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## 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)

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# PREJUDICIAL ROUTINE SHACKLING OF DEFENDANTS WITHOUT PROPER JUDICIAL ASSESSMENT DURING PRETRIAL: A FIFTH AND FOURTEENTH AMENDMENT VIOLATION

THUSHAN SABARATNAM

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### *Abstract*

In the Southern District of California, defendants that are in-custody after arrest awaiting an appearance before the judge can have their constitutional rights violated. Detainees are appearing before the court attendees and judicial officers in iron restraints to increase the safety of the courtroom. Shackles have been around for centuries, and overtime, this means of restraint is slowly being eliminated. Constitutional violations are exceeding more prevalent in the twenty-first century from the citizens challenging the

interpretations of the originally drafted constitution of the United States. The Judicial Branch interprets the laws and applies it to cases, ultimately having the final say of any violations the laws raise. This comment will dive into the routine policy of shackling detainees during their pre-trial hearings before the court. Contemporary problems require modish solutions to set precedent for future cases. Discussion of the pro and contra of shackling detainees routinely will be analyzed.

## I. INTRODUCTION

### A. *Making Court Hearings More Punitive*

How do the courts justify the allowance of individuals to not only be surrounded by law enforcement, but to also be wrapped in iron chains during their own pretrial? What justification if any do the courts allow for the shackling to occur?<sup>1</sup> Defendants are being shackled and prejudiced before the judge when they appear for pre-trial hearings in the Ninth Circuit.<sup>2</sup> Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Isabel Morales and Mark Ring have been forced to appear in shackles in front of judges during pretrial proceedings.<sup>3</sup> The routine shackling policy, which allows for the Marshals Service to produce all in-custody defendants in full restraints, was implemented in 2013 in the Southern District of California.<sup>4</sup> We the people have a right to a fair and proper trial without the prejudicial effects of shackles, chains, or any other physical restraints.<sup>5</sup> When fully restrained, the defendant's hands are handcuffed together, connected to a belly chain around the waist, which is then connected to the shackles around the defendant's feet.<sup>6</sup>

The Constitution of the United States gives individuals a right to procedural due process.<sup>7</sup> Particularly, the Fifth and Fourteenth Amendments prohibit the use of physical restraints, including shackles visible to the jury.<sup>8</sup> Walking into court with physical

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1. *People v. Knott*, No. 230476, 2001 Mich. App. LEXIS 985 (Ct. App. Mar. 30, 2001).

2. *United States v. Sanchez-Gomez*, 859 F.3d 649, 650 (9th Cir. 2017) (discussing defendants' Fifth Amendment Due Process Clause violation from the district-wide policy of routinely shackling all pretrial detainees in the courtroom without any individual assessment of their dangerousness).

3. *Id.* at 649.

4. *Id.* at 660.

5. Sheldon R. Shapiro, *Annotation, Propriety and Prejudicial Effect of Gagging, Shackling, or Otherwise Physically Restraining Accused During Course of State Criminal Trial*, 90 A.L.R.3d 17 (1978).

6. *Sanchez-Gomez*, 859 F.3d at 650.

7. *Deck v. Missouri*, 544 U.S. 622, 628 (2005) (dealing with the constitutionality of shackling a prisoner during the sentencing phase of a trial).

8. *Id.* at 629.

restraints at your hands and feet will undoubtedly concern the elements of the due process of law, which is protected by the Constitution.<sup>9</sup> Routine shackling has to be questioned of its merits on whether the benefits outweigh the immense burdens.<sup>10</sup> The fundamental rights that the United States Constitution gives its citizens applies to use of routine shackling procedures.<sup>11</sup>

The United States Constitution states that the accused have the right to appear at trial, free of visible shackles. This is to allow for the presumption of innocence to stay constant in the jurors' minds, as shackling is likely to influence their perception.<sup>12</sup> The courts have stated that the Fifth and Fourteenth Amendments provide all citizens with equal protection of their right to life, liberty, and property, and therefore routine shackling clearly violates a defendant's constitutional rights.<sup>13</sup> Under the Due Process and Equal Protection Clause, each and every person are given these fundamental rights which are deeply rooted in our nation's history.<sup>14</sup>

Routine shackling during pretrial proceedings already gives the defendant a wrongful appearance before the judge.<sup>15</sup> The Ninth Circuit Court of Appeals is split over whether the shackling of inmates for routine court proceedings is constitutional.<sup>16</sup> A routine procedure for defendants, whether it may include restraints, should be analyzed on a case-by-case basis instead of making it mandatory for every defendant.<sup>17</sup>

### *B. The Path to Understanding Shackling and Prejudicial Effects*

This comment will explore the constitutional rights of individuals, regarding appearances for pretrial motions.<sup>18</sup> The history of shackling will be discussed, regarding how shackling defendants has developed over the years, and how it has affected detained individuals.<sup>19</sup> This comment will uncover the advantages

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9. *Id.* at 629-31.

10. *Sanchez-Gomez*, 859 F.3d at 650 (2017).

11. *Missouri*, 544 U.S. at 629 (2005).

12. Brandon Dickerson, *Bidding Farewell to the Ball and Chain: The United States Supreme Court Unconvincingly Prohibits Shackling in the Penalty Phase in Deck v. Missouri*, 39 CREIGHTON L. REV. 741 (2006).

13. U.S. CONST. amends. V, XIV.

14. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2587 (2015).

15. *Sanchez-Gomez*, 859 F.3d at 651.

16. Jessica Prokop, *The Case for and Against Shackles: Court Rules Routine Restraints Violates Defendants' Fifth Amendment Rights*, COLUMBIAN CTS. REP. (June 18, 2017), [www.courts.wa.gov/content/publicupload/eclips/2017%2006%2019%20The%20Case%20for%20and%20against%20shackles.pdf](http://www.courts.wa.gov/content/publicupload/eclips/2017%2006%2019%20The%20Case%20for%20and%20against%20shackles.pdf).

17. *Id.* at 2-4.

18. *Sanchez-Gomez*, 859 F.3d at 653.

19. *State v. Finch*, 137 Wash. 2d 792 (1999) (indicating that the defendant

and disadvantages of visibly shackling a defendant during the pre-trial motion and ultimately draw a conclusion on whether it is constitutional.<sup>20</sup> There must be changes made to the policy of routine-shackling if visible shackling is found to be a violation of a defendant's constitutional rights.<sup>21</sup> This comment will analyze the issues presented and develop a proposal to make visible shackling less prejudicial, or even non-prejudicial in the courtroom setting, by applying a contemporary solution. Courtroom decorum and safety is a priority to this proposed solution.<sup>22</sup>

## II. BACKGROUND

### A. *The History of Shackling*

Shackling has been used in the courtroom setting to restrain defendants dating back to the nineteenth century.<sup>23</sup> There has been a long history of belligerent criminal defendants, causing countless disruptions, using obscene language, and making threats in the presence of the courtroom.<sup>24</sup> The only method courts have found to preclude obstructing behavior was to use restraints to avert any and all dangerous actions by a defendant.<sup>25</sup> There is a wide range of emotions that criminally accused defendants face, ranging from sadness to utter rage, which would require some form of detainment when they are in the courtroom.<sup>26</sup> The only way courts can detain defendants is the use of shackles, handcuffs, and gags.<sup>27</sup>

The Ninth Circuit stated that restraining defendants helped with the dignity, order, decorum of the courtroom and the judicial

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was shackled throughout the trial even though he was never disruptive in court, never was an escape risk, and never posed a risk during the proceedings).

20. *Lakin v. Stine*, 431 F.3d 959, 962 (6th Cir. 2005) (overwhelming evidence of guilt allows for the shackles).

21. *People v. Love*, 327 Ill. App. 3d 313 (2002).

22. Commonwealth of Mass., *Rules of Professional Conduct Rule 3.5: Impartiality and Decorum of the Tribunal* (Dec. 1, 2017), [mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-35-impairity-and-decorum-of-the](http://mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-35-impairity-and-decorum-of-the).

23. *State v. Sparks*, 68 So. 3d 435, 479 (La. 2011).

24. *United States v. Stewart*, 20 F.3d 911, 912-15 (8th Cir. 1994) (restraining defendant because he had assaulted a corrections officer and the court did not want anything else bad to happen in the courtroom).

25. *State v. Plunkett*, 934 P.2d 113, 116 (Kan. 1997) (holding that the defendant was disrespectful on all motions, refused to give respect towards the courtroom including the judge, used inappropriate language throughout all of the proceedings and altogether, caused much waste of time that could have been prevented by some means).

