August 9, 2014

Immigrants Unshackled: The Unconstitutional Use of Indiscriminate Restraints

Fatma E Marouf

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Abstract

This Article challenges the constitutionality of indiscriminately restraining civil immigration detainees during removal proceedings. Not only are immigration detainees routinely placed in handcuffs, leg irons, and belly chains without any individualized determination of the need for restraints, but Immigration and Customs Enforcement (ICE), the prosecuting party, makes the decisions about the use of restraints, rather than the judge. After examining the rationale for the well-established prohibition against the indiscriminate use of restraints during criminal and civil jury trials, and discussing how some courts have extended this rationale to bench trials, this Article contends that ICE's practice violates substantive and procedural due process, as well as the regulations governing the authority of immigration judges and ICE's own standards on restraints. The Article then provides empirical support for the arguments that restraints have profound cognitive and behavioral effects on both the restrained individual and the judge, drawing on studies of embodied cognition and implicit bias. These studies undermine the assumption that judges are immune to prejudice and emphasize how restraints interfere with a litigant's right to participate fully in the proceedings, which supports more widespread application of the prohibition against indiscriminate restraints to hearings before a judge.

[*] Associate Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law; J.D., Harvard Law School; B.A., Yale University. Thanks to Mary Berkhesier, Michael Kagan, Elizabeth MacDowell, and Anne Traum for their thoughtful comments on drafts of this Article, and to Michael Wishnie for sharing documents obtained from ICE. Thanks also to the Wiener-Rogers Law Library at UNLV for meticulous research assistance.

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I. INTRODUCTION

Courts have long recognized that a defendant should not appear in restraints before the jury unless the judge has made an individualized determination that such restraints are necessary for security reasons. Due process requires this type of individualized determination because restraints prejudice the jury and impede a defendant's ability to exercise the rights to participate fully in the proceedings and communicate freely with counsel.[1] Similarly, in civil cases, due process demands an individualized determination of the need to restrain a litigant or witness during a jury trial, such as when the plaintiff is a prisoner pursuing a civil rights action.[2] While the rule governing the use of restraints in jury trials is clear, the Supreme Court has never addressed the constitutionality of restraints in proceedings before a judge.

Two federal appellate courts have held that, in certain contexts, due process does not require an individualized determination of the need for restraints during pretrial and sentencing proceedings before a judge, but the highest courts of Illinois, California, and New York have reached the opposite conclusion.[3] These state courts prioritize the protection of defendants' constitutional rights and question the idea that judges are immune to prejudice. On the civil side, several states require individualized determinations of the need for restraints during involuntary commitment proceedings before a judge, and at least a dozen states now require such individualized determinations in juvenile adjudications, where there is no right to a jury.[4]

Like juvenile adjudications, removal proceedings involving immigration detainees take place before a judge and raise serious constitutional concerns about the use of restraints. Not only are detained noncitizens indiscriminately shackled in many immigration courts across the country, but Immigration and Customs Enforcement (ICE), an adversarial party, makes the final decision about the need for restraints, rather than the immigration judge.[5] Although removal proceedings are technically civil, detained noncitizens are forced to appear in court looking like dangerous criminals, wearing orange jumpsuits, handcuffs, leg irons, and belly chains. These restraints cause physical and emotional harm, and make it difficult to take notes, handle documents, and communicate with counsel. The situation is even worse for the vast majority of immigration detainees who are pro se and must present their own defense in chains.

Recently, the use of indiscriminate restraints in removal proceedings has been successfully challenged in two jurisdictions.[6] In line with those lawsuits, this Article argues that detainees in removal proceedings have a due process right to an individualized determination of the need for restraints, and that this determination must be made by the immigration judge, not

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[1] Deck v. Missouri, 544 U.S. 522, 626 (2005).

[2] *See, e.g.,* Maus v. Baker*,* 747 F.3d 926 (7th Cir. 2014) (Section 1983 lawsuit brought by an inmate against correctional officers for excessive force); Davidson v. Riley, 44 F.3d 1118, 1122-23 (2d Cir. 1995) (Section 1983 lawsuit brought by an inmate against correctional officers for interference with right of access to courts); Holloway v. Alexander, 957 F.2d 529, 530 (8th Cir. 1992) (Section 1983 lawsuit brought by an inmate regarding living conditions and punitive isolation area in maximum security prison); Woods v. Thieret, 5 F.3d 244, 246-47 (9th Cir. 1993) (addressing the shackling of witnesses who were inmates).

[3] *Compare* U.S. v. Zuber, 118 F.3d 101 (2d Cir. 1997) and United States v. Howard, 480 F.3d 1005 (9th Cir. 2007) *with* People v. Allen, 222 Ill.2d 340, 346, 856 N.E.2d 349, 353 (Ill. 2006); People v. Fierro, 1 Cal.4th 173, 219, 821 P.2d 1302 (Cal. 1991); People v. Best, 19 N.Y.3d 739, 979 N.E.2d 1187 (NY 2012).

[4] *See infra* Part IV.B.

[5] ICE is part of the Department of Homeland Security (DHS), whereas the Immigration Courts are part of the Executive Office of Immigration Review (EOIR) within the Department of Justice (DOJ).

[6] *See* Cindy Chang, THE LOS ANGELES TIMES, *Shackling to End at San Francisco Immigration Court*, Jan. 23, 2014; Reid v. Donelan, -- F.Supp.2d --, 2014 WL 896747 (D. Mass. 2014).

by ICE. In addition, this Article presents empirical evidence to support the argument that restraints have serious cognitive and behavioral effects on both the litigant and the judge.

Part II provides background information on the detention and deportation of noncitizens, describing the rapid expansion of immigration detention, the numerous challenges that detainees face in removal proceedings, and how poorly they fare in terms of outcomes compared to non-detained individuals. This Part also explains how restraints are used in removal proceedings and discusses detainees' own reports about how restraints affect them. Against this backdrop, Parts III and IV examine the use of restraints in criminal and civil proceedings respectively. Part III explains the rationale for the prohibition against the indiscriminate use of restraints during a jury trial and explores how some courts have applied this prohibition to proceedings before a judge. Part IV discusses how courts have embraced a similar standard in the civil context, requiring individualized determinations by the judge and finding it improper for the judge to delegate this duty. Part IV then examines the growing trend of requiring individualized determinations of the need for restraints in juvenile adjudications.

In Part V, the Article turns to the use of restraints in removal proceedings. This Part contends that substantive and procedural due process both prohibit the indiscriminate use of restraints in immigration court and the delegation of decision-making authority to ICE. In addition, Part V argues that ICE's current policies and practices regarding the use of restraints in the courtroom conflict with the regulations governing the authority of immigration judges, as well as ICE's own standards on the use of restraints in other contexts. Finally, Part VI explores the cognitive and behavioral impact of restraints on the litigant as well as the judge. This Part utilizes studies of embodied cognition and enclothed cognition to argue that restraints have a serious, adverse impact on litigants, affecting their mental faculties and motivation to fight their cases. Drawing on studies of cognitive and implicit biases conducted with actual judges, Part VI further argues that judges are not immune to the prejudicial impact of seeing a litigant in restraints, although the effect on a judge may be different than the effect on a jury. The Article offers recommendations in Part VII and concludes in Part VIII.

II. BACKGROUND ON DETENTION AND DEPORTATION OF NONCITIZENS

During the past twenty years, the number of individuals in civil immigration detention has expanded dramatically, from a daily population of about 6,000 in 1994 to around 33,000 today.[7] Annually, over 400,000 people pass through immigration detention, including individuals with serious health problems, mentally incompetent individuals, and the elderly.[8] These detainees are held in approximately 250 facilities across the United States, at a cost of over $5 million per day.[9] Some of these facilities are ICE Service Processing Centers or Contract Detention Facilities run by for-profit companies, but the vast majority are local and state jails

[7] CIVIC, Detention Map & Statistics, available at http://www.endisolation.org/about/immigration-detention/; Enforcement and Removal Operations (ERO) Statistical Tracking Unit, FOIA 13-17502 FY 2013 YTD Average Daily Population (ADP) by Detention Facility (reporting an average daily population of 33,811 in FY2013), available at http://www.ice.gov/doclib/foia/dfs/detaineepopytd2013.pdf; ERO Custody Management Division, FOIA 14-03470: Authorized Facilities with FY03-14 ADP (showing average daily center for FY03-FY14 by detention center), available at http://www.ice.gov/doclib/foia/dfs/detaineepopfy03-fy14.pdf.

[8] U.S. Immigration and Customs Enforcement, Fact Sheet: ERO – Detainee Health Care—FY2011, available at http://www.ice.gov/doclib/news/library/factsheets/pdf/dhc-fy11.pdf;

[9] National Immigration Forum, Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies (2013), available at http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf.

that have Intergovernmental Service Agreements with ICE.[10] It recently came to light that a congressional directive known as the "bed mandate," which has existed for several years, requires ICE to detain an average of 34,000 people per day.[11]

The rapid expansion of immigration detention means that an increasing number of noncitizens must go through removal proceedings while in custody. Many of them never have the opportunity to request a bond hearing in immigration court because they are subject to mandatory detention under the Immigration and Nationality Act (INA).[12] While the Ninth Circuit held in 2013 that mandatory detainees are entitled to a bond hearing after six months of detention, other circuits do not limit the length of detention before a removal order becomes final.[13] Even if a noncitizen is lucky enough to receive a bond hearing, the judge may refuse to set a bond. One study of noncitizens apprehended by ICE in New York found that 80% were detained without bond, compared to just 1% of criminal defendants who are held without bail.[14] Finally, many noncitizens remain detained simply because they cannot afford to post the bond set by the judge.

Detained noncitizens face multiple challenges in fighting their cases. One of the biggest challenges is finding an attorney, since there is no right to appointed counsel in removal proceedings.[15] Attorneys are often reluctant to represent them because communication is difficult, detention centers tend to be located in remote places, and the detained docket usually moves very quickly, allowing little time for preparation. Many detainees also cannot afford an attorney, since they generally lose their source of income after being taken into custody. In fiscal year 2013, 41% of all individuals in removal proceedings, detained and non-detained, were unrepresented.[16] The percent of unrepresented detainees is often much higher, depending on location. In Texas, for example, 83-90% of immigration detainees are unrepresented.[17]

Unrepresented detainees must fend for themselves in immigration court, where they face a trial attorney employed by ICE who acts like a prosecutor in seeking to deport them. They must try to navigate complex immigration laws alone, often in a language that is not their own. If they manage to figure out that they are eligible for some type of relief from removal, they must then attempt to gather supporting documents while detained. Such documents may include marriage certificates, birth certificates, death certificates, declarations, human rights reports, and

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[10] National Immigration Forum, The President's FY2013 Budget: Department of Homeland Security, available at http://www.immigrationforum.org/images/uploads/2012/dhs_fy_2013_budget_summary.pdf.

[11] Nick Miroff, THE WASHINGTON POST, *Controversial Quota Drives Immigration Detention Boom*, Oct. 14, 2013, available at http://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html. The FY2013 budget, however, allocated $1.959 billion to ICE's custody operations to support 32,800 detention beds, a slight decrease from 34,000 beds in FY2012. *See* National Immigration Forum, *supra* note 10.

[12] *See* 8 U.S.C. § 1226(c). In addition, "arriving aliens," those who showed up at a point of entry and asked for admission to the US, including asylum-seekers, are not entitled to a bond hearing in court. *See* 8 U.S.C. § 1225.

[13] Rodriguez v. Robbins, 715 F.3d 1227 (9th Cir. 2013) (upholding a preliminary injunction that required arriving aliens and mandatory detainees to receive a bond hearing after six months in detention). The Supreme Court has held that detention beyond 180 days after a final order of removal is issues is unconstitutional. *See* INS v. St. Cyr, 533 U.S. 289 (2001).

[14] NYU School of Law Immigrant Rights Clinic, Immigrant Defense Project, Families for Freedom, *Insecure Communities, Devastated Families: New Data on Immigration Detention and Deportation in New York City* 9 (2012) [hereinafter *Insecure Communities*], available at http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf.

