of their desire to punish Jack, how severe they thought they punishment should be, and a concrete punishment in an open-ended text field.<sup>210</sup> The participants were also asked to rate the likelihood of Jack reoffending in the future.<sup>211</sup>

Overall, the presence of a facial tattoo had no significant effect on any punishment measures.<sup>212</sup> Tattoos had no effect on either the desire to punish or punishment severity.<sup>213</sup> The lack of effect was the same for concrete punishment ratings.<sup>214</sup> However, in Study Two, Jack was rated as more likely to reoffend with a facial tattoo than without.<sup>215</sup>

Studies One and Two indicated that facial tattoos affect guilt decisions but do not affect punishment measures.<sup>216</sup> Study Three was “designed to study both guilt decisions and punishment [measures] in the same research design.”<sup>217</sup> Participants were shown a picture of Jack either with or without a facial tattoo, and just as in the previous two studies, were asked to imagine they were at a court hearing.<sup>218</sup> They were told that Jack was accused of assault for an altercation, and they were asked to decide whether Jack was

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> The wording of the tax fraud scenario was as follows:

Jack deliberately underreported his earning and overreported his expenses to pay fewer taxes. In the course of the last years, he has avoided paying \$18,000 in taxes by doing this. Jack is accused of tax fraud.

*Id.* The wording of the assault scenario was as follows:

Jack was at a bar. He bumped into another man while going to get a drink, causing the other man to spill his drink. The other man began to scream obscenities at him. Jack punched the man, breaking his jaw. Jack is accused of assault for an altercation causing minor bodily injury.

*Id.* at 471.

<sup>210</sup> *Id.* Participants could use the open-ended text field to indicate “the kind of punishment they would recommend as well as its magnitude.” *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 472.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*



guilty.<sup>219</sup> If they found that Jack was guilty, they were also asked to rate the severity of Jack's punishment and to identify what concrete punishment was appropriate.<sup>220</sup> Identical to Studies One and Two, participants were asked to rate Jack's likelihood of reoffending in the future.<sup>221</sup>

In the no-tattoo condition, 52% of participants decided that Jack was guilty, compared to 67.5% of participants in the tattoo condition.<sup>222</sup> These percentages confirmed the results from Study One: that the presence of facial tattoos increases the risk that a defendant will be judged as guilty.<sup>223</sup> Paralleling the results of Study Two, facial tattoos had no effect on punishment severity.<sup>224</sup> Identical to both Studies One and Two, Jack was rated as more likely to reoffend with a tattoo than without.<sup>225</sup>

In sum, Study Three replicated Studies One and Two in finding that facial tattoos influenced decisions of guilt but not decisions about punishment.<sup>226</sup> A tattooed defendant was more likely to be considered guilty compared to a non-tattooed defendant.<sup>227</sup> All three studies also revealed that a defendant was rated as more likely to reoffend when a facial tattoo was present.<sup>228</sup>

However, this study is limited in that participants were recruited through Amazon Mechanical Turk<sup>229</sup> and are therefore not comparable to typical jurors or judges. Furthermore, the study is about the effect of facial tattoos, which are not directly comparable to physical restraints. A facial tattoo is a criminal stereotype while physical restraints are put in place by an institution. Regardless, the study does reveal that criminal-like appearance can create biases that affect the accuracy of criminal proceedings.<sup>230</sup>

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<sup>219</sup> *Id.* at 472–73.

<sup>220</sup> *Id.* at 473.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 474.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 475.

<sup>229</sup> *Id.* at 467.

<sup>230</sup> *Id.* at 474.

## IV. TIPPING THE SCALE

As mentioned, there is no sufficient study analyzing whether or to what extent judges are biased by the sight of restraints.<sup>231</sup> It is therefore difficult to quantify to what extent judges may be influenced in their decision-making and how this affects criminal defendants. The empirical analysis above in Part III (B) attempts to answer the question posed in the *Sanchez-Gomez* case, whether the need for security outweighs the infringement on a defendant's rights.<sup>232</sup> The judiciary must weigh the survival of administrative freedom against the loss of individual freedom. In weighing these considerations, the scale should tip towards the side holding greater importance, whether it be the efficiency of law enforcement or the integrity of the criminal process.

The integrity of the criminal process is not entirely dependent on judicial decision-making because a defendant's prosecution begins with an arrest by a law enforcement official. If police officers also demonstrate bias against arrestees in making their arrests, the scale tips toward preserving the integrity of the criminal process. This Note discusses two studies involving law enforcement decision-making to further analyze whether the effect that shackling has on defendants' rights is significant enough to justify any administrative costs that arise from required individualized determinations of whether to shackle. These studies reveal that law enforcement officials may also be influenced by external factors in their decisions to arrest individuals.