26. *People v. Davis*, 851 P.2d 239, 243 (Colo. App. 1993) (holding that the defendant's anger was fierce when he spat on the prosecutor's face, fought with the sheriffs, and tried to attack the prosecution's witness).

27. *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (validating remedies including the binding and gagging of the defendant for behaving disrespectfully and causing havoc in the confinements of the courtroom).

process.<sup>28</sup> Judges and courtroom officials want all proceedings to happen in a safe and dignified manner as the judicial system is held as a place of great authority that shall not be battered by dangerous criminals.<sup>29</sup>

Defendants who have committed various crimes such as murders, rapes, robberies, stabbing, shootings, and other violent crimes should be thoroughly assessed to avoid prejudice, yet still keep the courtroom safe.<sup>30</sup> Violence can be triggered spontaneously, especially in the courtroom when defendants are furious with the charges, judges, and prosecutors.<sup>31</sup> Sheriffs and courtroom bailiffs deal with criminals regularly and for that reason, they face one of the highest rates of homicide in the workplace, which is substantially higher than the national average.<sup>32</sup> Shackling can be one of the most important decisions made as it can save the courtroom personnel from danger.<sup>33</sup> Safety concerns arise with dangerous felons and the courthouse facility should be protected at all costs.<sup>34</sup>

In the courtroom with judges and judicial personnel, there has to be exceptional security when defendants are present to ensure a safe and orderly hearing.<sup>35</sup> A person's liberty interests require the government and judicial branch to provide adequate or reasonable training to assure safety in the courtroom.<sup>36</sup> The courtroom bailiffs, police officers and security guards have a duty to maintain the courtroom in a secure and orderly manner and it is up to the judge to decide what methods to use to ensure sufficient security.<sup>37</sup>

Placing restraints on defendants, while they are present in the

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28. *Burks v. State*, 792 S.W.2d 835, 837 (Tex. Crim. App. 1990).

29. *Stewart v. Corbin*, 850 F.2d 492, 494 (9th Cir. 1988) (threatening the judge or witness will not be tolerated at any level).

30. David M. Herszenhorn, *Presumed Innocent, but Caged in Court*, N.Y. TIMES (Nov. 18, 2013), [www.nytimes.com/2013/11/19/world/europe/courtroom-cages-remain-common-despite-criticism.html](http://www.nytimes.com/2013/11/19/world/europe/courtroom-cages-remain-common-despite-criticism.html).

31. *Id.*

32. Thomas Faust & Michael Raffo, *Local Trial Court Response to Courthouse Safety*, 576 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 93-94 (2001); Neil Alan Weiner et al., *Safe and Secure: Protecting Judicial Official*, 36 CT. REV. 26, 27 (2000).

33. *Missouri*, 544 U.S. 622 at 629.

34. *Tiffany A. v. Superior Court*, 150 Cal. App. 4th 1344, 1348 (2007) (ordering that there are no requirements to completely ignore the courtroom or security conditions when making the determination of juvenile criminals needing shackles during their proceedings).

35. *People v. Bryant, Smith & Wheeler*, 60 Cal. 4th 335, 336 (2014) (restraining the defendant with shackles was necessary due to his dangerousness and violent behavior).

36. *Youngberg v. Romeo*, 457 U.S. 307, 312 (1982) (presenting the institution to provide safe conditions of confinement during trial proceedings, not to breach his constitutional rights).

37. *People v. Stevens*, 47 Cal. 4th 625, 630 (2009) (exercising judicial discretion, a deputy officer was to stand near the witness when the defendant was testifying as a means for safety).

courtroom, can adversely affect the outcome of their case.<sup>38</sup> Questions of appropriate restraint will become complex and convoluted when the disruptive party is not only a defendant, but also when he is representing himself pro se.<sup>39</sup> Not only the defendant, but also the community will raise questions of constitutionality, as the shackling procedure will seem normal to all spectators.<sup>40</sup> Furthermore, questions of prejudice and cruel punishment will be raised by the jurors and the judge, regarding why the defendant needs to be restrained with all these irons restraints.<sup>41</sup>

Many courts including Illinois, Missouri and New York understand that handcuffing and shackling will cause the jury to believe that the defendant is guilty so they started to stop handcuffing and solely shackle the individual.<sup>42</sup> The visibility of the shackles is far less noticeable than handcuffs around the defendant's hands.<sup>43</sup> Once courts became aware of the prejudicial effect that shackling can cause, laws were implemented to prohibit the routine use of them during the penalty phase of judicial proceedings.<sup>44</sup>

Over time, defendants have argued that their right to a fair trial had been violated due to the fact that they were visibly shackled during courtroom proceedings. As a result, courts began to understand the adverse effect that shackling can have on the outcome of a case.<sup>45</sup> There will be prejudicial effect on the jury when a defendant appears before them with shackles, handcuffs, and any other restraining tools.<sup>46</sup> Prejudice is presumed when jurors are visually seeing a defendant restrained by all means, subconsciously bestowing a guilty appearance.<sup>47</sup> The history of visible shackles has weighed heavily on the courts as it could greatly affect the outcome of the trial.<sup>48</sup> The visible nature of shackles is the most important

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38. *Allen*, 397 U.S. 337 at 344.

39. Brooksany Barrowes, *The Permissibility of Shackling or Gagging Pro Se Criminal Defendants*, 1998 U. CHI. LEGAL F. 349 (1998), [chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1257&context=uclf](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1257&context=uclf).

40. *Id.*

41. *Lemons v. Skidmore*, 985 F.2d 354, 357 (7th Cir. 1993) (holding that the appearance of shackles would prejudice the jury, causing them to believe that the defendant was dangerous).

42. *Id.* at 358.

43. *Allen*, 397 U.S. 337 at 343.

44. *State v. Carr*, 300 Kan. 1, 275 (2014); see *Fry v. Piller*, 551 U.S. 112, 127 (2007) (holding that the Constitution forbids use of visible shackles during the penalty phase unless there is justification).

45. *Bell v. State*, No. 06-10-00162-CR, 2011 Tex. App. LEXIS 7453, at \*5-6 (Tex. App. Sep. 14, 2011)

46. *Adams v. Bradshaw*, 817 F.3d 284, 288 (6th Cir. 2016).

47. *Sparks*, 68 So. 3d at 455.

48. *Id.* at 481. The Court also states that "shackles in the presence of juries would undermine the importance of guilty or innocence," explaining the judicial

factor in why there is a substantial effect on any detainee within the courtroom.<sup>49</sup>

### *B. Constitutional Right to Fair Trial*

All defendants, regardless of the crime they are being charged with, have the fundamental right to a fair trial.<sup>50</sup> The Supreme Court has noted that a defendant can move for a new trial based on evidence of specific prejudice tendered that denied a fair and impartial trial.<sup>51</sup> The safety measures of shackling used for extraordinary security can carry the risk of infringing upon a defendant's right to a fair trial.<sup>52</sup> The jury is responsible for making credibility determinations during the trial and must complete their duty by returning a verdict of guilty or not guilty.<sup>53</sup> With the visible shackles present during trial, the jury can be subconsciously affected and therefore the fundamental rights of the defendants can be deteriorated.<sup>54</sup> During the course of trial, judges are aware of the prejudicial nature and are only to use shackles as their last option for safety.<sup>55</sup> Now the question is whether the shackling of pretrial detainees can be a routine procedure during their hearing.<sup>56</sup>

Courts have set the precedent that courtroom security needs to justify shackling a defendant during trial beyond a reasonable doubt so that the shackling did not contribute to the verdict.<sup>57</sup> The Ninth Circuit has a two-step process to shackle a defendant which does not violate procedural due process.<sup>58</sup> There has to be

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system's power to inspire confidence of the general public for demands of justice the courts seek to serve.

49. *See Adams*, 817 F.3d at 288 (explaining that the petitioner's right was not violated because he was required to wear a stun belt, which was not visible to anyone, including the jurors, so there is no prejudicial effect as it does not satisfy the visibility requirement).

50. *People v. Hayes*, 21 Cal. 4th 1211, 1250 (1999).

51. *Chandler v. Florida*, 449 U.S. 560, 562 (1981) (holding that televising criminal trials over a defendant's objection have substantial risks and should not be permitted to develop into the reality of an unfair trial).

52. *Stevens*, 47 Cal. 4th at 633; *see Spain v. Rushen*, 883 F.2d 712 (9th Cir. 1989) (stating that the appellee's constitutional right to a fair trial was violated by shackling him during trial).

53. *United States v. Scheffer*, 523 U.S. 303, 304 (1998) (examining how the jury's role in making credible determination can be greatly affected from the evidence that is presented to them).