[15] 8 U.S.C. § 1229a(b)(4)(A) (2006) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings.").

[16] U.S. Department of Justice, Executive Office for Immigration Review, FY 2013 Statistics Yearbook F1 (2014), available at http://www.justice.gov/eoir/statspub/fy13syb.pdf.

[17] Texas Appleseed, Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System 13 (2010), available at http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313.

other evidence. And they must often do all of this without the support of family or friends, since immigration detainees are frequently sent far from their homes to detention centers in other parts of the country. One study initiated by the Honorable Robert Katzmann, Chief Judge of the U.S. Court of Appeals for the Second Circuit, found that ICE transferred 18,000 New Yorkers, over half of those apprehended from October 2005 through December 2010, to faraway jurisdictions like Texas and Louisiana.[18] Almost all of those transferred outside of New York and New Jersey were ordered deported.[19]

Compounding these challenges, detainees are forced to appear in court looking like violent criminals, wearing orange jumpsuits and restraints. During both master calendar hearings, which resemble arraignments or pretrial hearings, and merits hearings, which resemble trials, detainees are normally brought into court by ICE wearing handcuffs, waist chains, and leg irons, which ICE calls "full restraints."[20] The detainees generally remain in these restraints throughout the proceedings. ICE also frequently chains detainees to each other during master calendar hearings in what is euphemistically called a "daisy chain."[21] The restraints are not only visible to everyone in the courtroom, but they are also audible, making clanking noises whenever the detainee moves. Detainees report that the restraints cause pain and physical discomfort, as well as humiliation and fear, especially as they are often kept in restraints for most of the day.[22]

For an eight a.m. court hearing, detainees are usually awoken at three or four a.m., even if the court is near the detention center. Before being packed into transportation vans, they are placed in full restraints, and they remain that way for hours while waiting in ICE holding cells, which are usually located close to the courthouse. The holding cells are often freezing cold, cramped and filthy.[23] Detainees report that the restraints prevent them from being able to eat, drink, or use the toilet by themselves, causing both physical and emotional distress.[24] Thus, by the time they appear in court, they have already had a harrowing experience. After sitting restrained in court for what may be hours more, they are finally called up for their hearings. Detainees then take their seat before the judge in chains.

If they are unrepresented, this means that will need to serve the trial attorney, approach the bench, handle documents, testify, and question witnesses while wearing handcuffs, leg irons, and a waist chain. If they are lucky enough to have counsel, they must attempt to communicate with their attorney while wearing these restraints. Handcuffs and shackles make passing notes to counsel during the hearing difficult and render talking to counsel before or after the proceedings almost impossible. After all of the detainees on the docket have concluded their hearings, ICE transports them back to the holding cells to endure the same conditions as before, until they are once again packed into vans or buses and transported to the detention center. They usually receive only a small amount of food in the holding cells, such as a stale baloney sandwich.[25] The

[18] *See Insecure Communities*, *supra* note 14, at 3.
[19] *Id.* (reporting that 94.5% of those transferred outside the area were deported).
[20] *See* Abadia-Peixoto v. U.S. Dept. of Homeland Sec., 277 F.R.D. 572, 574 (N.D. Cal. 2011); U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, Use of Restraints, Policy Number ERO 11155.1 ¶ 4, November 19, 2012 (on file with author).
[21] *See* Abadia-Peixoto v. U.S. Dept. of Homeland Sec., 277 F.R.D. 572, 574 (N.D. Cal. 2011).
[22] *Id.*
[23] *See,* e.g., Statement of Anca Plesoianu, submitted to Congressional Ad Hoc Hearing on Immigration, North Las Vegas, NV, Mar. 17, 2014 (on file with author).
[24] *See,* e.g., Statement of Anca Plesoianu, submitted to Congressional Ad Hoc Hearing on Immigration, North Las Vegas, NV, Mar. 17, 2014 (on file with author).
[25] *See,* e.g., Statement of Anca Plesoianu, submitted to Congressional Ad Hoc Hearing on Immigration, North Las Vegas, NV, Mar. 17, 2014 (on file with author).

detainees generally do not arrive back at the detention center until late afternoon or evening, having spent the entire day in restraints.

Given the numerous challenges that detainees face, their low rates of success in immigration court are not surprising. One study found that in New York City only 18% of the represented detainees and 3% of the unrepresented ones had favorable outcomes in their removal proceedings.[26] By comparison, 76% of the represented non-detainees and 13% of the unrepresented ones had favorable outcomes.[27] Other studies confirm that detainees fare far worse than non-detainees with almost all types of applications for relief from removal.[28] In many cases, these discrepancies may be due, in part, to higher rates of criminal convictions among the detained population, but the difficulties of fighting a case while detained are also likely part of the explanation.

The justification for keeping immigration detainees restrained during their removal proceedings is the need to maintain courtroom security. Security is, of course, an important concern. The U.S. Marshals Service reports that the number of judicial threat investigations at the federal level increased from 592 cases in FY 2003 to 1,238 cases in FY 2011.[29] In state and local courts, the number of violent incidents has increased every year since 1970, reaching 67 in 2011.[30] However, there are no reported incidents of violence by noncitizens in immigration court, even in non-detained proceedings where restraints are not used. A report published in 2012 by the Center for Judicial and Executive Security documents 238 incidents of violence, including disrupted incidents, in various courts around the country between January 2005 and December 2011, none of which occurred in an immigration court.[31] Furthermore, ICE's own data indicates that approximately 40% of immigration detainees have no criminal record.[32] An internal review found that only 11% of immigration detainees had been convicted of a violent crime and described "the majority of the population" as "low custody, or having a low propensity for violence."[33] Thus, there appears to be a significant rift between the pervasive use of restraints in immigration court and the actual security risk posed by civil immigration detainees.

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[26] NYIR Study Steering Committee, *Accessing Justice; the Availability and Adequacy of Counsel in Removal Proceedings, New York Immigrant Representation Study Report: Part I*, 33 CARDOZO L. REV. 357, 364 (2011).

[27] *Id.*

[28] *See* Donald Kerwin, "Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded," 04-06 *Immigration Briefings* 6 (June 2004). This study found that success rates in non-detained asylum cases were 39% for represented noncitizens and 14% for unrepresented ones, compared to 18% and 3% respectively for detainees. In adjustment of status cases, the success rates for non-detainees were 87% for represented noncitizens and 70% for unrepresented ones, dropping to 41% and 21% percent respectively for detainees. In cancellation of removal cases for lawful permanent residents, the success rates for non-detainees were 68% for represented persons and 60% for unrepresented ones, compared to 59% and 55% respectively for detainees. In cancellation of removal cases for non-lawful permanent residents, the success rates were 6% for represented persons and 3% for unrepresented ones; the detainees in the sample lost all such cases, regardless of whether or not they had counsel. Finally, in INA § 212(c) cases, which involve waivers for certain legal permanent residents, the success rates for non-detainees were 75% for represented persons and 49% for unrepresented ones, dropping to 56% and 34% respectively for detainees.

[29] Tim Fautsko, Steve Berson, and Steve Swensen, *Courthouse Security Incidents Trending Upward: The Challenges Facing State Courts Today*, *in* FUTURE TRENDS IN STATE COURTS TODAY 102 (2012), available at http://www.ncsc.org/~/media/Microsites/Files/Future%20Trends%202012/PDFs/TRENDS%202012%20BOOK.ashx.

[30] *Id.*

[31] Steven K. Swensen, Center for Judicial and Executive Security, *Disorder in the Court: Incidents of Courthouse Violence: List of Court-Targeted Violence 2005-Present* (2012), available at http://www.cjesconsultants.com/assets/documents/CJES-JCVI-Disorder-in-the-Court-Incidents-IV.pdf.

[32] *See* Miroff, *supra* note 11 (stating that ICE reported that only 19,864 of the 33,391 detainees in its custody on September 9, 2013 were convicted criminals).

[33] U.S. Department of Homeland Security, Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations 2 (2009), available at http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf; *see also* TRAC Immigration, Few ICE Detainers Target Serious Criminals, available at http://trac.syr.edu/immigration/reports/330/. The data

III. Restraints in Criminal Proceedings

A. Origins of Rule Against Restraining Defendants During Trial

The rule against restraining defendants during the guilt phase of a criminal trial has "deep roots in the common law."[34] Blackstone explained that, no matter how serious the indictment, a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape."[35] A central reason for this prohibition was the concern that restraints would diminish a defendant's mental faculties. Courts recognized that a defendant should "stand at ease"[36] during trial in order to "have the use of his reason, and all advantages to clear his innocence."[37] Removing restraints helped ensure that defendants' "pain shall not take away any manner of reason, nor them constrain to answer, but at their free will."[38]

In addition to acknowledging that restraints would impede a defendant's ability to participate fully in the proceedings, the common law rule recognized that restraints would skew perceptions of the defendant's character. A leading eighteenth century treatise on criminal procedure warned that a defendant "ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach, unless there be some Danger of a [Rescue] or Escape."[39] Courts also expressed concern that "hav[ing] a man plead for his life" in shackles before "a court of justice, the highest in the kingdom for criminal matters, where the king himself is supposed to be personally present," undermined the "dignity of the Court."[40]

State courts in the U.S. followed the common law rule, with published decisions dating back to the late nineteenth century.[41] In 1871, the California Supreme Court recognized that shackling a defendant "imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby [tends] materially to abridge and prejudicially affect his constitutional rights of defense."[42] The following year, California codified this rule in legislation, providing that "[n]o person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary

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analyzed by TRAC shows no more than 14% of ICE detainers issued in FY 2012 and the first four months of FY 2013 targeted individuals who pose a serious threat to public safety or national security. About half of the 347,691 individuals subject to an ICE detainer had no record of a criminal conviction. If traffic violations, including driving while intoxicated, and marijuana possession are omitted, two thirds of all detainers were for individuals with no record of conviction

[34] Deck v. Missouri, 544 U.S. 522, 626 (2005).

[35] 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769) (footnote omitted) (quoted in Deck v. Missouri, 544 U.S. 522, 626 (2005)).

[36] Cranburne's Case, 13 How. St. Tr. 222 (K.B.1696) (footnote omitted) (quoted in Deck v. Missouri, 544 U.S. 522, 631 (2005)).

[37] Trial of Christopher Layer, 16 How.St.Tr. 94, 100 [K.B. 1722] (1812) ("[T]he authority is that [the defendant] is not to be 'in vinculis' during his trial, but should be so far free, that he should have the use of his reason, and all advantages to clear his innocence") (quoted in Riggins v. Nevada, 504 U.S. 127, 154 n.4. (1992)).

[38] 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 34 ("If felons come in judgment to answer, ... they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will") (quoted in Deck v. Missouri, 544 U.S. 522, 626 (2005)); *see also* Resolutions of the Judges upon the Case of the Regicides, Kelyng's Report of Divers Cases, *in* PLEAS OF THE CROWN 10 (1708) (Old Bailey 1660) ("It was resolved that when Prisoners come to the Bar to be tryed, their Irons ought to be taken off, so that they be not in any Torture while they make their defense, be their Crime never so great").

[39] 2 HAWKINS, PLEAS OF THE CROWN 308 (1716–1721).

[40] Trial of Christopher Layer, 16 How. St. Tr. 94, 99 [K.B.1722] (1812).

[41] Parker v. Territory, 5 Ariz. 283, 287, 52 P. 361, 363 (1898); State v. Williams, 18 Wash. 47, 48-50, 50 P. 580, 581 (1897); Rainey v. State, 20 Tex.App. 455, 472-73, 1886 WL 4636 (1886) (opinion of White, P.J.); State v. Smith, 11 Ore. 205, 8 P. 343 (1883); Poe v. State, 78 Tenn. 673, 674-78 (1882); State v. Kring, 64 Mo. 591, 591 (1877); People v. Harrington, 42 Cal. 165, 167, 1871 WL 1466 (1871).