A. "GENDER, POLICE ARREST DECISIONS, AND NOTIONS OF CHIVALRY"<sup>233</sup>

In an article about gender and police arrests, the author used data derived from a 1977 evaluation of police services conducted.<sup>234</sup> In the evaluation, trained civilians rode on 900 patrol shifts and observed 5,688 encounters between citizens and police officers.<sup>235</sup> The data comprised

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<sup>231</sup> See Marouf, *supra* note 50, at 277 ("Future research that specifically examines whether—or to what extent—judges are susceptible to prejudice by the sight of restraints would be extremely helpful.").

<sup>232</sup> *United States v. Sanchez-Gomez*, 859 F.3d 649, 666 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

<sup>233</sup> Christy A. Visher, *Gender, Police Arrest Decisions, and Notions of Chivalry*, 21 CRIMINOLOGY 5 (1983).

<sup>234</sup> *Id.* at 11 (1983).

<sup>235</sup> *Id.*

police practices from twenty-four different police departments.<sup>236</sup> The observers of the encounters recorded both police officers' and citizens' characteristics and behavior, along with other features of the encounter, including the time, place, and nature of the offense.<sup>237</sup>

For situational factors, two factors significantly affected arrest rates for male suspects but had no effect for female suspects.<sup>238</sup> The first factor was "whether the encounter took place in a private commercial location," and the second was whether bystanders were present.<sup>239</sup> The author theorized that it is possible that police officers are more likely to arrest male offenders "in commercial locations to maintain their image as law enforcement officers."<sup>240</sup> Similarly, police officers may feel more inclined to arrest male suspects when they have an audience.<sup>241</sup> Female suspects, in contrast, may be treated with chivalry because they are viewed as less threatening to police officers.<sup>242</sup> Although gender norms and notions of chivalry have progressed since 1983 (the year these findings were published), these same gender norms still exist and have the potential to bias decision-making by law enforcement. External factors influencing law enforcement decision-making is also explored in the following study.

#### B. OFFICERS' ARRESTS OF DOMESTIC VIOLENCE VICTIMS

The study surveyed "111 officers from three city and seven small-town police departments in Wisconsin."<sup>243</sup> Two of the three city departments had routine recruit and in-service training on domestic violence.<sup>244</sup> The officers were each given a survey containing one of two vignettes.<sup>245</sup> Both vignettes

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<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 18.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 19.

<sup>242</sup> *Id.*

<sup>243</sup> Daniel G. Saunders, *The Tendency to Arrest Victims of Domestic Violence: A Preliminary Analysis of Officer Characteristics*, 10 J. INTERPERSONAL VIOLENCE 147, 149 (1995).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 150. Vignette A was as follows:

You arrive at the scene of a family disturbance, the third such call to this family in about 2 months. The woman has a broken nose and numerous cuts and bruises on her face and arms. She is crying and says between her sobs, "He came home drunk and started accusing me of spending too much money on myself. When I said I wouldn't discuss it when he was drunk, he started hitting me." Immediately the husband says she is lying and tells you angrily:

were of a scenario in which domestic violence appeared to have been perpetrated by a man against a woman, with the woman—who exhibited physical signs of injury—telling the police that the man had beaten her.<sup>246</sup> However, Vignette A included the man admitting to the police that he did have an altercation with the woman (although claiming she was lying about the details of the altercation), while Vignette B contained no such admittance.<sup>247</sup> Each vignette was followed by ten response options including: “arrest man,” “arrest woman,” “refer man,” “refer woman,” “warn man of possible arrest,” “warn woman of possible arrest,” “help couple solve immediate problem by mediating between them,” “discourage woman from seeking arrest,” “show that I understood each person’s feelings,” and “tell woman of her legal and personal options.”<sup>248</sup> Participants could respond to each answer option with a probability from 0 to 100 percent that they would use that option.<sup>249</sup>

The difference in results between the two vignettes was significant.<sup>250</sup> For example, the “average probability of arresting the woman in Vignette A was only 1.53, compared with 10.58 for Vignette B.”<sup>251</sup> 15% of those who responded to Vignette A, versus 2% of those who responded to Vignette B, said there was a fifty percent or higher chance of them arresting the victim.<sup>252</sup> Twenty-four officers wrote down the type of arrest they would make: twenty-three wrote “disorderly conduct,” while only one wrote “battering.”<sup>253</sup>

This study attempts to make sense of why police officers make decisions based on their attitudes towards victims and their thoughts on

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“Our fights are none of your business. She deserved what she got and she knows it too.”