54. *Id.* at 313.

55. *Span*, 883 F.2d at 734.

56. *Sanchez-Gomez*, 859 F.3d at 650.

57. *Marquard v. Sec'y for the Dep't of Corr.*, 429 F.3d 1278, 1298 (11th Cir. 2005) (holding that the court did not violate its discretion in shackling the defendant because his actions allowed for restrains during trial because they were gruesome and with mental or emotional disturbance).

58. *Duckett v. Godinez*, 67 F.3d 734, 751 (9th Cir. 1995); *see United States v. Cazares*, 788 F.3d 956 (9th Cir. 2015) (being persuaded by compelling circumstances that more security is needed in the courtroom based on the



compelling evidence as well as first pursuing less restrictive alternatives before imposing restraints.<sup>59</sup> In criminal trials, shackling can be a due process violation based on four factors.<sup>60</sup> Factors include physical restraints in the presence of jury, seen by the jury, not justified by the state, and all of that resulting in prejudice.<sup>61</sup> Based upon court rulings, restraints on defendants are not allowed during the trial phase but there is no discussion on whether or not they should be allowed during the pretrial phase of a criminal proceeding.<sup>62</sup>

The Fifth and Fourteenth Amendments prohibit visible restraints as it deteriorates the court's formal dignity.<sup>63</sup> The dignity of the courtroom will increase if shackles are removed because it shows that the courts and judicial system care about the defendants and their proceedings.<sup>64</sup> If defendants are shackled outside of court, during transportation, or even in facilities, it can be viewed as reasonable but when it comes within the confinements of the courtroom, there is constitutional obstruction.<sup>65</sup> The courts have held that the dignity and decorum of the judicial process can be deeply impaired by shackles and should not be used in trials. This should extend to pretrial motions as well.<sup>66</sup>

### C. Pre-Trial Motions Versus Trial

After the preliminary hearing but before a case goes to trial, there are pre-trial motions where both the prosecutor and defense counsel are present for in order to argue what evidence and motions should be allowed.<sup>67</sup> The pretrial motions set the standard for how the trial will take place, setting the boundaries and limitations for

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defendant allows for more physical restraints).

59. *Id.*

60. *United States v. Cazares*, 788 F.3d 956, 958 (9th Cir. 2015).

61. *Walker v. Martel*, 803 F. Supp. 2d 1032, 1051 (N.D. Cal. 2011); *see People v. Bryant, Smith & Wheeler*, 60 Cal. 4th 335 (2014) (the defendant could not establish all factors needed to show that the security measures taken were prejudicial to the jury against him).

62. *People v. Jonathon C.B. (In re Jonathon C.B.)*, 2011 IL 107750, ¶66 (allowing criminal proceedings not to be prejudicial to the jury and showing why shackles are necessary to that individual).

63. *Wharton v. Chappell*, 765 F.3d 953, 964 (9th Cir. 2014) (appearing in shackles before the court affects the courtroom's dignity as there are better means in achieving the ends).

64. *People v. Virgil*, 51 Cal. 4th 1210, 1213 (2011) (imposing heightened security based on the defendant's priors, the court wanted the least intrusive measures to make the defendant stay a low risk so they placed a stun belt on the defendant which was not visible to the courts in the proceedings).

65. *Wharton*, 765 F.3d at 958.

66. *Leonard v. Warden, Ohio State Penitentiary*, No. 1:09-cv-056, 2015 U.S. Dist. LEXIS 63329, at \*26 (S.D. Ohio May 14, 2015).

67. *Pre-Trial Motions*, FINDLAW, [criminal.findlaw.com/criminal-procedure/pre-trial-motions.html](http://criminal.findlaw.com/criminal-procedure/pre-trial-motions.html) (last visited Nov. 22, 2017).

each party prior to the trial.<sup>68</sup> During pretrial motions, there is only a judge present without any jurors whereas a jury trial will have jurors present.<sup>69</sup> The defendant's reputation starts to build from the pretrial stage and continues until the end of a returned verdict.<sup>70</sup>

#### D. District-Wide Policy of Routine Shackling

In *United States v. Sanchez-Gomez*, the defendants challenged the Southern District of California's policy of routinely shackling in-custody defendants without any individual assessment of the material risk of violence or flight.<sup>71</sup> "The judges allowed for the U.S. Marshals Service's request for a district-wide policy of allowing the Marshals to produce all in-custody defendants in full restraints for most non-jury proceedings."<sup>72</sup> With this policy in effect, defendants had to request release from the restraints, but were consistently denied.<sup>73</sup> A blanket policy, which requires the shackling of pretrial detainees, is the question at hand.<sup>74</sup> The policy was implemented in April 2003, mainly because detainees were coming from a heavily secured facility to a less-secure courtroom.<sup>75</sup> With all the safety measures taken into consideration, the court's discretion cannot be arbitrary to defendants and must be guided by fixed legal principles.<sup>76</sup>

The Second Circuit Court of Appeals understands that even though there are jurors present during certain hearings, an individual should not suffer from the unnecessary degrading nature of being chained and paraded in the courtroom.<sup>77</sup> Shackling during pretrial can be more substantial than shackling during a trial, as more people, and possibly even a jury, are present.<sup>78</sup>

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68. *Id.*

69. Martin Levin, *Pre-Trial Procedure*, HARVARD L. SCH. (Winter 2007), [cyber.harvard.edu/~nesson/Reading--Pre-Trial\\_Procedures.pdf](http://cyber.harvard.edu/~nesson/Reading--Pre-Trial_Procedures.pdf).

70. *Id.*

71. *Sanchez-Gomez*, 859 F.3d at 650. (infringing a defendant's right starts from the pretrial hearing and the courts must decide whether the need for extensive security outweighs the infringement upon that person).

72. *See generally id.*

73. *Id.*

74. *United States v. Howard*, 480 F.3d 1005, 1013 (9th Cir. 2007) (regarding safety concerns, the shackling policy was implemented to protect an unsecured courtroom during pretrial, but when a defendant is shackled before a jury, there has to be compelling circumstances for allowing this to happen).

75. *Id.* at 1008.

76. *Small v. Superior Court*, 79 Cal. App. 4th 1000, 1005 (2000) (holding that the defendant who was charged with murder still had the right to be free of shackles during pre-trial hearings even though he was coming from a maximum-security facility).

77. *United States v. Zuber*, 118 F.3d 101, 106 (2d Cir. 1997) (holding that the court will not permit the defendant to be restrained at sentencing as it can have some affect upon the court).

78. *Small*, 79 Cal. App. 4th at 1008.

The courtroom attendees and presiding judge can be prejudicially affected based on the shackling of defendants, which should be stricken immediately to allow for fair pre-trial proceedings to all defendants.<sup>79</sup> Before any trial begins, there are always pre-trial motions and procedures to be conducted to test whether there is reason to go to trial.<sup>80</sup> A defendant has to have a rational factual understanding of the charges against him and be able to consult with his lawyer; and being restrained will certainly lead to complications in that matter.<sup>81</sup> When a defendant does not understand the nature of the proceedings that they are involved in, they will not know their constitutional right to a fair trial, thus leading to constitutional violations which give rise to convictions.<sup>82</sup>

Pre-trial motions do not have a jury present so therefore judges are the sole decision-makers in these proceedings.<sup>83</sup> Having to be shackled during pretrial motions can affect the judge's decision on the defendant's motions as the judge's perception of the detainee will be altered.<sup>84</sup> Not only do pre-trial motions have a strong impact on how the case proceeds, but it also develops a stigma that is hard to change.<sup>85</sup> The presumption of innocence will be hard to reobtain once it has been thwarted by the presence of shackles.<sup>86</sup> Laws and policies that regulate people must be sufficiently clear so that those who enforce the law do not act in an inconsistent way towards detainees.<sup>87</sup> If the shackling routine policy is not found to be vague under the due process clause, the judge's discretion is to follow the standards and prevent any divergence from the range.<sup>88</sup>

A trial judge has the discretion to order the shackling of a

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79. *Cox v. Ayers*, 588 F.3d 1038 (9th Cir. 2009) (allowing for the defendant to be shackled is justified by the defendant's prior history and how the individual tended to act during court hearings).

80. *Frye v. Warden, San Quentin State Prison*, No. 2:99-cv-0628 KJM CKD, 2015 U.S. Dist. LEXIS 7526, 133-34 (E.D. Cal. Jan. 21, 2015).