[42] People v. Harrington, 42 Cal. 165, 168 (1871); *see also* People v. Duran, 16 Cal.3d 282, 288 (1976).

for his detention to answer the charge."[43] Similarly, a U.S. treatise on criminal procedure from 1895 stated that restraints may be used only "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand," because a defendant "at the trial should have the unrestrained use of his reason, and all advantages, to clear his innocence."[44] As discussed below, the rationale that restraints impede a litigant's mental faculties, prejudice the fact-finder, and create an undignified spectacle continue to justify the prohibition against indiscriminate use of restraints in criminal proceedings today.

B. Modern Rationale for Prohibition Against Indiscriminate Restraints

The U.S. Supreme Court addressed the constitutionality of shackling defendants during trial for the first time in 1970, a century after the first published state court decisions on this issue. In *Illinois v. Allen,* the Supreme Court indicated that the prohibition against physically restraining a defendant at trial is integral to the right to due process under the Fifth and Fourteenth Amendments.[45] That case involved an unusually obstreperous defendant, who, among other things, threatened that the judge would be a "corpse" by lunchtime and tore up his attorney's file.[46] Recognizing the importance of order and decorum in the courtroom, the Court proposed three ways for trial judges to handle such "disruptive, contumacious, stubbornly defiant defendants."[47] One option was to "bind and gag" the defendant, but the Court expressed grave concerns about this proposal, stating that "even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort."[48]

The Court offered three reasons why restraints should remain a last resort. First, "the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant."[49] Second, "the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.[50] Third, the defendant's ability to communicate with counsel "is greatly reduced when the defendant is in a condition of total physical restraint."[51] In light of these disadvantages, the Court found that a trial judge is allowed to decide to have a defendant removed from the courtroom.[52] However, the Court did not rule out that "in some situations . . . binding and gagging might possibly be the fairest and most reasonable way" to handle a highly disruptive defendant.[53]

In 1976, the Court examined a related issue about whether it was inherently unfair to require a defendant to stand trial in prison garb.[54] *Estelle v. Williams* explained that judges must "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt."[55] The Court was concerned that "the constant

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[43] *See* Criminal Practice Act, § 13(1872), later codified as Cal. Penal Code § 688 (cited in *Tiffany A. v. Superior Court,* 150 Cal.App.45h 1344, 1355 n. 9 (2007)).
[44] 1 BISHOP, NEW CRIMINAL PROCEDURE § 955, p. 572-73 (4th ed. 1895).
[45] Illinois v. Allen, 397 U.S. 337, 343-44 (1970); *see also* Deck v. Missouri, 544 U.S. 622, 628 (2005).
[46] Illinois v. Allen, 397 U.S. 337, 340 (1970).
[47] *Id.* at 343.
[48] *Id.* at 344.
[49] *Id.* at 344.
[50] *Id.* at 344.
[51] *Id.* at 344.
[52] *Id.* at 344.
[53] *Id.* at 344.
[54] Estelle v. Williams 425 U.S. 501, 502 (1976).
[55] *Id.* at 503.

reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment."[56] The Court was also troubled that only those who could not post bail would be compelled to stand trial in jail garb, imposing a condition on one category of defendants in a manner "repugnant to the concept of equal justice embodied in the Fourteenth Amendment."[57]

A decade later, in *Holbrook v. Flynn*, the Supreme Court considered whether the presence of four uniformed state troopers in the first row of the spectator section of the courtroom during a trial violated due process.[58] The Court found that the conspicuous presence of security personnel during trial was not inherently prejudicial and did not need be justified by an essential state interest specific to each trial.[59] The Court distinguished the use of identifiable security officers from the inherently prejudicial practice of shackling on the basis that there is a "wider range of inferences that a juror might reasonable draw from the officers' presence."[60] The Court explained that "[w]hile shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable"; jurors might simply perceive the officers "as elements of an impressive drama."[61]

Most recently, in its 2005 decision in *Deck v. Missouri*, the Supreme Court addressed in detail the constitutionality of shackling during the guilt and penalty phases of a trial. A jury had sentenced Carman Deck to death for robbing and murdering an elderly couple in their home. During the sentencing proceeding, Deck was shackled with leg irons, handcuffs, and a belly chain. The Court explained that a consensus had emerged among state courts and commentators that *Allen, Flynn, and Williams* established a constitutional basis for the prohibition against shackling a defendant during trial, which could be "overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum."[62] The Court explicitly rooted the general prohibition against the use of visible restraints at a jury trial in the right to due process under the Fifth and Fourteenth Amendments.[63]

The Court then found that the reasons for the prohibition against shackling during the guilt phase apply with comparable force to the penalty phase of a capital case.[64] The Court noted that the penalty phase, like the trial phase, requires a reliable, accurate process, and that the appearance of the offender in shackles "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community."[65] The use of shackles also "almost inevitably affects adversely the jury's perception of the character of the defendant," which "undermines the jury's ability to weight accurately all relevant considerations."[66] The Court therefore concluded that judges must exercise discretion in making an individualized determination of whether shackling is necessary during the penalty phase of a capital proceeding, taking into account special circumstances related to the particular defendant

[56] *Id.* at 504-05.
[57] *Id.* at 505-06.
[58] Holbrook v. Flynn, 475 U.S. 560 (1986).
[59] *Id.* at 568-69.
[60] *Id.* at 569.
[61] *Id.* at 569.
[62] Deck v. Missouri, 544 U.S. 622, 628 (2005).
[63] *Id.* at 629.
[64] *Id.* at 630-32.
[65] *Id.* at 632-33.
[66] *Id.* at 633.

on trial.[67] In Deck's case, the trial judge had made no findings showing such exercise of discretion, so the Supreme Court reversed.[68]

These Supreme Court precedents leave many questions unanswered. Two important issues that the Court has not yet addressed are whether the prohibition against indiscriminate shackling applies to bench trials and whether it applies to other types of proceedings before a judge. As discussed below, courts are divided on these issues.

C. Application of Prohibition to Proceedings Before a Judge

Two federal appellate courts, the Second and Ninth Circuits, have held that the prohibition against indiscriminate shackling does not apply to certain types of proceedings before a judge. These decisions deem the prejudicial impact of restraints on the jury the paramount reason for the prohibition against indiscriminate shackling and assume, without explanation, that judges are not vulnerable to the same type of prejudice. The highest courts of at least three states, however, have applied the prohibition to proceedings before a judge. The decisions of the Supreme Courts of Illinois and California emphasize how restraints impede a defendant's ability to exercise his or her constitutional rights and undermine dignity, thereby avoiding the difficult issue of whether judges are susceptible to prejudice. The highest court of New York has gone further, suggesting that the sight of restraints may also have an unconscious prejudicial effect on the judge.

1. Federal Cases Addressing Proceedings Before a Judge

In *U.S. v. Zuber,* the Second Circuit declined to extend the holding in *Deck* to a sentencing hearing before a judge.[69] Zuber appeared at his sentencing hearing in physical restraints pursuant to a decision made by the U.S. Marshals Service. When defense counsel asked for the restraints to be removed, the judge assured the defendant that the presence of the restraints would not affect the court's sentencing. Zuber was then sentenced to 151 months in prison. In rejecting Zuber's argument that the district court judge had erred in deferring to the recommendation of the Marshals Service, the Second Circuit distinguished a sentencing hearing before a judge from cases finding that an independent evaluation of the need for physical restraints is necessary in the context of a jury trial and jury sentencing.[70] The court reasoned that juror bias is "the paramount concern in such cases" and that it has been "traditionally assumed that judges, unlike juries, are not prejudiced by impermissible factors."[71] For example, a judge may hear evidence at a bench trial that he later deems inadmissible without prejudicing his

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[67] *Id.* at 633.

[68] Justice Thomas, joined by Justice Scalia, dissented in *Deck*. They argued that the basis for the traditional rule against shackling a defendant at trial no longer exists and that the Court erred in extending the rule from trials to sentencing. First, the dissent reasoned that modern restraints differ from the "irons" used in the seventeenth and eighteenth centuries, which were "heavy and painful." *Id.* at 638 (Thomas, J., joined by Scalia, J., dissenting). The dissent also stressed that there was no right to defense counsel at that time, and "[t]he accused was compelled to respond to the witnesses, making him the primary source of information at trial." *Id.* at 639. After examining historical variations in State court practice, the dissent asserted that the requirement imposed by the majority--on-the-record findings by the trial judge--is "unsupported by state practice" and "inconsistent with the traditional discretion afforded to trial courts." *Id.* at 649. The dissent also dismissed the more recent consensus regarding shackling as stemming "from a series of ill-considered dicta" in three cases. *Id.*

[69] U.S. v. Zuber, 118 F.3d 101 (2d Cir. 1997).

[70] *Id.* at 103.

[71] *Id.* at 104.

verdict.[72] The court further noted that it is routine for district court judges to defer to the professional judgment of the Marshals Service regarding security precautions that seem appropriate or necessary.[73]

In a concurring opinion, Judge Cardamone expressed a contrary view, stating "[t]he fact that the proceeding is non-jury does not diminish the degradation a prisoner suffers when needlessly paraded about a courtroom, like a dancing bear on a lead, wearing belly chains and manacles."[74] Judge Cardamone argued that it is the trial judge's responsibility to assess the need for restraints, and this inquiry may not be delegated to the federal marshals or other custodial personnel.[75] He stressed that the rule requiring an independent judicial determination of the necessity for restraints is based on "more than the danger of jury prejudice"; restraints interfere with the dignity of court proceedings, as well as the defendant's ability to assist counsel in presenting the case, and these concerns exist whether the case is before a judge or jury.[76]

A decade later, in 2007, the Ninth Circuit held in *Howard* that a general policy of restraining defendants during pretrial hearings before a judge in the Central District of California did not violate due process.[77] Like the Second Circuit, the Ninth Circuit noted that almost all of the shackling cases involve proceedings before a jury, which "turn in large part on fear that the jury will be prejudiced by seeing the defendant in shackles."[78] The court then asserted that fear of prejudice was not at issue in the case at hand, "as a judge in a pretrial hearing presumably will not be prejudiced by seeing the defendants in shackles."[79] In addition, the court mentioned several factors that supported the general policy of shackling defendants at pretrial hearings: the proceedings took place in a large courtroom where multiple defendants were present, creating a heightened risk of conflict or escape; there was a shortage of officers to secure the space; and a defendant could make a motion to remove the shackles, at which time the court would render an individualized determination.[80]

The decisions in *Zuber* and *Howard* both assume that judges are not prone to the same prejudices as juries, but empirical studies on judges suggest that this assumption is wrong, as discussed in Part VI below. Moreover, neither *Zuber* nor *Howard* addressed *trial* before a judge, and it is unclear whether the courts would reach the same conclusion in that situation, since the level of participation required of defendants is different. In a case involving a defendant who was subjected to trial wearing a concealed stun belt, for example, the Ninth Circuit highlighted due process concerns around the use of restraints that were completely unrelated to prejudicing the jury.[81] In finding that the trial judge violated due process by failing to make an individualized determination of the need for the restraint and delegating the decision to correctional officers, the court stressed that the stun belt interfered with the defendant's ability to participate fully in his

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[72] *Id.* (citing *Anderson v. Smith,* 751 F.2d 96, 106 (2d Cir. 1984)); *see also United States v. Graham,* 72 F.3d 352, 359 (3d Cir. 1995) (("[N]othing in the record of [defendant's] sentencing hearing ... suggest[ed] that the district court relied on [statements from codefendant's sentencing hearing] in imposing [defendant's] sentence .... [and][w]e are confident that experienced district judges are able to avoid the influence of inappropriate, irrelevant, or extraneous information."), *cert. denied,* 516 U.S. 1183 (1996)).
[73] *Id.* at 104.
[74] *Id.* at 106.
[75] *Id.* at 105 (Cardamone, J., concurring).
[76] *Id.* at 105-06.
[77] U.S. v. Howard, 480 F.3d 1005, 1012 (9th Cir. 2007).
[78] *Id.* at 1012.
[79] *Id.* at 1012.
[80] *Id*. at 1013-14.
[81] Gonzales v. Pliler, 341 F.3d 897, 900-905 (9th Cir. 2003);

defense, communicate with counsel, and "concentrate adequately on his testimony because of the stress, confusion and frustration over wearing the belt."[82]

Howard is also distinguishable from other types of proceedings, including immigration proceedings, in that the magistrate judge who presided over the pretrial proceedings was not the ultimate trier of fact. Furthermore, the policy at issue in *Howard* did not prevent defendants from requesting the judge to make an individualized determination about the need for restraints at a later time, whereas immigration detainees are totally deprived of this opportunity. Recognizing the unique context of *Howard,* the Ninth Circuit itself has indicated that the decision should be construed narrowly, stating that it had not "fully defined the parameters of a pretrial detainee's liberty interest in being free from shackles at his initial appearance, or the precise circumstances under which courts may legitimately infringe upon that interest in order to achieve other aims, such as courtroom safety."[83]

2. State Court Cases Addressing Proceedings Before a Judge

While most federal appellate courts have been silent on the issue, three state courts have found that defendants are entitled to an individualized determination of the need for restraints during proceedings before a judge. The highest courts of Illinois and New York have held that a defendant cannot be tried before a judge without a showing of necessity, and the Supreme Court of California has extended a scaled-down version of this rule to preliminary hearings.