*Id.* Vignette B was as follows:

You are dispatched to the scene of a domestic disturbance. The woman who comes to the door tells you her husband has been beating her and she wants him removed. She has apparently been crying and has a black eye and bruises on her arms and neck. They continue to argue in your presence.

*Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 153. Vignette A “had a factor for arrest of the man and another for warning or arresting the woman” and Vignette B had “a factor for mutual arrest and another for warning the woman of arrest.” *Id.* at 150.

<sup>249</sup> *Id.* at 150.

<sup>250</sup> *Id.* at 153.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

domestic violence in general.<sup>254</sup> Another takeaway, however, is that police officers lack consistency in their decisions to arrest based on the circumstances.<sup>255</sup> It is difficult to identify exactly why the police officers selected the options they did, but most likely, there was some indicator in Vignette B that made it more likely for an officer to arrest the victim.<sup>256</sup> The difference in results could be based on a number of factors, including that, in Vignette B, the couple continues to argue in the presence of the officer, the victim is no longer actively crying, and there were no prior recent calls from the residence.<sup>257</sup> Regardless of the exact factor, the potential indicators in Vignette A versus Vignette B led to inconsistent decision-making by law enforcement officials.<sup>258</sup>

The discrepancy revealed by this study is problematic because our criminal justice system initially relies on decision-making by law enforcement. The criminal justice system is designed to remove the innocent from its negative consequences and uphold the presumption of innocence in criminal trials. Even so, the inconsistencies among law enforcement, combined with the aforementioned empirical analysis on judicial decision-making, undercut these goals as applied to the shackling of criminal defendants before a judge.

## V. CONCLUSION

The study of defendant dress and supervision reveals that jurors are influenced by external factors,<sup>259</sup> and the findings of this study affirm why most judicial opinions on shackling recognize that jurors are susceptible to bias.<sup>260</sup> The study by Wistrich et al. about judges' emotional biases shows that judges are not fully impartial.<sup>261</sup> If judges are not immune from bias, judges may also be influenced by the same external factors that affect jurors—including shackles. Furthermore, law enforcement officials may also fall into bias in their decision-making based on a number of factors.

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<sup>254</sup> *Id.* at 155.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 150.

<sup>258</sup> *Id.* at 153

<sup>259</sup> Fontaine & Kiger, *supra* note 174.

<sup>260</sup> *See, e.g.*, Deck v. Missouri, 544 U.S. 622, 626 (2005) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)); United States v. Zuber, 118 F.3d 101, 103–04 (2d Cir. 1997); United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015) (emphasizing that the “routine use of visible shackles” before a jury “has deep roots in the common law.”).

<sup>261</sup> Wistrich et al., *supra* note 128, at 900.

The evidence that the potential for bias starts with a defendant's arrest and continues into the courtroom indicates that there is a high probability of infringement on a defendant's rights.

Empirical analysis reveals that “unconscious bias may include ‘representativeness bias’—the tendency to infer that a person’s appearance corresponds to [a person’s] character.”<sup>262</sup> Although it is evident that bias exists, as exemplified in Part III (B), courts have determined that shackling does not inhibit judicial decision-making since judges are viewed as impartial arbiters. The studies on judicial bias in Part III (B) (1) show that judges are no different than other individuals in that they are susceptible to bias. Nevertheless, judges are tasked with putting that bias aside. The debate over the indications of shackling defendants before a judge continues, as the question posed in *Sanchez-Gomez* was left unanswered by the Supreme Court.<sup>263</sup> The ongoing nature of this debate, coupled with the importance of protecting criminal defendants’ rights, has led to the necessity of conducting a study on the biasing effects of shackling. This research would preferably examine whether and to what extent judges are prejudiced by the sight of shackles.<sup>264</sup> This research could also “explore not only judges’ unconscious responses to restrained litigants, but also the influence of race, gender, and legal status on judges’ decisions to require restraints.”<sup>265</sup> Ideally, the results of the study would assist in unpacking the stereotypes fueling implicit biases, allowing us the opportunity to subvert these stereotypes in the context of the courtroom before a judge and preserve the integrity of the United States criminal justice system.<sup>266</sup>

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<sup>262</sup> Brief Amicus Curiae of the National Association of Federal Defenders in Support of Respondents at 13, *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018) (No. 17-312).

<sup>263</sup> *See supra* note 64 and accompanying text.

<sup>264</sup> Marouf, *supra* note 50, at 277.

<sup>265</sup> *Id.*

<sup>266</sup> *See id.* at 278 (highlighting that “challenging the indiscriminate use of restraints could help subvert the very stereotypes that contribute to the formation of implicit biases.”).