81. *Anderson v. Gipson*, No. 2:12-cv-2964 KJN P, 2014 U.S. Dist. LEXIS 36338, at \*46 (E.D. Cal. Mar. 19, 2014) (failing to have a competent understanding of the proceedings caused by visible shackles and ineffective assistance of counsel).

82. *Id.* at \*34.

83. *Henley v. State*, 576 S.W.2d 66, 69 (Tex. Crim. App. 1978).

84. *Spain*, 883 F.2d at 721; *see William v. Woodford*, 306 F.3d 665, 678 (9th Cir. 2002) (holding excessive shackling was prejudicial and deprived him of a fair trial).

85. *William*, 306 F.3d at 683-87.

86. *State v. Wall*, 252 Or. App. 435, 441 (2012) (ordering leg restraints to be removed based on insufficient evidence to show that the defendant was a dangerous or disruptive).

87. *Beckles v. United States*, 137 S. Ct. 886, 889 (2017) (exercising the court's discretion in choosing the appropriate sentence was within an appropriate range and was not void for vagueness).

88. *United States v. Matchett*, 837 F.3d 1118, 1130 (11th Cir. 2016) (guiding judicial discretion within a range is proper when there is no vagueness in the policy or procedure).

defendant when he or she finds it necessary.<sup>89</sup> There can be evidence of previous conduct that may persuade the judge to order the shackles or there may be disruptive behavior during the proceeding that would lead the judge to order restraints.<sup>90</sup> In other words, there has to be substantial justification for the judge to warrant the shackles during a hearing, otherwise, there can be grounds for reversal.<sup>91</sup> And as a result, a mistrial could be granted.<sup>92</sup> Judicial discretion varies but most judges are experienced enough to decide whether shackles are necessary on a particular defendant.<sup>93</sup> But that is not always the case as there are many defendants, including *Sanchez-Gomez*, who are shackled based on a courtroom policy and therefore the judge's discretion would be considered erroneous.<sup>94</sup> However, each judge does take an oath or affirmation before performing the duties of being a judge.<sup>95</sup> The oath states, "The justice or judge will administer justice without respects to persons, and do equal right to the poor and to the rich, and faithfully and impartially discharge and perform all the duties incumbent upon me."<sup>96</sup>

### *E. Individual Assessment*

Each defendant has their own history, whether it is a number of dangerous prior offenses, or a history of peacefulness being a humanitarian.<sup>97</sup> Commentators believe that the correct method in assessing whether an individual needs shackles has to be through a thorough examination and not by a routine policy set by the Marshals.<sup>98</sup> Trial and pretrial motions should not differ on how Marshals treat defendants, and thus, individual assessments can

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89. *State v. Kessler*, 57 Ore. App. 469, 475 (1982) (holding that the judge has discretion to order shackles or order the removal of shackles during the court proceeding).

90. *Id.* at 472.

91. *State v. Glick*, 73 Ore. App. 79, 85 (1985) (regarding the defendant's criminal history lacked immediate and serious risk to any of the law enforcement so there was grounds for reversal).

92. *Id.* at 82; *see State ex rel. Juvenile Dep't v. Millican (In re Millican)*, 138 Ore. App. 142, 149 (1995) (asking the judge to think about whether shackles are necessary and if there is no real justification for the restraints, they should be removed as per request).

93. *State ex rel. Juvenile Dep't v. Millican (In re Millican)*, 138 Ore. App. 142, 150 (1995).

94. *Sanchez-Gomez*, 859 F.3d at 651.

95. 28 U.S.C. § 453 (2012).

96. *Id.*

97. *Wall*, 252 Ore. App. at 441 (reversing the decision of the court because the defendant was not shown to be a dangerous individual and there were insufficient facts for shackles).

98. *State v. Moore*, 45 Ore. App. 837, 839-40 (1980) (ordering the defendant be restrained based on his violent and disruptive behavior before and during the presence of court).

provide an explanation for why that defendant truly needs to be shackled.<sup>99</sup> Just as a trial court cannot simply accept the prosecutor's assertion that the defendant presents a security risk to demand shackles, this should be the same for pre-trial motions as well.<sup>100</sup>

Oregon courts state that information has to be presented in a formal adversarial proceeding in order to provide a basis for why an independent assessment of the risk is necessary.<sup>101</sup> The evaluation of relevant information is needed, such as evidence of an immediate and serious risk of dangerous, or disruptive behavior.<sup>102</sup> In Oregon, the courts have held that if a defendant has multiple priors, and there are compelling reasons to believe that the defendant is a toxic and dangerous criminal, there is valid justification for restraints.<sup>103</sup> There can always be legal justification based on a reasonable doubt but the defendant also has reason to object to the evidence that is offered.<sup>104</sup>

When a defendant is shackled or physically restrained, there is opportunity for the defendant to show that there was no substantial necessity and therefore argue that there has been a violation of his right to a fair trial.<sup>105</sup> Knowledge outside of formal evidence can be offered and admitted at trial to show the radical characteristics of a defendant.<sup>106</sup> Courts have held that disrespectful behavior towards the judge and misbehaving in court can instantaneously show that shackling the defendant is justified.<sup>107</sup>

Routine shackling follows a procedure in shackling all in-custody defendants for their pre-trial hearing rather than conducting individualized assessments.<sup>108</sup> The nature of this routine practice is why the circuit courts are split on deciding whether it is constitutional.<sup>109</sup>

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99. *Id.* at 840.

100. *State v. Bird*, 59 Ore. App. 74, 77 (1982) (reversing the decision that the defendant requires shackles just because he is charged with murder is not valid without proper examination).

101. *Kessler*, 57 Ore. App. at 472 (lacking substantial justification for shackling the defendant).

102. *Id.* at 473.

103. *State v. Long*, 195 Ore. 81 (1952) (believing that the defendant is a dangerous criminal and there is serious danger of his harming those in the courtroom, attempting to escape, and other unforeseen actions taken by desperate persons).

104. *Id.* at 92.

105. *Allen*, 397 U.S. at 340 (being exceedingly disruptive in the courtroom setting is a basis for shackling and may even give the judge discretion to remove the defendant from the courtroom).

106. *Long*, 195 Ore. at 93.

107. *Douglas v. State*, 214 P.3d 312, 322 (Alaska 2009) (holding that the trial judge was not obligated to accept all promises of future good behavior and may decide based on the present disruptive and disrespectful behavior).

108. *Sanchez-Gomez*, 859 F.3d at 656.

109. *Id.*

### III. ARGUMENT

#### A. Roadmap of Argument

The use of restraints around and in the vicinity of a courtroom brings prejudicial effects to those who witness the shackled individual. The Constitution gives citizens the right to due process and any breach thereof will result in a mistrial. The judge presiding on a case has the discretion to make procedural decisions that can help and/or hurt the defendant. Safety is always a top priority in the courtroom especially as altercations can break out amongst dangerous people. Before shackles are placed on an individual, there should be assessments and case-by-case analyses done beforehand to ensure constitutional due process. When it comes to identifying a dangerous person from someone who is not, there needs to be a thorough analysis before any shackles are placed. No one size will fit all when it comes to detainees. Furthermore, shackling can result in more than just a prejudicial affect, as some defendants can be shackled for hours at a time, resulting in harm to one's joints and muscles. New methods have to be implemented now to prevent all the contras from proceeding any further.

#### B. Prejudice of Shackling

All defendants have the fundamental right to a fair trial and procedural due process which under no circumstances can be violated.<sup>110</sup> Shackling is a violation of a defendant's fundamental rights, as there will be prejudicial and discriminatory effects of any iron restraints.<sup>111</sup> Courts have long held that during trial, especially with a jury trial, there should not be any prejudicial effect upon the jurors, as it will result in a reversible holding.<sup>112</sup> The prejudicial effect against a defendant will be strong and must be stopped before it applies to any motions and proceedings within the courtroom, including pre-trial.<sup>113</sup> Safety concerns can be managed in many different ways that do not prejudice the defendant during trial or pretrial.<sup>114</sup>

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110. *Missouri*, 544 U.S. at 629 (2005).

111. *Allen*, 397 U.S. at 342 (regarding the defendant's constitutional right to be present in trial with an acceptable manner which holds the judicial dignity and decorum, as well as the respect for the individual which is the lifeblood of the law).

112. *People v. Jenkins*, 22 Cal. 4th 900, 943-45 (2000) (shackling in the presence of the jury is subject to scrutiny because there is a wide range of inferences that a juror must draw from the restraints).

113. *Majors v. Warden*, No. 2:99-cv-00493 MCE KJN, 2016 U.S. Dist. LEXIS 70099, at \*94-97 (E.D. Cal. May 26, 2016).