In 1977, the Supreme Court of Illinois held that judges must make an individualized determination of the need for restraints in juvenile adjudications, analogizing them to criminal trials and reasoning that it makes no difference whether the case is before a judge or jury.[84] In 2006, the court reached the same conclusion in a criminal case, holding that, "even when there is no jury, any unnecessary restraint is impermissible because it hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence, and demeans both the defendant and the proceedings."[85] Applying this logic, the court found that a concealed electronic stun belt requires the same due process analysis as any visible restraint.[86] In deeming visibility unimportant, the court emphasized the impact of restraints on the defendant, rather than on the fact-finder.[87] The court also confirmed that the judge, not law enforcement, is responsible for determining how security regarding the defendant should be handled "so as to fully protect his constitutional rights."[88]

Similarly, in 2012, the Court of Appeals of New York, the highest court in that state, held that "the rule governing visible restraints in jury trials applies with equal force to nonjury

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[82] *Id.* at 900-902; *see also* United States v. Durham, 287 F.3d 1297, 1305-06 (11th Cir. 2002) (finding that a stun belt may have "significant psychological consequences" on the defendant and impede the right to confer with counsel as well as impair the "defendant's ability to follow the proceedings and take an active interest in the presentation of his case"); Kennedy v. Cardwell, 487 F.2d 101, 106 (6th Cir. 1973) (recognizing that restraints confuse mental faculties and abridge a defendant's constitutional rights); *but see* Earhart v. Konteh, 589 F.3d 337 (6th Cir. 2009) (holding that requiring a defendant to wear a concealed stun belt while representing himself at a jury trial, without an individualized determination of necessity, did not violate due process).

[83] United States v. Brandau, 578 F.3d 1064, 1065 (9th Cir. 2009).

[84] *See* In re Staley, 364 N.E.2d 72 ((Ill. 1977)

[85] People v. Allen, 222 Ill.2d 340, 346, 856 N.E.2d 349, 353 (2006). In Allen, the court found a due process violation but refused to find plain error because no trial objection had been made to use of the electronic stun belt. *Id.* at 360. In other words, the court was not persuaded that the error "resulted in fundamental unfairness or caused a 'severe threat' to the fairness of the defendant's trial." *Id.*

[86] *Id.* at 360.

[87] *Id.* at 345.

[88] *Id.* at 356.

trials."[89] The court found "no basis" for distinguishing bench trials from jury trials, stating that the three reasons given by the Supreme Court in *Dec*k are equally implicated when the fact-finder is a judge.[90] While stating that a judge is "uniquely capable of . . . making an objective determination based upon appropriate legal criteria," the court also recognized that "judges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial fact-finder."[91] In addition, the court reasoned that "the psychological impact on the defendant of being continually restrained at the order of the individual who will ultimately determine his or her guilt should not be overlooked."[92] Finally, the court considered "the way the image of a handcuffed or shackled defendant affects the public's perception of that person and of criminal proceedings generally."[93] Applying these principles, the court found that the trial judge had violated the defendant's constitutional rights by failing to articulate a justification for his restraint.[94]

The California Supreme Court has held that the prohibition against indiscriminate shackling not only applies at trial, but also at a preliminary examination before a judge.[95] The court found that the use of shackles in court has long been prohibited "not just because of the impact they might have on the jury, but because of their unsettling effect on the defendant and consequently his constitutional rights of defense."[96] The court further explained that "maintain[ing] the composure and dignity of the individual accused" and "preserv[ing] respect for the judicial system as a whole" are "paramount values to be preserved irrespective of whether a jury is present during the proceeding."[97] In addition, "the unjustified use of restraints could, in a real sense, impair the ability of the defendant to communicate effectively with counsel . . . , or influence witnesses at the preliminary hearing."[98] The court therefore concluded that there must be some showing of necessity for the use of shackles at a preliminary hearing, but since "the dangers are not as substantial as those presented during trial, . . . a lesser showing than that required at trial is appropriate."[99] These cases demonstrate that some courts have recognized both the severity of the impact of restraints on a defendant and their impact on judges, although the decisions do not cite any empirical evidence.

IV. Restraints in Civil Proceedings

[89] People v. Best, 19 N.Y.3d 739, 979 N.E.2d 1187 (NY 2012).
[90] *Id.* at 743-44.
[91] *Id.* at 744.
[92] *Id.* at 744.
[93] *Id.* at 744.
[94] *Id.* at 744. After finding a due process violation, the court applied the harmless error analysis and concluded, based on the overwhelming evidence of guilt, that there was no reasonable possibility that the defendant's appearance in handcuffs contributed to the finding of guilt. *Id.* at 744-45.
[95] People v. Fierro, 1 Cal.4th 173, 219, 821 P.2d 1302 (Cal. 1991). The Supreme Court of California addressed shackling of defendants during proceedings before a jury in detail in a 1976 decision called *Duran*. *Duran* discussed how shackling may prejudice jurors, but also noted "the affront to human dignity, the disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant's decision to take the stand." People v. Duran, 16 Cal.3d 282, 290 (1976). In 1981, a California appellate court extended *Duran's* reasoning to a preliminary hearing before a judge, explaining that "[r]espect for the dignity of the individual and the court are values to be preserved whether or not a jury is present." Solomon v. Superior Court, 122 Cal.App.3d 532, 536 (1981). The court therefore concluded that physical restraints could not be applied at a preliminary examination without a showing of good cause. *Id.*
[96] People v. Fierro, 1 Cal.4th 173, 219, 821 P.2d 1302 (Cal. 1991) (internal quotation marks omitted).
[97] *Id.* at 219-20.
[98] *Id.* at 220.
[99] *Id.* at 220.

Federal appellate courts have recognized that many of the Supreme Court's concerns about shackling, articulated in *Allen* and *Deck,* apply equally to civil cases, as all persons have the right to a fair trial under the Fifth Amendment Due Process Clause.[100] The issue of shackling often comes up in the civil context in involuntary commitment proceedings or in civil rights lawsuits where the plaintiff is a prisoner.[101] As discussed below, courts have consistently found that due process requires the judge to make an individualized determination of the need for restraints during a civil jury trial and prohibits the judge from delegating this responsibility to anyone else. Furthermore, in at least one type of civil case—juvenile adjudications—this rule has been applied by at least a dozen states to proceedings before a judge.

A. Prohibition Against Indiscriminate Use of Restraints

Civil cases require individualized determinations of the need for restraints, whereby courts must balance the interests of the litigant in a particular case against the government's need to maintain safety or security in the courtroom.[102] A court must be careful to "impose no greater restraints than are necessary"--a case-specific analysis--and "it must take steps to minimize the prejudice resulting from the presence of the restraints."[103] When there are genuine disputes of material facts regarding the threat to security, the trial court must hold an evidentiary hearing.[104] In analyzing the due process concerns around the use of restraints in civil trials, especially those that are quasi-criminal in nature, courts have examined both criminal precedents and cases involving juvenile adjudications.[105]

For example, in *Tyars,* which involved the involuntary commitment of a young man with mental retardation, seizures, and a severe speech impediment, the Ninth Circuit explained that fundamental fairness does not require automatic congruence between the procedural requirements in criminal trials, juvenile proceedings, and involuntary commitments, but it does require courts to "'measure the requirements of due process by reference both to the problems which confront the State and to the actual character of the procedural system which the State has created.'"[106] In the civil context, as in the criminal one, "[s]hackling, restraining or evening removing a respondent from the courtroom must be limited to cases urgently demanding that action."[107] In Tyars' case, the record did not describe any behavior that could have justified his

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[100] *See, e.g.,* Davidson v. Riley, 44 F.3d 1118, 1122-23 (2d Cir. 1995) ("[T]he concerns expressed in *Allen* are applicable to parties in civil suits as well."); Tyars v. Finner, 709 F.2d 1274, 1284-85 (9th Cir. 1983) (stating that "[a]lthough the criminal cases do not necessarily apply in a civil proceeding, we find them persuasive" and finding it "no great extension of Supreme Court precedent to conclude that [being bound in restraints while in the presence of the jury during an involuntary commitment proceeding] may have violated [Tyars'] rights under the due process clause"); Woods v. Thieret, 5 F.3d 244, 246-47 (9th Cir. 1993) ("[T]he principles from *Allen*... extend[ ] to include not just criminal defendants, but inmates bringing civil actions and inmate-witnesses as well."); Holloway v. Alexander, 957 F.2d 529, 530 (8th Cir. 1992) ("In [prisoner civil rights] cases, the district court has a responsibility to ensure reasonable efforts are made to permit the inmate and the inmate's witnesses to appear without shackles during proceedings before the jury."); Sides v. Cherry, 609 F.3d 576 (3d Cir. 2010) ("Several of our sister circuit courts have reasoned that the concerns expressed in *Allen* also apply in the context of civil trials. . . . We agree with these courts, as "fairness in a jury trial, whether criminal or civil in nature, is a vital constitutional right.").

[101] *See supra* note 100 for examples.

[102] *See, e.g.,* Sides v. Cherry, 609 F.3d 576, 581 (3d Cir. 2010).

[103] Davidson v. Riley, 44 F.3d 1118, 1122-23 (2d Cir. 1995).

[104] Sides v. Cherry, 609 F.3d 576, 582 (3d Cir. 2010); Davidson v. Riley, 44 F.3d 1122, 1125 (2d Cir. 1995); Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993).

[105] Tyars v. Finner, 709 F.2d 1274, 1281 (9th Cir. 1983)

[106] *Id.* at 1283 (quoting In re Gault, 387 U.S. at 68 (Harlan, J., concurring and dissenting)).