114. *Ayala v. Ayers*, No. 01cv0741 BTM, 2008 U.S. Dist. LEXIS 31359, at

Routine shackling must cease, as no individual examination of dangerousness is ever done to determine the risk of violence in the courtroom.<sup>115</sup> There are obvious benefits to shackling such as heightened security but there should be constitutional standards before the utmost force controls the courtroom.<sup>116</sup> The defense will be harder to construe with the prejudicial effects of shackling that are pressed upon the defendant during pre-trial; therefore, pre-trial shackling must be abandoned.<sup>117</sup>

### *C. Shackling Violates the Accused's Fundamental Right to Procedural Due Process*

To analyze the prejudicial nature of shackles, there must be a constitutionally violated right that requires correction.<sup>118</sup> The specific right under the Fifth and Fourteenth Amendments is the defendant's right to a fair trial without any inherent prejudice towards the outcome of the case.<sup>119</sup> The nature of shackling is inherently prejudicial under these Amendments because it violates a fundamental right of procedural due process.<sup>120</sup> What is given during a fair trial is the entitlement to be presumed innocent until proven guilty.<sup>121</sup> When a defendant is paraded into court with iron shackles around his body, his reputation is ultimately shattered, as it shows that he needs to be separated from the community at large.<sup>122</sup>

The constitutional amendments are provided to each and every citizen as protection against unfair discrimination and to promote justice.<sup>123</sup> Due process gives the accused a right to a fair trial,

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\*43 (S.D. Cal. Apr. 16, 2008) (understanding safety concerns for all individuals, including high profile defendants, can be managed by various procedures).

115. *Jones v. Sec'y Fla. Dep't of Corr.*, 834 F.3d 1299, 1312 (11th Cir. 2016) (holding that the mental health of an individual should be reasonably determined before shackles are used).

116. *Ayers*, No. 01cv0741 BTM, 2008 U.S. Dist. LEXIS 31359, at \*163.

117. *Sanchez-Gomez*, 859 F.3d at 654.

118. *United States v. Baker*, 432 F.3d 1189, 1201 (11th Cir. 2005) (showing that defendants have many rights which were violated by the courts and thus, convictions were reversed and remanded).

119. *Adams v. Bradshaw*, 826 F.3d 306, 320 (6th Cir. 2016) (requiring fair trials is part of the constitutional right that is given to everyone who is a citizen of the United States).

120. *United States v. Honken*, 378 F. Supp. 2d 1010, 1021 (N.D. Iowa 2004) (applying safety measures has to be done by conducting a prejudice analysis, otherwise, it will affect the defendant's right to fair trial).

121. *Id.* at 1027.

122. *Stevens*, 47 Cal. 4th at 632 (understanding the need to separate the defendant from the community has to be done on a case specific basis and not a routine procedure).

123. *State v. Addison*, 165 N.H. 381, 402 (2013) (convicting a defendant of killing a police officer and sentencing the defendant to the death sentence was found to be fair under the circumstances).

including any court proceedings that may come before and after trial.<sup>124</sup> The Equal Protection Clause forbids the violation of due process, and those violations include the prejudicial effect that shackling defendants during pretrial stages have on a defendant's case.<sup>125</sup> The standard for why equal protection is substantial is because of the need for preserving the defendant's presumption of innocence to avoid any wrongful convictions.<sup>126</sup> The deprivation of life, liberty, or property is the indigence of the constitutionality of the Fourteenth Amendment, found by prejudicial effects to the jurors and/or judges.<sup>127</sup> The Fifth and Fourteenth Amendments state that a defendant should only be shackled and/or gagged as a last resort.<sup>128</sup> The dignity of the courtroom was established in *Illinois v. Allen*, where shackles were only used for last resorts, otherwise, there will be a question of constitutionality.<sup>129</sup> Arbitrary legislation has to be non-existent, and the constitutional Due Process Clause shall be implemented to stop against notions of this kind.<sup>130</sup>

#### *D. The Severe Prejudicial Nature of Shackles*

The Supreme Court of the United States has recognized that shackling during trials is prejudicial, a violation of a right to a fair trial, and an abolishment of any defense to a defendant.<sup>131</sup> Pre-trial and trial are both formal hearings in front of judges, where the charges and indictments are argued by the prosecution and defense counsel.<sup>132</sup> Visible shackles in front of judges and/or jurors without adequate justification is undoubtedly prejudicial, and the defense attorney has to let the community know that there has been prejudice, to dismiss the conviction.<sup>133</sup> If shackling during the penalty phase of a case has been determined to be prejudicial, so should shackling or any restraints used during pretrial motions of in-custody detainees.<sup>134</sup> The inherent prejudicial effect of shackles

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124. *Id.* at 431-44.

125. *Schall v. Martin*, 467 U.S. 253, 267 (1984) (holding that the constitutionality of a statute regarding pretrial detention practices did not violate the due process clause).

126. *People v. Litmon*, 162 Cal. App. 4th 383, 390 (2008) (failing to engage in the balancing process necessary to resolve the procedural due process claim).

127. *Bostean v. L.A. Unified Sch. Dist.*, 63 Cal. App. 4th 95, 101 (1998).

128. *Bradshaw*, 826 F.3d 306.

129. *Allen*, 397 U.S. at 342.

130. *Sanchez-Gomez*, 859 F.3d at 650.

131. *Missouri*, 544 U.S. 622 at 629.

132. *United States v. Scott*, 450 F.3d 863, 881 (9th Cir. 2006).

133. *Chapman v. Cal.*, 386 U.S. 18, 24 (1967) (holding that in affirming the convictions, there has to be harmless error during the phases of trial, free from unconstitutional inferences).

134. *State v. Young*, 853 P.2d 327, 342 (Utah Sup.Ct. 1993) (finding that reversible errors happened during trial on the constitutionality of shackling and restraining the individual in front of the jurors).



spans from judges to the community, which results in an irreversible mark of guilt that begins with the appearance of an individual.<sup>135</sup> For an action to be inherently prejudicial, it must pose an unacceptable threat to the defendant's right to a fair trial.<sup>136</sup> Most of the shackling cases are so inherently prejudicial that they can never be determined harmless under judicial review.<sup>137</sup>

The subconscious prejudicial effect upon the community during procedures is an unacceptable risk when incorporated with trials and tribulations.<sup>138</sup> How is it possible that judges are aware of the need for justice during pretrial motions yet such prejudicial practices exist?<sup>139</sup> The precedence of shackling during jury trials have been shown to be inherently prejudicial, yet there is no clear-cut law on the prejudicial effect on pretrial motions.<sup>140</sup> There is ingrained prejudice with any shackles on any human being and it must be terminated on the basis of justice and lawfulness.<sup>141</sup>

### *E. Judicial Discretion*

Judges have the power to handle defendants in the manner they wish by allowing for shackles to be placed on the detainee, or allowing for no restraints whatsoever.<sup>142</sup> With the discretion that judges are permitted, there can be a wide range of discrepancies between judges and there will not be a standard platform of uniformity.<sup>143</sup> In *Sanchez-Gomez*, where there was a routine shackling procedure, the defendants were continuously denied by the judges after asking to have the shackles taken off.<sup>144</sup> The judges should not be given the right to deny requests for the removal of shackles because it will affect all other cases without any assessment.<sup>145</sup>

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135. *Estelle v. Williams*, 425 U.S. 501, 518 (1976).

136. *Holbrook v. Flynn*, 475 U.S. 560, 571 (1986).

137. *Riumveld v. Birkett*, 404 F.3d 1006, 1010 (6th Cir. 2005) (being surrounded by numerous guards plus the added shackles might have further prejudiced his case among jurors as well as other defendants).

138. *Holbrook v. Flynn*, 475 U.S. at 573 (deploying security personnel in the courtroom is inherently as prejudicial as putting shackles on the defendant because it separates accused from the community).

139. *Id.*

140. *Sanchez-Gomez*, 859 F.3d at 650.

141. *Flynn*, 475 U.S. at 568.

142. *Allen*, 397 U.S. at 342 (allowing for the judge to make decisions after viewing the defendant).

143. *Estelle v. Williams*, 425 U.S. at 521 (objecting how the trial judge ordered jail attire deliberately with no appropriate reasoning).

144. *Sanchez-Gomez*, 859 F.3d at 657.

145. *Diaz v. United States*, 223 U.S. 442, 451 (1912) (exercising judgment in how to conduct a trial may vary among judges).

### F. Individual Assessment

Before any shackling decision is made, the court must make an individualized assessment on whether shackles are the least restrictive means. However, in *Sanchez-Gomez*, it was a routine procedure.<sup>146</sup> Periodic shackling without individualized determination violates the fundamental right to due process.<sup>147</sup> Based on an individual's criminal history, shackling may be appropriate for the safety of the courtroom and can be reasonable under those exclusive circumstances.<sup>148</sup>

Case-by-case determinations are the proper way to decide whether shackles are necessary or if they are the best way to restrict the accused.<sup>149</sup> Factors that should be assessed include any prior convictions, any imminent threats, violent tendencies, and physical attributes of the defendant such as size, strength, and age.<sup>150</sup> A defendant who has no priors, has a small build, and is an elderly person should not be treated in the same manner as a defendant who has been charged multiple times on violent crimes, has a heavy build, and is in his mid-thirties.<sup>151</sup> Strong probative value is needed under the individual assessment to give a true and appropriate reason for shackling during the pretrial hearings.<sup>152</sup> If there is overwhelming evidence of dangerousness that can only be remedied by iron restraints, the defendant should be shackled as a last resort.<sup>153</sup> Proof is needed and if it can be shown without bias, some form of restraint should be implemented.<sup>154</sup>

### G. Safety of the Courtroom

There are many courtroom security measures that can be taken when there is a dangerous defendant present in the courtroom.<sup>155</sup> Some measures that are used more commonly than

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146. *Sanchez-Gomez*, 859 F.3d at 650.

147. *Reid v. Donelan*, 2 F. Supp. 3d 38, 44 (D. Mass. 2014) (holding that individualized assessment prior to shackling a detainee at a hearing is necessary not to violate a defendant's due process rights based on his criminal history).

148. *Id.* at 42-44.

149. *Tiffany A.*, 150 Cal. App. 4th at 1354 (moving to prohibit the policy of shackling all minors during court appearance because there was no individualized assessment to determine whether they were actually dangerous).

150. *Missouri*, 544 U.S. at 629.

151. *Hernandez v. State*, 4 So. 3d 642, 645 (Fla. 2009) (having the defendant wear shackles after committing deadly crimes is not erroneous in the court's opinion because shackles are needed to have a secure courtroom).

152. *State v. Coursolle*, 255 Minn. 384, 389 (1959).

153. *Allen*, 397 U.S. at 343.

154. *United States v. Talley*, 315 Fed. Appx. 134, 141 (11th Cir. 2008) (requiring shackles and handcuffs was in error without case-specific findings to show that such measure were appropriate).

155. *State v. Ronquillo*, No. 17628-2-III, 2000 Wash. App. LEXIS 450, 14-15

others include restraining the individual with handcuffs, shackles, and gags, and the other common measure is surrounding the defendant with armed, uniformed guards.<sup>156</sup>

However, safety measures should be taken as long as they do not interfere with the accused's actual presumption of innocence.<sup>157</sup> When defendants are brought in with iron shackles around their feet, it is like a bear on a chain.<sup>158</sup> Defendants should not be paraded in front of all courtroom members including the community with iron shackles because the prejudicial effect in many cases greatly outweighs the safety concerns.<sup>159</sup> The visibility and appearance of shackles present a strong conclusion to judges and jurors in finding him or her guilty by separation from the community at large.<sup>160</sup> Uniformly requiring these pretrial detainees to appear in shackles does no justice to the legal system and the detainee.<sup>161</sup> There are now more discreet measures that can be taken such as the use of stun belts that are hidden under the defendant's clothing.<sup>162</sup> Stun belts can be hidden under clothing and is controlled by trained personnel to use at any sign of dangerousness.<sup>163</sup>

Living in an era of modern technology, increased judicious and discreet methods must be implemented to reduce prejudice to ensure safety in the courtroom. Especially in the Ninth Circuit, the split decision came about when it was found that shackles without case-by-case analysis is unconstitutional because of its strong prejudicial effect.<sup>164</sup>

### H. Courtroom Altercations

Safety is always an issue because there have been many incidents of violent attacks during procedural hearings, some even

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(2000) (imposing security measures for dangerous criminals can include shackles, armed guards, and other forms of restraints).

156. *Id.* at 3-4.

157. Kristina Davis, *'Like a Bear on a Chain': Ruling Deems San Diego Federal Court Shackling Policy Unconstitutional*, SAN DIEGO UNION TRIB. (June 1, 2017) [www.sandiegouniontribune.com/news/courts/sd-me-shackle-ruling-20170531-story.html](http://www.sandiegouniontribune.com/news/courts/sd-me-shackle-ruling-20170531-story.html).

158. *Id.*

159. *Missouri*, 544 U.S. at 629.

160. *Conroy v. Racette*, No. 14-cv-5832 (JMA), 2017 U.S. Dist. LEXIS 104480, at \*31-32 (E.D.N.Y. July 6, 2017) (proving dangerousness of defendant based on multiple murders was reasonable to restrain the individual).

161. Dirk VanderHart, *Local Courts Have Been Improperly Shackling Inmates, a Ruling Finds*, PORTLAND MERCURY, (June 28, 2017), [www.portlandmercury.com/news/2017/06/28/19123973/local-courts-have-been-improperly-shackling-inmates-a-ruling-finds](http://www.portlandmercury.com/news/2017/06/28/19123973/local-courts-have-been-improperly-shackling-inmates-a-ruling-finds).

162. *Stephenson v. Wilson*, 619 F.3d 664, 669 (7th Cir. 2010) (requiring stun belt versus leg shackles or additional guards because it was less prejudicial than traditional restraints).

163. *United States v. Gray*, 292 F. Supp. 2d 71, 74 (D.D.C. 2003).

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

causing death.<sup>165</sup> Many judges know that certain defendants are high profile criminals who have tendencies to seek revenge against anyone who betrays them.<sup>166</sup> As one sheriff stated, “You never know what to expect, anything can happen.”<sup>167</sup> In 2013, there were two incidents of inmate-on-inmate assaults, one of which was a stabbing in the face.<sup>168</sup> It is true that homemade weapons can be made in holding cells and used in the courtroom but those instances are extremely rare.<sup>169</sup>

Detainees are thoroughly searched before entering the courtroom to ensure safety, including spectators as they are required to go through personal screening, including metal detectors, pat downs, and searching of all belongings.<sup>170</sup> Even with conducting thorough searches, the Ninth Circuit found it easier and more convenient to shackle each and every detainee, violating the constitutional rights of the defendants.<sup>171</sup> With an estimated 40,000 detainees in-custody detainees, the courts took the easier route to deal with transferring them from courts to cells.<sup>172</sup> Violent or not, there should be an evaluation done before prejudicial restraints are placed on defendants, greatly impacting the outcome of their case.<sup>173</sup> The consequence of degradation of human beings by shackling innocent detainees before any guilt has been shown is completely unconstitutional.<sup>174</sup>

### I. *One Size Does Not Fit All*

The U.S. Marshals Service, Southern District of California, was established in 1850, responsible for prisoner services, courthouse locations, and U.S. and District courts.<sup>175</sup> The Marshals’ policy of one-size fits all, in reference to shackling all detainees because they are murderous, is completely erroneous.<sup>176</sup> Any

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165. William Vogeler, *Judges Can’t Routinely Shackle Defendants*, U.S. NINTH CIR. BLOG (June 7, 2017), [blogs.findlaw.com/ninth\\_circuit/2017/06/judges-cant-routinely-shackle-defendants.html](https://blogs.findlaw.com/ninth_circuit/2017/06/judges-cant-routinely-shackle-defendants.html).

166. Julia Lewis, *Courtroom Dangers Exist, Despite Security Precautions*, CAPITOL BROAD. CO. (July 12, 2006), [www.wral.com/news/local/story/1056403/](http://www.wral.com/news/local/story/1056403/).

167. *Id.*

168. *Sanchez-Gomez*, 859 F.3d at 655.

169. *Id.*

170. *Buchanan v. Cate*, No. 10-0423 BTM (NLS), 2011 U.S. Dist. LEXIS 157379, at \*99-100 (S.D. Cal. Sep. 30, 2011) (stating that an individual charged with kidnapping, extortion and assault with firearm and who makes numerous threats can be shown to be dangerous).

171. *Sanchez-Gomez*, 859 F.3d at 655.

172. *Howard*, 480 F.3d at 1013 ((stating that court justice includes assessing whether to detain an individual to the full extent).

173. *Id.*

174. *Sanchez-Gomez*, 859 F.3d at 655.

175. *Southern District of California*, U.S. MARSHALS SERVS., [usmarshals.gov/district/ca-s/](http://usmarshals.gov/district/ca-s/) (last accessed Apr. 1, 2019).