[107] *Id.* at 1284.

being restrained; in fact, "his medication was so strong that he slept soundly through the pretrial motions."[108] The court therefore concluded that the proceeding lacked "the appearance of evenhanded justice which is at the core of due process."[109]

1. Improper Delegation of Judicial Responsibility

The civil cases make it clear that a trial judge may not delegate to security officers the responsibility to determine whether restraints should be used in the courtroom. Judge Posner has described a trial judge's abdication of this responsibility as an absence and abuse of discretion, not an exercise of discretion.[110] In *Lemons*, which involved a prisoner-plaintiff who was brought to the courthouse in handcuffs and leg-irons for a civil rights trial about excessive force by prison guards, the trial judge denied a request to have the restraints removed, stating, "[s]ince Mr. Lemons is in the custody of the Department of Corrections, they set the rules for how he will be restrained, if at all."[111] The Seventh Circuit held that the judge had "abused his discretion by relying on the self-serving opinion of fellow penal officers of the defendants and not holding a hearing to determine what, if any, restraints were necessary."[112] The court explained:

> The judge may not delegate his discretion to another party. While he could have consulted the Department of Corrections employees or court security officers, and listened to their opinions and the reasons in support of them, he had to consider all the evidence and ultimately make the decision himself.... Instead he delegated the decision to the Department of Corrections employees. To nobody's surprise, they said he should keep Lemons in handcuffs and leg irons. That delegation was particularly dangerous here where all of the defendants were also Department of Corrections employees, so that the decisionmaker could hardly be called impartial.[113]

Similarly, in *Davidson,* which also involved a civil rights lawsuit against correctional personnel, the Second Circuit held that the trial court had "abdicated its responsibility to determine the need for the physical restraints" by "leaving the decision to the [Department of Corrections] guards."[114] The Second Circuit found "an impermissible delegation of the court's responsibility to determine whether Davidson's due process right not to appear before the jury in shackles and manacles was outweighed by considerations of security."[115] The Second Circuit was especially dismayed that the trial court had "refused to consider removal of Davidson's handcuffs even though as a *pro se* litigant he would be conspicuously hampered in the handling of his papers"

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[108] *Id.* at 1284.
[109] *Id.* at 1285.
[110] Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993).
[111] Lemons, 985 F.2d at 356 (quoting magistrate judge).
[112] Lemons, 985 F.2d at 356.
[113] Lemons, 985 F.3d at 358; *see also* Woods v. Thieret, 5 F.3d at 244, 248 (7th Cir. 1993) ("While the trial court may rely 'heavily' on the marshals in evaluating the appropriate security measures to take with a given prisoner, the court bears the ultimate responsibility for that determination and may not delegate the decision to shackle an inmate to the marshals."); Hameed v. Mann, 57 F.3d 217, 222 (2d Cir. 1995) (same); Sides v. Cherry, 609 F.3d 576, 581 (3d Cir. 2010) (same);
[114] Davidson v. Riley, 44 F.3d 1118, 1125 (2d Cir. 1995); *see also* Hameed v. Mann, 57 F.3d 217, 222 (2d Cir. 1995) ("In determining what restraints are necessary, the court cannot properly delegate that decision to guards or other prison officials but must decide that question for itself. . . . If the court has deferred entirely to those guarding the prisoner, it has failed to exercise its discretion.").
[115] Davidson v. Riley, 44 F.3d 1118, 1125 (2d Cir. 1995). In addition, the trial judge had erred by failing to conduct an evidentiary hearing on the need for restraints and failing to make any substantial effort to minimize their prejudicial effect. *Id.* at 1225-26.

and had to "hobble in leg-irons from counsel table to the bench" after each round of questioning during voir dire.[116]

Lemons and *Davidson* are particularly useful in examining the use of restraints in immigration court because they underscore the impropriety of relying on a security officer's judgment when that officer has an interest in the case. In addition, *Davidson* draws attention to the heightened impact of restraints on an unrepresented litigant, which is relevant to removal proceedings where the majority of detained noncitizens are pro se.

2. Harmless Error

While the civil cases discussed above make it clear that due process prohibits both the unnecessarily imposition of restraints at a jury trial and the delegation of decision-making authority about the need for restraints, these violations will not lead to reversal on appeal if the error is deemed harmless.[117] In deciding whether error is harmless, the reviewing court considers several factors, including "the strength of the case in favor of the prevailing party and what effect the restraints might have had given the nature of the issues and evidence involved in the trial."[118] Two situations that are particularly relevant to immigration proceedings where appellate courts have found error not to be harmless are where the dangerousness of the restrained litigant is pertinent to the substance of the case and where his or her credibility is at issue.

The issue of dangerousness arises in both excessive force and involuntary commitment cases. In *Lemons,* for example, the Seventh Circuit rejected the defendants' argument that any error regarding the use of restraints was harmless, explaining that "[t]he use of handcuffs and leg irons suggested to the jury that the plaintiff was dangerous and violent, so that whatever force the guards had used was probably necessary, and not excessive."[119] Similarly, in *Tyars*, the Ninth Circuit opined that "[t]he likelihood of prejudice inherent in exhibiting the subject of a civil commitment hearing to the jury while bound in physical restraints, when the critical question the jury must decide is whether the individual is dangerous to himself or others, is simply too great to be countenanced without at least some prior showing of necessity."[120] By contrast, in *Woods v. Thieret,* where the § 1983 action focused on living conditions in a prison, the Ninth Circuit found any error to be harmless because the central issue was unrelated to the presence of physical restraints.[121] In the immigration context, discussed further below, dangerousness is always a critical issue in bond hearings and is also often relevant to merits hearings.

Restraints can also have a negative impact on credibility assessments. In *Davidson*, which involved a § 1983 action against prison officials for violating the right of access to courts by reading legal mail, the Second Circuit reasoned that although the plaintiff's claim did not "b[ear] a relationship to either a propensity toward violence or a risk of escape, the potential for prejudice nonetheless seem[ed] to have been significant, for the verdict apparently was to turn on whether the jury would believe Davidson and his prisoner-witnesses or the [Department of

[116] Davidson, 44 F.3d at 1126.
[117] Davidson, 44 F.3d at 1124-25.
[118] Davidson, 44 F.3d at 1124-25.
[119] Lemons v. Skidmore, 985 F.2d 354, 359 (7th Cir. 1993); *see also* Maus v. Baker, 747 F.3d 926 (7th Cir. 2014) (finding that the trial court's error in failing to conceal a pretrial detainee's shackles in an excessive force case was not harmless).
[120] Tyars v. Finner, 709 F.2d 1274, 1285 (9th Cir. 1983) (remanding for the district court to address the issue of prejudice, which is analogous to harmless error).
[121] Woods v. Thieret, 5 F.3d at 249; *see also* Davidson v. Riley, 44 F.3d 1118, 1124-25 (2d Cir. 1995).

Corrections'] witnesses."[122] As the Ninth Circuit has explained, restraints increase anxiety, which may impact demeanor on the stand and therefore affect assessments of the testimony.[123] In removal proceedings, credibility is often a crucial issue, so cases like *Davidson* are helpful in assessing whether a due process violation resulted in prejudice.

B. Extension of Prohibition to Civil Proceedings Before a Judge

As in the criminal context, some states have extended the prohibition against indiscriminate shackling to civil proceedings that take place before a judge rather than a jury. For example, several states require individualized determinations of the need for restraints in involuntary commitment proceedings before a judge.[124] Furthermore, a growing number of states prohibit indiscriminate shackling during juvenile adjudications, where there is no right to a jury trial.[125] So far, twelve states have prohibited indiscriminate shackling of juveniles through case law,[126] legislation,[127] or court procedures and policies.[128] Recent legislative efforts to address this issue may reflect a growing awareness of the especially harmful impact of restraints on children and adolescents.[129] The rationale set forth in some state court decisions does not, however, depend on any unique characteristics of juveniles.

In a 1977 decision holding that a 15-year-old should not have been handcuffed at a juvenile adjudication without a showing of necessity, the Supreme Court of Illinois stressed that the possibility of prejudicing a jury is not the only reason underlying the prohibition against indiscriminate shackling; the rule also exists to protect the presumption of innocence, a person's right to appear before the court with dignity and self-respect, and an individual's ability to communicate with counsel and assist in the case.[130] Accordingly, the court concluded that an

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[122] Davidson v. Riley, 44 F.3d 1118, 1126 (2d Cir. 1995). Some courts have, however, found harmless error even when credibility was at the heart of the case. *See* Sides v. Cherry, 609 F.3d 576, 584 (3d Cir. 2010) (concluding that the error was harmless because the trial court had given a cautionary jury instruction at the beginning of the trial, but not ruling out the possibility that credibility issues could lead to a different result in other cases).

[123] Gonzales v. Pliler, 341 F.3d 897, 901 (9th Cir. 2003).

[124] *See* In re T.J.F., 248 P.3d 804 (Mont. 2011) ("we find that in an involuntary commitment proceeding before a district court sitting without a jury, there must be a showing on the record that restraints are needed before the District Court may order them."); Interest of Hoff, 830 N.W.2d 608, 612-613 (N.D. 2013) (holding that the trial court abused its discretion when it failed to independently decide whether to remove a sex offender's restraints during an involuntary commitment proceeding and instead deferred to the sheriff); Interest of F.C. III, 607 Pa. 45, 80-82, 2 S.3d 1201 (Pa. 2010) (finding that an individualized determination of the need for restraints is required at a hearing before judge regarding involuntary commitment of a minor to a drug treatment program); In re Mark P., 402 Ill.App.3d 173, 178 (Ill. 2010) ("At minimum, a respondent appearing before a judge for trial or hearing should not be shackled without good cause shown on the record.").

[125] *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[126] *See* Tiffany A v. Superior Court of L.A. Cnty., 59 Cal. Rptr. 3d 363 (Cal. Ct. App. 2007); In re Staley, 364 N.E.2d 72 ((Ill. 1977); In re R.W.S., 728 N.W.2d 326 (N.D. 2007); State ex rel. Juvenile Dep't of Multnomah Cnty. V. Millican, 906 P.2d 857 (Or. Ct. App. 1995); State v. E.J.Y., 55 P.3d 673 (Wash. Ct. Ap. 2002); *see also* Kim M. McLaurin, *Children in Chains: Indiscriminate Shackling of Juveniles*, 38 WASH. U. J.L. & POL'Y 213, 232 & n. 119 (2012) (citing state court decisions).

[127] Fla. R. Juv. P. 8. 100(b) (2011); N.C. Gen. Stat. § 7B-2402.1 (2010); N.Y. Comp. Codes R. & Regs. Tit.9, § 168.3(a) (2011); 237 P. Code § 139 (2011). Legislation is pending in Alaska, Connecticut and South Carolina [CHECK AND UPDATE]. *See* McLaurin, *supra* note 127, at n. 123.

[128] *See* Mary Berkheiser, "Unchain the Children," *Nevada Lawyer* 30 (June 2012); Amy Kingsley, "Why the Practice of Shackling Juvenile Defendants is Coming to an End," *Las Vegas City Life* (August 2012); *see* Trial Court of the Commonwealth Court Officer Policy & Procedures Manual ch. 4, § 6 (2010); In re Use of Physical Restraints on Respondent Children, No. CS-2007-01, (N.M. Sept. 19, 2007), available at http://nmsupremecourt.nmcourts.gov/rules/pdfs/comments/Comments%20on%C20Proposed520Amendments%C20toForm%10-427.pdf.

[129] McLaurin discusses the special characteristics of adolescents that make them especially vulnerable to being harmed by physical restraints. *See* McLaurin, *supra* note 126, at 227-31.

[130] In re Staley, 67 Ill.2d 33, 37 (1977).

individual should not be required to appear in restraints without a showing of necessity, "whether there is to be a bench trial or a trial by jury."[131] The court further found that concerns about courtroom security do not provide a sufficient justification for requiring restraints where there is no evidence of a threat of escape.[132]

In 2007, two California appellate courts similarly prohibited indiscriminate shackling in juvenile proceedings but adopted a lower standard than applies during a criminal jury trial.[133] In *Deshaun M.,* the court held that "while there are dangers in using unwarranted shackling at a juvenile hearing, they are not as substantial as those presented during a jury trial and a lesser showing should suffice."[134] In *Tiffany A*., the appellate court further explained that the burden remains on the government to establish the "need" for restraints and that the trial court, not law enforcement personnel, must decide whether restraints are appropriate in a given case.[135] The court also extracted two general principles from the California case law. First, the amount of "need" that the court must find to justify restraints depends on the type of proceeding.[136] Second, the court must make an individualized determination of whether restraints are necessary; restraints cannot be justified solely by someone's status in custody, lack of security personnel, or the inadequacy of the court facilities.[137] These principles are useful for considering how restraints should be handled in immigration proceedings, which share the quasi-criminal qualities of juvenile adjudications.[138]

V. Restraints in Removal Proceedings

Unlike the criminal and civil contexts discussed above, which require individualized determinations about the need for restraints during jury trials and, in at least some courts, during bench trials, restraints are indiscriminately applied to all immigration detainees during their removal proceedings. Moreover, while it is the trial judge who must make the determination about the need for restraints in criminal and other types of civil cases, it is ICE that makes this determination in removal proceedings. Both of these issues raise serious constitutional due process concerns and conflict with regulations governing the authorities of immigration judges. ICE's use of restraints in the courtroom also conflicts with its standards on the use of restraints in other contexts, such as detention and transportation, which require at least some level of individualized assessment.