176. *Castillo v. Stainer*, 983 F.2d 145, 155 (9th Cir. 1992) (weighing the

routine policy that places innocent people in a more favorable light to guilt should be halted immediately.<sup>177</sup> Absent an individualized decision, heightened security by placement of iron shackles on a detainee is absolute infringement on the individual's Fifth Amendment right.<sup>178</sup> If a detainee creates a homemade weapon in their cell, it is the job of the guards to find that weapon and remove it before it enters the courtroom.<sup>179</sup> If there are rival gang members present, it is the job of the guards and maybe even the Marshals to figure that out and prevent them from ever being together in the courtroom.<sup>180</sup>

A new policy can be implemented without having to increase the costs of hiring more security personnel. Understanding the detainees more thoroughly will reduce the violent nature in the courtroom because there will be no need for a detainee to act aggressively in front of other detainees.<sup>181</sup> The practice of shackling and handcuffing aggravates the defendant more than treating them like an innocent human being.<sup>182</sup> Humans should not be paraded around the judicial courts like animals with every possible restraint fixed on them.<sup>183</sup> Not only is this prejudicial, it can also be painful to certain individuals who have pre-existing medical conditions that do not allow for long periods of restriction.<sup>184</sup>

No routine shackling policy should ever be implemented especially when the detainees have never been proven to be guilty and are not danger. A basic and simple blanket policy will do more harm than good when a person's future is at stake. Individual assessment is mandatory before anything is done to prejudice the outcome of the pretrial motions.<sup>185</sup>

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burdens of shackling against other possible alternative showed that each individual was different and must be tested on the level of risk).

177. Michael Garabed, *Ninth Circuit Rules Practice of Routinely Shackling Pretrial Detainees Unconstitutional*, SAN DIEGO CHAPTER (June 5, 2017), [fbasd.org/blog/ninth-circuit-rules-practice-of-routinely-shackling-pretrial-detainees-unconstitutional](http://fbasd.org/blog/ninth-circuit-rules-practice-of-routinely-shackling-pretrial-detainees-unconstitutional).

178. *Id.*

179. *State v. Powell*, 274 Kan. 618, 623 (2002) (determining that the defendant was truly a danger to the public and the courts because they consistently were finding homemade shanks in his cell).

180. *Id.*

181. Garabed, *supra* note 177.

182. Kyle Hopkins, *Unconstitutional? Inmates seek to Ban Practice of "Human Chains" in Alaska Court Rooms*, ANCHORAGE KTUU (Oct. 27, 2017), [www.ktuu.com/content/news/Unconstitutional-Inmates-seek-to-ban-practice-of-human-chains-in-Alaska-court-rooms-453707993.html](http://www.ktuu.com/content/news/Unconstitutional-Inmates-seek-to-ban-practice-of-human-chains-in-Alaska-court-rooms-453707993.html).

183. *Id.*

184. Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214 (2015).

185. *Sanchez-Gomez*, 859 F.3d at 655.

### *J. No Actual Assessments, Rather Setting Precedent*

Routine shackling with the exception of judicial discretion to remove such restraints is not good enough for the defendants and ultimately, the judicial system. Even if the defendant has no prior criminal history and is awaiting an initial appearance for a misdemeanor offense, they still have to appear before the court in shackles.<sup>186</sup> Magistrate judges are choosing not to remove shackles even after the defendants asks for the removal of restraints before the courts.<sup>187</sup> Judges believe that if they allow for one defendant to have their shackles removed, all defendants are going to ask for the same thing, setting precedent, and then this policy will start to become ineffective.<sup>188</sup> Magistrate judges are seeking justice, but following routine procedures for convenience in judicial system keeps defendants in a vital position.<sup>189</sup>

### *K. Injurious Nature of Shackling Causing Further Damage*

Some people cannot even wear shackles and restraints due to physical disabilities that would injure the detainee, resulting in more expenditures for medical attention. It has been held that all pregnant women and youth in detention centers should not be shackled because there can be physical injury that arises from long periods of restraint.<sup>190</sup> If pregnant women and youth should not be shackled, neither should anyone with physical disabilities. There has to be assessments made to figure out the history of the detainee. There should be limitations as to how long a person can be shackled to restrict further injury and it should be a considered when creating the new policy.<sup>191</sup>

The Eleventh Circuit Court of Appeals held that shackling without any juror present is completely fine because there will be no prejudice to the detainee.<sup>192</sup> However, more courts, such as the

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186. *Missouri*, 544 U.S. at 629.

187. *State v. Gomez*, 211 Ariz. 494 (2005) (holding that there was a fundamental error during the trial because the State failed to prove that the defendant being shackled was harmless error).

188. *Id.*

189. *People v. Jackson*, 13 Cal. 4th 1164, 1173 (1996) (reviewing for courts' abuse of discretion will be done when there are physical restraints imposed without proper analysis).

190. *ACLU Briefing Paper: The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*, ACLU, [www.aclu.org/files/assets/anti-shackling\\_briefing\\_paper\\_stand\\_alone.pdf](http://www.aclu.org/files/assets/anti-shackling_briefing_paper_stand_alone.pdf).

191. *Keech v. Amie*, File No. 1:92-CV-792, 1994 U.S. Dist. LEXIS 14989, \*at 18 (W.D. Mich. Aug. 23, 1994) (arguing the length of time that he was shackled was excessive and unreasonable given that he had to be present for numerous hours).

192. *Jones*, 834 F.3d at 1302 (holding that even if the shackling was

Oregon U.S. District Court is now aware of the constitutional violations that shackling brings and are implementing more policies to discontinue blanket policies.<sup>193</sup> With the ever-increasing number of courts moving towards the impartial view, they are preventing any constitutional appeals in the near future, and developing good policy for superior lawfulness.<sup>194</sup> Time and money can be saved from applying the right standard and approach in dealing with detainees within the court.

#### IV. PROPOSAL

##### A. *The Abolishment of Routine Shackling of Criminal Defendants/Detainees*

The Ninth Circuit has ruled that lower courts may no longer have a routine shackling policy for all pretrial detainees in the courtroom.<sup>195</sup> Having defendants like “bears on chains” is what the court ruled to be a violation of the Fifth Amendment of having the right to be free of unwarranted restraints.<sup>196</sup> However, the scope of the law should encompass more than just forbidding routine shackling, it should also implement a new policy that will allow for safe, yet constitutional court hearings for everyone.

This modern problem of shackling requires a modern solution to prevent and protect defendants of any constitutional wrongdoing. The tricky logistics of transporting detainees makes shackling easy but is absolutely unconstitutional.<sup>197</sup> With modern new technology, restraints do not have to be made of iron, rather plastic with wireless controls or even medical injections could be used to deter any inappropriate behavior.<sup>198</sup>

##### B. *Holding the Presumption of Innocence*

When detainees are marched in with iron shackles, there is nothing to visualize other than the dangerousness of the detainee

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prejudicial, it was not before anyone who can be affected because there was no jury present).

193. Maxine Bernstein, *Judges Now Deciding Daily if Inmates Should Wear Shackles in Court*, OREGONIAN (Oct. 8, 2017), [www.oregonlive.com/portland/index.ssf/2017/10/judges\\_now\\_deciding\\_daily\\_if\\_i.html](http://www.oregonlive.com/portland/index.ssf/2017/10/judges_now_deciding_daily_if_i.html).

194. *Id.*

195. Christopher Coble, *Court: No More Routine Shackling of Criminal Defendants*, FINDLAW (June 7, 2017), [blogs.findlaw.com/blotter/2017/06/court-no-more-routine-shackling-of-criminal-defendants.html](http://blogs.findlaw.com/blotter/2017/06/court-no-more-routine-shackling-of-criminal-defendants.html).

196. Sandra Dalton, *9th Circuit Rules – No Routine Shackling of Defendants*, AM. LEGAL NEWS (Aug. 2, 2017), [americanlegalnews.com/9th-circuit-rules-no-routine-shackling-defendants/](http://americanlegalnews.com/9th-circuit-rules-no-routine-shackling-defendants/).