A 1988 memorandum of understanding (MOU) between the EOIR and INS (now ICE) sets forth guidelines on immigration court security that are still utilized today.[139] Before that

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[131] *Id.* at 38.
[132] *Id.* at 38.
[133] *In re Deshaun M.,* 148 Cal.App.4th 1384, 56 Cal.Rptr.3d 627, 630 (2007) ("some showing of necessity for the use of physical restraints at a juvenile jurisdictional hearing should be required"); Tiffany A. v. Superior Court, 150 Cal.App.4th 1344, 59 Cal.Rptr.3d 363, 371, 373 (2007) ("any decision to shackle a minor who appears in the Juvenile Delinquency Court for a court proceeding must be based on the non-conforming conduct and behavior of that individual minor").
[134] Deshaun M., 148 Cal.App.4th 1384, 1387, 56 Cal.Rptr.3d 627, 630 (2007).
[135] Tiffany A. v. Superior Court, 150 Cal.App.4th 1344, 1357, 59 Cal.Rptr.3d 363, 371- 372 (2007).
[136] *Id.* at 1357.
[137] *Id.* at 1357-58.
[138] *See* Fatma E. Marouf, *Incompetent but Deportable: The Case For a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929, 957-59 (2014).
[139] U.S. Dept. of Justice, Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 88-9: Courtroom Security, Nov. 29, 1988, available at http://www.justice.gov/eoir/efoia/ocij/oppm88/88-9.pdf.

MOU, security in immigration courts was addressed "on an as needed basis by locality."[140] The MOU provides that ICE bears the primary responsibility of providing adequate security in courtrooms located within immigration detention facilities.[141] If an immigration judge feels that the security measures are inadequate to ensure the safety of the people in the courtroom, the judge may request ICE to upgrade the security level.[142] The judge may also adjourn a hearing if ICE fails to comply with the request for increased security.[143] If, on the other hand, the judge requests a downgrade in security, such as having restraints removed, ICE need not comply and the judge *must* commence the hearing.[144] Thus, ICE maintains the authority to make the final decision about the use of restraints. The judge's only recourse is to write to the Chief Immigration Judge after the hearing is over.[145]

The 1988 Memo does not specify how ICE should go about making determinations on the need for restraints. As discussed below, ICE has issued other standards and directives on the use of restraints, but they do not apply to the courtroom. Consequently, variations exist in ICE's practices regarding the use of restraints in different immigration courts around the country. In the absence of specific guidance, ICE officers often subject detainees to indiscriminate restraints.

A. Constitutional Concerns with Indiscriminate Use of Restraints by ICE

The Fifth Amendment Due Process Clause prohibits the deprivation of life, liberty, or property by the government without due process of law. This due process guarantee has substantive and procedural components that extend to noncitizens in removal proceedings.[146] While procedural due process ensures that the procedures followed provide a fair hearing, substantive due process prohibits the government from constraining fundamental rights, no matter how much process is provided.[147] As discussed below, the indiscriminate shackling of immigration detainees violates both substantive and procedural due process.

1. Substantive Due Process

Substantive due process protects fundamental rights that are so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed."[148] The Supreme Court has recognized that freedom from physical restraints is a fundamental right protected by substantive due process.[149] Government conduct that burdens a fundamental right is generally subject to strict scrutiny and must be narrowly tailored to serve a compelling state interest.[150] If the government conduct does not implicate a fundamental right, it receives rational basis review and will be prohibited only if it so arbitrary or egregious that it shocks the

[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] Reno v. Flores, 507 U.S. 292, 306 (1993).
[147] *Id.* at 302.
[148] Palko v. Conn., 302 U.S. 319, 325 (1937).
[149] *See* Youngberg v. Romeo, 457 U.S. 307, 316-20 (1982); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (1979).
[150] Reno v. Flores, 507 U.S. 292, 302 (1993).

conscience.[151] Conduct rises to the shocks-the-conscience level if it is "intended to injure in some way unjustifiable by any government interest."[152]

ICE's current policy of indiscriminately restraining immigration detainees during their removal proceedings implicates the fundamental right to be free of physical restraints and should be subjected to strict scrutiny. While ICE has a compelling interest in maintaining security in the courtroom, the practice of restraining detainees, without any individualized determination of risk, is not a narrowly tailored means of protecting that government interest.[153] Many detainees who pose no threat to safety are unnecessary restrained under ICE's current policy. As noted above, 40% of detainees have no criminal record and vast majority are characterized as having a "low propensity for violence."[154] When security concerns do arise, lesser restraints may be adequate to alleviate those concerns, depending on the particular case. Individualized determinations of the need for restraints would be a narrowly tailored way to protect the government's interest in maintaining a secure courtroom.

While strict scrutiny is the appropriate standard here, ICE's practice of indiscriminate shackling should be found unlawful even if a lower standard of review were applied. The Supreme Court has deviated from the strict scrutiny standard in certain types of cases involving infringements on fundamental liberty. For example, in cases involving the involuntary administration of antipsychotic drugs, the Supreme Court has applied an intermediate level of scrutiny.[155] In *Sell*, the Court held that the involuntarily administration of antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial is only permissible "if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."[156] The decision stressed that courts must consider the facts of the individual case in evaluating all components of the test, including the government's interest in prosecution.[157] If a similar standard were applied to the use of restraints, it would still require an individualized determination about the appropriateness of restraints, their physical and psychological "side effects" on the respondent, and the efficacy of less intrusive alternatives. The practice of indiscriminate shackling by no means satisfies this standard.

Courts have also veered from strict scrutiny in cases addressing the use of physical restraints during involuntary civil commitment. *Youngberg,* which set forth the standard in that context, involved an individual with profound mental retardation who alleged that the employees of the institution where he was committed had violated his constitutional rights by physically restraining him "for prolonged periods on a routine basis."[158] The Supreme Court agreed that

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[151] United States v. Salerno, 481 U.S. 739, 746 (1987).
[152] County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998).
[153] *See* Deck v. Missouri, 544 U.S. 622, 628 (2007) (describing "physical security, escape prevention, or courtroom decorum" as "essential state interests").
[154] *See* Miroff, *supra* note 11 (stating that ICE reported that only 19,864 of the 33,391 detainees in its custody on September 9, 2013 were convicted criminals); U.S. Department of Homeland Security, Immigration and Customs Enforcement, Immigration Detention Overview and Recommendations 2 (2009), available at http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.
[155] *See* Washington v. Harper, 494 U.S. 210, 221 (1990); Riggins v. Nevada, 504 U.S. 127 (1992).
[156] Sell v. U.S., 539 U.S. 166, 180-81 (2003); *see also* Zavala v. Ridge, 310 F.Supp.2d at 1076 (finding that an immigration regulation that permitted the government to stay the release of detainees upon appeal of the Immigration judge's decision granting relief violated substantive due process because "no special justification exists that outweighs the constitutionally protected interest in avoiding physical restraint").
[157] Sell v. U.S., 539 U.S. 166, 180 (2003).
[158] Youngberg v. Romeo, 457 U.S. 307, 311 (1982).

freedom from physical restraints "always has been recognized as the core of the liberty protected by the Due Process Clause."[159] Yet the Court did not apply strict scrutiny, explaining that this rigorous analysis would unduly burden the ability of states, specifically their professional employees, to administer mental health institutions.[160] Instead, the Court held that "the Constitution only requires that the courts make certain that professional judgment was in fact exercised."[161] ICE officers are not the types of professionals, like doctors or educators, whose expertise makes their decisions presumptively valid. But even under the *Youngberg* standard, ICE's policy of indiscriminate shackling is unconstitutional because officers are not exercising professional discretion in each case; rather they are following a policy of blanket shackling.

Finally, in some situations, the Supreme Court has found that government conduct implicating fundamental rights receives only rational basis review. For example, "the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is 'reasonably related to legitimate penological interests.'"[162] This ensures appropriate deference to prison officials.[163] The Court applied this reasonableness standard in *Harper,* which addressed the involuntary use of medication on a mentally ill prisoner to prevent dangerousness to self and others, as well as in *Turner,* which involved a prisoner's right to marry.[164] The issue of restraints in immigration court is easily distinguishable from these cases because civil immigration detainees are not prisoners and the restraints are being applied in the courtroom, not in a detention facility. Thus, rational basis review is not appropriate.

Yet even under rational basis review, ICE's policy of indiscriminate shackling should be rejected as arbitrary and punitive. In *Bell,* a case involving pretrial detainees, the Supreme Court explained that if a restriction or condition is "arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."[165] Thus, "loading a detainee with chains and shackles and throwing him into a dungeon" to secure his presence at trial would imply an intention to punish in violation of due process."[166] A court may "infer punitive intent from the nature of the conditions or restrictions; the court may consider whether the condition or restriction was excessive in relation to its non-punitive purpose or was employed to achieve objectives that could be accomplished by alternative methods that were less harsh or onerous."[167] The way in which ICE restrains immigration detainees for their court hearings is arguably punitive. As described in Part II above, detainees are often kept in restraints for most of the day when they are scheduled for court hearings, and they are placed in freezing, cold, dirty ICE holding cells for

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[159] Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (internal quotation marks omitted). *See* Reno v. Flores, 507 U.S. 292, 302 (1993) (stating that freedom from physical restraint is "at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

[160] Youngberg v. Romeo, 457 U.S. 307, 322 (1982).

[161] *Id.* at 321. Under *Youngberg,* "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." *Id.* at 323. The *Youngberg* standard has been applied to certain other contexts, such as the use of physical restraints in schools. *See* Society for Good Will to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239, 1245-46 (2d Cir. 1984); Heidemann v. Rother, 84 F.3d 1021, 1028 (8th Cir. 1996).

[162] Turner v. Safley, 482 U.S. 78, 89 (1987); *see also* Estate of Shabazz, 482 U.S. 342, 349 (1987).

[163] Estate of Shabazz, 482 U.S. at 349.

[164] Washington v. Harper, 494 U.S. 210 (1990); Turner v. Safley, 482 U.S. 78 (1987).

[165] Bell v. Wolfish, 441 U.S. 520, 539 (1979).

[166] Bell v. Wolfish, 441 U.S. 539 n. 20 (1979).

[167] Bell, 441 U.S. at 538-39.

hours before and after their hearings. Although these conditions may not be intended to inflict punishment, their cumulative effect is punitive.

2. Procedural Due Process

Procedural due process constrains government decisions that deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause.[168] It requires an opportunity to be heard at a meaningful time and in a meaningful manner.[169] In determining whether government action violates procedural due process, courts apply the three-part test in *Mathews v. Eldridge.*[170] This test requires the court to consider: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[171] ICE's practice of indiscriminately shackling immigration detainees raises two important procedural due process concerns. First, it deprives detained noncitizens of liberty without any type of individualized determination. Second, the 1988 MOU permits ICE, an adversarial party, to make the final decision about the need for restraints. Each of these procedural issues is analyzed under the *Mathews* test below.

a) Failure to Provide Individualized Determinations

Under the first *Mathews* factor, detained noncitizens have a strong liberty interest in being free of restraints in order to remain mentally alert and pain-free, which is necessary to participate fully in the proceedings, as well as to communicate with counsel and maintain their dignity in the courtroom.[172] These interests are also directly related to the liberty interest in not being deported.[173] Second, the risk of erroneous deprivation of these liberties is high, since restraining all detainees makes it likely that individuals who pose no threat to safety and are not a flight risk will be deprived of their liberty. Due to the cognitive and behavioral impact of restraints, discussed in Part VI below, restrained detainees are also likely to have diminished capacity to fight their cases, which may result in wrongful deportations.