197. VanderHart, *supra* note 161.

198. *Id.*

who needs to be restrained with raucous and stringent shackles.<sup>199</sup> 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.<sup>200</sup> Why should the defendants even attend their hearing if the magistrate judges are going to find some prejudice on the detainees and lose that presumption of innocence based on shackles and restraints? It is the duty of magistrate judges to allow detainees to maintain the presumption of their innocence. The final say of the judge should be unbiased towards the detainee to ensure susceptible righteousness.<sup>201</sup>

The Ninth Circuit's decision was partially based on a presumptively innocent defendant who had the right to be treated with respect and dignity, not like an animal in front of the courts and public.<sup>202</sup> All courts should have various modern methods to keep the respect of the detainees while simultaneously preserving their innocence. Detainees have not been proven guilty and consistently aggravating them by placing them in a bad light will continue to diminish the peacefulness trait they have. The Ninth Circuit Court of Appeals, has to stop all routine shackling because all detainees are innocent until proven guilty and there is no just reason for iron shackles. If treated like a criminal, the detainees will act like a criminal.<sup>203</sup> There has to be minimal effect on the detainee which can be done by treating them with respect and only placing restraints if there is no other choice.

### C. *Protecting the Public and Being Constitutional*

Routine shackling has to be completely abolished immediately. The Ninth Circuit Court is reluctant to banish shackles altogether as there will be many safety concerns that will arise if detainees know that they will no longer be shackled during any courtroom proceedings.<sup>204</sup> However, the Ninth Circuit should have a policy of not shackling any detainee until there is strong evidence to show that there will be an actual safety concern with this particular person.<sup>205</sup> Living in a perfect world, there would not be any need for shackles, jails, even laws. However, in today's world, there is a need to detain defendants so there must be a compromise made to ensure safety while also maintaining defendants' constitutional rights. If

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199. Dalton, *supra* note 196.

200. Beth Schwartzapfel, *The Garb of Innocence*, THE MARSHALL PROJECT (Jan. 23, 2015), [www.themarshallproject.org/2015/01/23/the-garb-of-innocence](http://www.themarshallproject.org/2015/01/23/the-garb-of-innocence).

201. Jessica Winter & Roy Moore, *Abortion, and the Presumption of Innocence*, THE NEW YORKER (Nov. 27, 2017), [www.newyorker.com/news/news-desk/roy-moore-abortion-and-the-presumption-of-innocence](http://www.newyorker.com/news/news-desk/roy-moore-abortion-and-the-presumption-of-innocence).

202. Dalton, *supra* note 196.

203. Schwartzapfel, *supra* note 200.

204. *Id.*

205. Coble, *supra* note 195.



there is overwhelming evidence of the dangerousness of the detainee, there can be methods to stay far away from prejudicial effects on the courts.

Not only are stun belts the future of restraints, there can be other discrete methods such as wristlets or even increased charges to detainees.<sup>206</sup> Stun belts are worn underneath clothing and an officer can activate them using a remote-control device.<sup>207</sup> However, stun belts are not completely invisible, therefore having the same results as if the detainee was wearing shackles to begin with.<sup>208</sup> The Ninth Circuit Court should find new methods to deter any violent behavior by the detainee such as having deterrence laws enforced within the courtroom. Harsher penalties pressed upon the detainee for being disobedient by inappropriate behavior can be implemented to deter detainees from trying anything mischievous.

Another reason why the use of iron shackles should be eliminated is the injurious nature it can cause to the person wearing them.<sup>209</sup> In California, courts have held that minors and pregnant women should not be shackled unless there is outstanding evidence to show why it would be reasonable.<sup>210</sup> Keeping the court's decision in those cases at hand, we can reasonably infer that even average citizens will have physical problems with wearing shackles for a long period of time.<sup>211</sup> These long-outdated iron shackles should be banished for all regular citizens and if there is a need for heightened security, there should be stun belts used or even stricter sentencing if any outrageous conduct happens.

#### *D. Barricades and Drapes*

The Ninth Circuit is reluctant to remove shackles as a whole because it is easy and simple to place on detainees, but there can be different measures taken to remove any prejudice. In the Sixth Circuit Court of Appeals, the judges draped the tables so it would cover the defendant from the mid-chest down.<sup>212</sup> Tackling the notion of visible shackles, this can be easily prevented from the drapes or barricades that cover all means of restraints. These drapes and paper covers can be easily put up and kept up for a long duration

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206. Julian Borger, *US Prisons "Use Electric Shock Belts for Torture"*, THE GUARDIAN (June 8, 1999), [www.theguardian.com/world/1999/jun/09/julianborger](http://www.theguardian.com/world/1999/jun/09/julianborger).

207. *Id.*

208. Schwartzapfel, *supra* note 200.

209. *Prisons and Detention Facilities, Prisoner Restraint*, AELE (2017), [www.aele.org/law/Digests/jail106.html](http://www.aele.org/law/Digests/jail106.html).

210. *Id.*

211. *Id.*

212. *Mendoza v. Berghuis*, 544 F.3d 650, 655 (6th Cir. 2008) (though defendant was shackled after being deemed a security risk based on the violent nature of the defendant, the tables had a paper skirt to conceal any restraints that were placed on the defendant during court proceedings).

without much maintenance.<sup>213</sup> Exposure is the biggest hurdle that shackles present and the dignity and respect of the individual will deteriorate when they are presented as guilty instead of innocent.

Drapes will be great when the detainee is seated but restraints are still visible from the entrance to the table. Drapes can be placed from the doorway to the table to cover any restraints. There is strong prejudicial effect of these shackles when walking into the courtroom so there should be drapes or clothing to cover any iron restraints.<sup>214</sup> The visibility should be non-existent to the judges because this is the whole purpose of why it is prejudicial. Before all the new technology can be implemented into all courtrooms, such as stun belts and wireless restraints, drapes would be cheaper and more accessible to put up immediately.

### *E. Physical Disabilities, Less Strain*

A new policy should be implemented to disallow for long periods of shackles and even more strongly enforced if the detainee is disabled in any way. Shackling a person for a substantial length of time deprives due process and can be injurious to the detainee, requiring a new policy limiting time on restraints and shackles.<sup>215</sup> This will be easier to manage, as it should be in conjunction with individual assessment, other means of restraint, and covering the restraints.

### *F. Case-by-Case Assessments*

With the previous proposals, if the courts do not enact a policy, the policy should be heavily amended to provide for case-by-case analysis on shackling detainees.<sup>216</sup> Many courts have adopted this policy but the Ninth Circuit has to amend its current policy to include an outlined assessment. An explanatory assessment of the defendant's positive and negative history to determine the necessary level of shackles will bring the policy much further in constitutionality.<sup>217</sup> There should be multiple factors in assessing the individual including personal history as well as surrounding circumstances. Criminal history, body size, reputation for violence,

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213. *Id.* at 651.

214. *People v. Reese*, 2015 IL App (1st) 120654, 98-99 (Ill. App. Ct. 2015) (court upholding trial court's decision in shackling the defendant during jury selection and defendant contending that this was strongly prejudicial especially during the beginning of the judicial process).

215. *People v. Jackson*, 14 Cal. App. 4th 1818, 1820 (1993) (requiring the length of time shackles are placed have to be reasonable and harmless to the detainee's constitutional right).

216. *Tiffany A.*, 150 Cal. App. 4th at 1350 (deciding on whether to shackle an individual should be made on a case-by-case basis and only then can restraints be used).

217. *Id.*

and mental state are all mandatory factors for the individualized assessments.<sup>218</sup>

New factors such as outside work, personal character, criminal charges and/or convictions should be added to the non-exhaustive list, even though they are mostly subjective tests. A more comprehensive and subjective test will give each detainee a better opportunity to have a fair trial and place no burden on the prejudicial nature of shackling.<sup>219</sup> All in all, shackling should be banned in its entirety as it causes a prejudicial effect during pretrial motions, making it unconstitutional for the detainees. The presumption of innocence has to be maintained under the constitution, and with this routine shackling procedure, the innocence of a person is deteriorated.

## V. CONCLUSION

The routine policy of shackling pretrial detainees in the Southern District of California is the matter being addressed in this comment. The Ninth Circuit Court of Appeals is allowing for magistrate judges to routinely shackle detainees during pretrial hearings, regardless of any criminal history they may have before said court. It is true that the safety of the courtroom must be held to a high standard, but it must also be done in a constitutional manner. The Fifth and Fourteenth Amendments do not allow for unconstitutional trials and pretrial motions because it will affect everyone's life and liberty.

The Ninth Circuit Court of Appeals must ban its routine shackling policy as it violates due process, and start implementing new methods of restraints, such as stun belts. Also, new methods of restraints can be brought by having longer sentences for disruptive behavior. There has to be a case-by-case analysis on each of the detainees to ensure constitutionality. We are at a crossroads on how banishing this policy will affect future hearings. These new techniques are uniquely qualified to fulfill the role of prejudicing shackles. Nevertheless, this policy must be changed in order to be constitutional.

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218. *Missouri*, 544 U.S. at 629.

219. *Id.*