Balanced against these two factors is the government's compelling interest in maintaining security in the courtroom. However, most security concerns should be addressed by individualized determinations of risk. Furthermore, restraints are not the only way to protect the government's interest in security. Criminal courts are generally secure, even though most defendants are not restrained and have more dangerous backgrounds than civil immigration detainees. Placing a bailiff in the courtroom, law enforcement officers inside and outside the courthouse, screening for weapons, and having a plan in place to respond to violent incidents are all ways to promote security without infringing on fundamental liberty interests. Weighing all

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[168] Mathews v. Eldridge, 424 U.S. 319, 332 (1976).
[169] *Id.* at 333.
[170] *Id.* at 335.
[171] *Id.* at 335.
[172] *See* Spain v. Rushen, 883 F.2d 712, 721 (9th Cir. 1989) (recognizing that restraints may impair the litigant's mental faculties, cause physical pain, impede communication with counsel, and diminish the dignity and decorum of judicial proceedings).
[173] *See*, e.g. Bridges v. Wixon, 326 U.S. 135, 154 (recognizing that deportation "visits a great hardship on the individual" and "[m]eticulous care must be exercised lest the procedure by which [a noncitizen] is deprived of that liberty not meet the standards of fairness.").

three factors, courts should find that procedural due process requires an individualized determination of the need for restraints.

b) Delegation of Decision-making Authority to ICE

The next question is whether ICE may make this individualized determination or whether the decision-maker must be the judge. Applying the same *Mathews* analysis, the respondent has a strong interest in an independent and neutral decision-maker who will fairly assess the need for restraints. ICE is an adversarial party and therefore cannot be neutral. The risk of erroneous deprivation is also high when the agency seeking deportation decides whether the respondent should be restrained; ICE has motivation to detain respondents who pose no risk simply to weaken their ability to fight their cases.

Turning to the third factor, the government has an interest in efficient assessments of safety risks. Requiring the judge, rather than ICE, to make the assessment will impose additional administrative and fiscal burdens on both the court and ICE. Immigration courts are already overburdened and underfunded, and requiring the judges to make yet another type of determination will only add to their workloads. Similarly, ICE trial attorneys will need to expend time, energy, and money in gathering and presenting evidence to justify the need for restraints.

ICE's burden is mitigated, however, because it already classifies detainees based on security risk.[174] ICE's Risk Classification Assessment system generates standardized recommendations for detention or release, bond amount, custody classification level, and community supervision level based on "a variety of forms and systems, including: criminal history, history of disciplinary infractions, possible gang involvement, and equities regarding the individual's ties to the local community."[175] This information should help assess whether a detainee presents a safety or flight risk and is therefore relevant to evaluating the need for restrains. Furthermore, the burden on both ICE and the court is not so great if the presumption is that detainees do not pose a safety or flight risk unless there is evidence indicating otherwise, which will only be in exceptional cases.

Since two of the *Mathews* factors support requiring the judge to determine the need for restraints, and the burden on ICE in presenting evidence should not be that great, procedural due process prohibits ICE from being the decision-maker. This conclusion is consistent with the cases discussed above that prohibit delegation of the judicial responsibility to determine the need for restraints to correctional officers, especially when they are an adversarial party.[176] Where judges have been allowed to delegate certain decisions to someone with a particular kind of expertise, that person must be an independent decision-maker to comport with procedural due

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[174] *See* INS Detention Standard, Detainee Classification System (2002), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/classif.pdf; ICE/DRO Detention Standard: Classification System (2008), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/classification_system.pdf; ICE, Performance Based Detention Standards, 2.2 Custody Classification System 70-89 (2011), available at https://www.ice.gov/doclib/detention-standards/2011/classification_system.pdf.

[175] U.S. Immigration and Customs Enforcement, Risk Classification Assessment (RCA) Overview, 2013 (on file with author).

[176] In other contexts as well, appellate courts have held that judges may not delegate certain types of decisions. For example, most circuits have held that the court, not a probation officer, must decide whether a defendant should receive mental health treatment. *See* Amanda Rios, Note, *Arms of the Court: Authorizing the Delegation of Sentencing Discretion to Probation Officers*, 21 CORNELL J. L. & PUB. POL'Y 431, 445-46 (2011) (citing circuit court precedents); Mark Thomson, *Who are They to Judge? The Constitutionality of Delegations by Courts to Probation Officers*, 96 MINN. L. REV. 306 (2011). Similarly, some courts have found it improper for family court judges to defer to recommendations made by mental health professionals in child custody proceedings. *See* Janet M. Bowermaster, *Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings*, 40 DUQUESNE L. REV. 265 (2002).

process. For example, in *Harper,* where the Supreme Court held that a medical professional may authorize the administration of involuntary medication to a mentally ill prisoner who poses a danger to himself or others, the Court explained that the Due Process Clause "has never been thought to require that the *neutral and detached trier of fact* be law trained or a judicial or administrative officer."[177] ICE, however, is obviously not a neutral and detached trier of fact.

c) The Issue of Prejudice

The issue of prejudice arises in determining whether a decision should be reversed based on a due process violation.[178] Efforts to enjoin ICE from shackling detainees in order to prevent a due process violation from taking place would not require any showing of prejudice, but once an individual has been ordered deported and is challenging the use of restraints on appeal, reversal requires a showing of prejudice.[179] To demonstrate prejudice, the respondent must show that the due process violation may have affected the outcome of the proceedings.[180] As civil cases such as *Lemons* and *Davidson* indicate, appellate courts have often found that a due process error involving the use of restraints is not harmless if dangerousness or credibility was a central issue in the case. Both of these issues frequently arise in immigration proceedings.

Dangerousness is a critical issue in bond hearings, where the two key issues that the judge must address are whether the noncitizen is a flight risk or a danger to the community.[181] Appearing in restraints at a bond hearing is therefore analogous to appearing in restraints at a civil rights trial about excessive force, where the dangerousness of the plaintiff-prisoner is the main issue. Dangerousness is also relevant to merits hearings, since most forms of relief from removal are discretionary and will not be granted if the judge thinks the noncitizen poses a threat to safety. In addition, dangerousness is relevant to determining the applicability of certain bars to relief. For example, noncitizens are barred from applying for asylum and withholding of removal if they have been convicted of a "particularly serious crime," which is a term of art that requires the judge to consider four factors, including "whether the type and circumstances of the crime indicate that the alien will be a danger to the community."[182]

Like dangerousness, credibility plays a critical role in most applications for relief from removal. Establishing credibility is especially important in applications for asylum, withholding of removal, and protection under the Convention Against Torture.[183] In these cases, the main evidence is usually the respondent's own testimony about any past harm and fear of future harm.

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[177] Washington v. Harper, 494 U.S. 210, 231 (1990) (emphasis added); *see also* Parham, 442 U.S. at 607-09 ("[D]ue process is not violated by use of informal, traditional medical investigative techniques.... The mode and procedure of medical diagnostic procedures is not the business of judges").

[178] *See* De Abadia-Peixoto v. U.S. Dep't of Homeland Sec., 277 F.R.D. 572, 575 (N.D. Cal. 2011) ("The premise that a due process violation is not grounds for *reversal* absent a showing of that degree of prejudice has no bearing on a plaintiff's right to seek to enjoin due process violations from occurring in the first place.") (Emphasis in original); Reid v. Donelan, -- F.Supp.2d --, 2014 WL 896747 *5 (D. Mass. 2014) (same).

[179] De Abadia-Peixoto v. U.S. Dep't of Homeland Sec., 277 F.R.D. 572, 575 (N.D. Cal. 2011); Reid v. Donelan, -- F.Supp.2d --, 2014 WL 896747 *5 (D. Mass. 2014).

[180] *See, e.g.,* Mohammed v. Gonzales, 400 F.3d 785, 793-94 (9th Cir. 2005); Dakane v. U.S. Atty. Gen., 371 F.3d 771, 775 (11th Cir. 2004); Garza-Moreno v. Gonzales, 489 F.3d 239, 341 (6th Cir. 2007); Rusu v. U.S. INS, 296 F.3d 316, 320-21 (4th Cir. 2002);

[181] *See* 8 U.S.C. § 1226(c)(2).

[182] *See* 8 U.S.C. § 1231(b)(3)(B); *Matter of Frentescu,* 18 I. & N. Dec. 244, 247 (BIA 1982).

[183] *See* Scott Rempell, *Credibility Assessments and the REAL ID Act's Amen*dments, 44 TEXAS INT'L L. J. 185 (2008); Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the REAL ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 129 (2006); Michael Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination*, 17 GEO. IMMIGR. L.J. 367, 368 (2003).

Under the REAL ID Act, immigration judges may consider a wide range of evidence in determining whether an applicant is credible, including all aspects of demeanor.[184] Thus, the judge may consider "the expression of [the respondent's] countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication."[185] Being restrained impacts many of these aspects of demeanor and may therefore influence a crucial credibility determination.[186]

B. Inconsistency with Regulations on Immigration Judges' Authority

Giving ICE final decision-making authority about the use of restraints in the courtroom not only raises serious due process concerns, but also conflicts with regulations requiring Immigration Judges to exercise "independent judgment and discretion" and take "any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of cases."[187] Federal appellate courts and the BIA have rejected improper delegation of an immigration judge's authority under these regulations to DHS in other contexts. Three examples pertain to motions to reopen for adjustment of status (the process of becoming a lawful permanent resident), motions to continue to pursue adjustment of status, and motions for administrative closure.

In *Matter of Velarde-Pacheco*, the BIA listed five factors that must be met in order for an immigration judge to grant a motion to reopen for adjustment of status. The fifth factor required that the Department of Homeland Security not oppose the motion.[188] The Second, Sixth and Ninth Circuits all disapproved of this decision, finding that it improperly took away the adjudicator's authority and gave veto power to an adversarial party, thereby also preventing any meaningful review.[189] Subsequently, the BIA clarified in *Matter of Lamus-Pava* that the fifth factor in *Velarde-Pacheco* did not give DHS veto power over a motion to reopen.[190] The BIA explained that "DHS's arguments advanced in opposition to a motion should be considered in adjudicating a motion, but they should not preclude the Immigration Judge or the Board from exercising 'independent judgment and discretion' in ruling on the motion."[191]

A few months before the BIA issued its decision in *Lamus-Pava*, it also ruled on the standard for continuing proceedings to afford a noncitizen the opportunity to apply for adjustment of status.[192] The BIA listed a variety of illustrative factors to be considered, including

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[184] REAL ID Act of 2005, 8 U.S.C. §§ 1229a(c)(4)(C), 1158.
[185] Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir. 2003); Shrestha v. Holder, 590 F.3d 1034, 1042 (9th Cir. 2010) (quoting *Mendoza Manimbao*).
[186] *See* Gonzales v. Pliler, 341 F.3d 897, 901 (9th Cir. 2003) (discussing the impact of restraints on demeanor).
[187] 8 C.F.R. 1003.10(b).
[188] In re Velarde-Pacheco, 23 I. & N. Dec. 253, 256 (BIA 2002).
[189] Melnitsenko v. Mukasey, 517 F.3d 42, 51-52 (2d Cir. 2008) (finding that the BIA failed to "justify the imposition of a mechanism by which the DHS . . . may unilaterally block a motion to reopen"); Sarr v. Gonzales, 485 F.3d 354, 363 (6th Cir. 2007) ("affording such importance to [DHS opposition] would effectively remove all authority over the granting or denial of such motions by the Board and place it solely within the hands of one of the adversarial parties to the proceedings"); Ahmed v. Mukasey, 548 F.3d 768, 772 (9th Cir. 2008) ("[a]llowing the adversarial party to a proceeding to unilaterally block a motion, for any or no reason, deprives the BIA, and by extension this court, of any meaningful review"); *but see* Bhiski v. Ashcroft, 373 F.3d 363, 371 (3d Cir. 2004) (accepting the dispositive factor in *Velarde-Pacheco*); Ramchandani v. Gonzales, 434 F.3d 337 (5th Cir. 2005) (same).
[190] Matter of Lamus-Pava, 25 I. & N. Dec. 61, 64-65 (BIA 2009).
[191] *Id.* at 65 (citing 8 C.F.R. § 1003.1(d)(1)(ii)); *see also* 8 C.F.R. 1003.10(b) ("In deciding the individual cases before them, and subject to the applicable governing standards, immigration judges shall exercise their independent judgment and discretion").
[192] Matter of Hashmi, 24 I. & N. Dec. 785, 790 (BIA 2009).

"the DHS response to the motion."[193] There, the BIA stressed that the Immigration Judge must independently evaluate the basis for DHS's position, stating: "Government opposition that is reasonable and supported by the record may warrant denial of a continuance. On the other hand, unsupported opposition does not carry much weight."[194]

More recently, in its 2012 decision in *Matter of Avetsiyan,* the BIA held that an Immigration Judge is allowed to administratively close removal proceedings over DHS's objection, reversing its previous position.[195] In reaching this conclusion, the BIA stressed that "[i]n deciding individual cases, an Immigration Judge must exercise his or her independent judgment and discretion and may take any action consistent with the Act and regulations that is appropriate and necessary for the disposition of such cases."[196] These cases support the position that the regulation requiring judges to exercise independent discretion prohibits delegation of decision-making authority to ICE.

C. Inconsistency with ICE's Standards on Use of Restraints in Other Contexts

ICE's indiscriminate use of restraints in immigration court conflicts with its national standards governing the use of restraints in detention facilities and during transportation. ICE initially operated under the former's INS's National Detention Standards, issued in 2000, and then updated these standards in 2008 and 2011, renaming them the Performance Based National Detention Standards. Since ICE has been slow to implement its new standards, different facilities are currently using different standards, but all three sets of standards require individualized determinations in applying restraints.[197] Policy memoranda issued by ICE in 2004 and 2008 likewise require individualized assessments. Only a recent 2012 Directive requiring the nearly blanket use of restraints during transportation represents a departure from this approach.

1. Detention Standards on Use of Restraints

The 2000, 2008, and 2011 standards provide that physical restraints may only be used to gain control of a detainee in a detention facility under specific circumstances. The 2000 standard allows the use of restraints where a detainee "acts violently or appears on the verge of violent action(s)" in order to prevent the detainee from harming self, others or property.[198] Similarly, the 2008 and 2011 standards permit using restraints "as a precaution against escape during transfer, for medical reasons, when directed of the medical officer; or to prevent self-injury, injury to others, or property damage."[199] The standards make it clear that restraints should never be used as a form of punishment and should be applied for the least amount of time necessary.[200] These standards also require an individualized analysis of the need for restraints, setting forth specific

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[193] *Id.* at 790
[194] *Id.* at 791.
[195] Matter of Avetisyan, 25 I. & N. Dec. 688, 694 (BIA 2012).
[196] *Id.* at 691 (citing 8 C.F.R. § 1003.10(b)).
[197] *See* Immigration and Customs Enforcement, *Fact Sheet: ICE Detention Standards* (2012), available at http://www.ice.gov/news/library/factsheets/facilities-pbnds.htm.
[198] INS, National Detention Standards [hereinafter NDS 2000], Use of Force 1 (2000), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/useoffor.pdf; *see also id.* at 5 (permitted the immediate use of restraints "to prevent the detainee from harming self or others, or from causing serious property damage").
[199] ICE, Performance-Based National Detention Standards 2008 [hereinafter "PBNDS 2008"], Use of Force and Restraints 3 (2008); ICE, Performance-Based National Detention Standards 2011 [hereinafter "PBNDS 2011"], Use of Force and Restraints 210 (2011), available at https://www.ice.gov/doclib/detention-standards/2011/use_of_force_and_restraints.pdf.
[200] NDS 2000, Use of Force 5; PBNDS 2008, Use of Force and Restraints 1, 3; PBNDS 2011, Use of Force and Restraints 208.

factors that should be considered, including "the detainee's medical/mental history; recent incident reports involving the detainee, if any; and shocks or traumas that may be contributing to the detainee's state of mind (e.g. a pending criminal prosecution or sentencing, divorce, illness, death, etc.)."[201]

Similarly, the 2000, 2008, and 2011 standards on land transportation indicate that detainees should be restrained during transport only if their "documents or behavior in transit indicate a security risk."[202] Those deemed to be security risks should be placed in the first seats behind the security screen.[203] Officers must also keep a log including the reason for using restraints, the type of restraints, and the times when the restraints are applied and removed.[204] These requirements indicate that restraints should not be used as a matter of routine but rather when an individualized analysis indicates that they are necessary.

Furthermore, the detention standards protect certain vulnerable groups. Specifically, the 2000 and 2008 transportation standards state that, as a rule, transporting officers should not handcuff women or minors, and if an exception arises, the facts and reasons must be documented.[205] The 2011 transportation standard provides that only "exigent circumstances" justify handcuffing women and minors in transit, including if "they have shown or threatened violent behavior, have a history of criminal activity, or an articulable likelihood of escape exists."[206] In addition, the 2008 standard sets forth three special classes of detainees where consultation with medical staff is required prior to the use of force or restraints: (1) pregnant detainees, where a medical professional should help determine the necessity of restraint as well as the safest method of restraint in order to protect the fetus; (2) detainees with wounds or cuts; and (3) detainees with special medical or mental health needs.[207] The 2011 standard gives more detailed instructions regarding the use of restraints on pregnant women, stating that a woman who is pregnant or recuperating after delivery may not be restrained during transport, in a detention center, or at an outside medical facility absent truly extraordinary circumstances, and a woman in active labor or delivery may never be restrained .[208]

2. ICE Memoranda on Use of Restraints

Between the 1988 Memorandum on the use of restraints in immigration court and the 2012 Directive, ICE issued at least two other memoranda on the use of restraints.[209] On July 20, 2004, ICE Acting Director Victor X. Cerda issued a memorandum entitled "Use of Restraints"

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[201] NDS 2000, Use of Force 2; PBNDS 2008, Use of Force and Restraints 9; PBNDS 2011, Use of Force and Restraints 216.
[202] NDS 2000, Transportation (Land Transportation) 7, available at http://www.ice.gov/doclib/dro/detention-standards/pdf/transp.pdf; PBNDS 2008, Transportation (by Land) 9, available at http://www.ice.gov/doclib/dro/detention-standards/pdf/transportation_by_land.pdf; PBNDS 2011, Transportation (by Land) 49, available at https://www.ice.gov/doclib/detention-standards/2011/transportation_by_land.pdf.
[203] NDS 2000, Transportation (Land Transportation) 7; PBNDS 2008, Transportation (by Land) 9; PBNDS 2011, Transportation (by Land) 49.
[204] NDS 2000, Transportation (Land Transportation) 7; PBNDS 2008, Transportation (by Land) 9; PBNDS 2011, Transportation (by Land) 49.
[205] NDS 2000, Transportation (Land Transportation) 14; PBNDS 2008, Transportation (by Land) 12.
[206] PBNDS 2011, Transportation (by Land) 53.
[207] PBNDS 2008, Use of Force and Restraints 6.
[208] PBNDS 2011, Use of Force and Restraints 213. These developments in detention standards appear related to increased attention to the harms caused by shackling pregnant prisoners. *See, e.g.,* Nelson v. Correctional Medical Services, 583 F.3d 522, 533 (8th Cir. 2009) (holding that shackling during childbirth violates the Eighth Amendment); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239, 1255-58 (2012).
[209] These memoranda are not publicly available but were obtained from counsel involved in the Massachusetts litigation challenging the indiscriminate use of restraints.

that instructs each officer to "make an assessment of the detainee's risks to the public, the escorting officer(s), himself or herself, as well as the likelihood of absconding when determining whether to use restraints."[210] The policy further provides that "[t]his assessment will include, at a minimum, a review of the detainee's criminal violations (if any), aggressive or anti-social behavior, suspected influence of alcohol or drugs, physical condition, sex, age, and medical condition."[211] Officers must also "take into consideration the nature of the assignment such as type of detainee, length of travel, destination and exposure of the individual to the public."[212] The 2004 policy therefore clearly requires individualized determinations.

Several years later, in 2008, ICE Director John P. Torres issued a memorandum regarding the "Escorting of Aliens."[213] This Memorandum prohibits the transportation of a detainee for any purpose unless an assessment has been performed in accordance with the Use of Restraints standard.[214] Escorting officers must make a determination about the need for restraints "based on an articulated reason(s)," taking into consideration "all known information of escape risks, criminal background or involvement, potential threat to national security, violence, victim of sex crimes, or medical indications to escorting officers."[215] Thus, the 2008 policy also requires an individualized assessment.

3. ICE's 2012 Directive on the Use of Restraints

Only recently did ICE adopt a policy that departs from an individualized approach to the use of restraints. In November 2012, ICE issued a directive titled "Use of Restraints" that explicitly supersedes the 2004 Memorandum. The 2012 directive "applies from the time the arrestee is encountered until processed into an ICE approved detention facility or turned over to another law enforcement agency, and to subsequent detainee transfers or transports by ERO officers."[216] Under this directive, noncitzens must be handcuffed or placed in full restraints at the time of arrest.[217] Those who are only handcuffed must be transferred to full restraints as soon as practicable.[218] Furthermore, detainees must be placed in full restraints during any subsequent transportation.[219]

In addition, the 2012 directive provides few exceptions from blanket shackling for vulnerable groups. It states that "age, size, or gender is not a valid reason for failing to handcuff an arrestee" and only permits using different types of restraints or a different position if the detainee is in an obvious state of pregnancy, has a physical disability, or has injuries that could be aggravated by standard handcuffing procedures.[220] Even "large or inflexible persons" must be restrained, using "several sets of handcuffs linked together, flex-cuffs, or other specifically

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[210] Memorandum from Victor Cerda, Acting Director of ICE, entitled "Use of Restraints" (Jul. 20, 2004).
[211] *Id.*
[212] *Id.*
[213] Memorandum by John P. Torres, Director of ICE, entitled *Update to the Detention and Deportation Officers Field Manual: Appendix 16-4, Part 2; Enforcement Standard Pertaining to the Escorting of Aliens* (Jan. 31, 2008).
[214] *Id.* at III.B.
[215] *Id.* at IV.C.
[216] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, Use of Restraints ¶ 1.2, Policy Number: ERO 111.55.1, issued and effective Nov. 19, 2012 (on file with author).
[217] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, Use of Restraints ¶ 5.1-5.2, Policy Number: ERO 111.55.1, issued and effective Nov. 19, 2012 (on file with author).
[218] *Id.* at ¶ 5.7.
[219] *Id.* at ¶ 5.10.
[220] *Id.* at ¶¶ 5.1, 5.3, 5.10.

designed flexible restraints, if necessary."[221] The 2012 Directive also limits the protections given to youth.[222] It abandons the term "minor," which includes everyone under the age of 18, and uses the term "child," which it defines as those under the age of 14, providing that children will not be restrained as long as they do not pose a threat of harm or escape.[223]

Insofar as ICE officers may be relying on the 2012 Directive to justify the practice of indiscriminately shackling detainees in immigration court, the directive does not apply to that context.[224] It covers transportation to and from the immigration court, but not the use of restraints in the courtroom itself. Furthermore, since the 2012 Directive fails to explain the departure from prior policies and cannot be reconciled with ICE's national standards on transportation, which remain in effect, ICE officers would be wise to follow the traditional approach of making individualized assessments of the need for restraints when deciding how to apply restraints in the courtroom, especially in light of recent litigation.

D. Litigation Challenging the Indiscriminate Use of Restraints

Given that ICE's practice of indiscriminately restraining detainees in immigration court raises serious constitutional concerns, conflicts with the regulations governing the authority of immigration judges, and diverges from ICE's national standards and past policies governing the use of restraints, it is not surprising that the practice has come under judicial scrutiny. This section discusses two lawsuits filed in federal district courts in California and Massachusetts, which represent the first steps towards changing ICE's approach to the use of restraints in court.

1. California Litigation

In August 2011, four detainees in removal proceedings before the San Francisco Immigration Court filed a lawsuit in the U.S. District Court for the Northern District of California challenging a district-wide practice of requiring detained noncitizens to wear metal restraints around their wrists, ankles, and waists during their hearings.[225] During master calendar hearings, detainees were also often chained together.[226] The complaint alleged that the restraints caused physical and psychological harm, impaired mental acuity and confidence, and impeded taking and passing notes, handling documents, making gestures, and communicating with counsel.[227] The plaintiffs argued that substantive and procedural due process required individualized determinations regarding the need for restraints during court appearances and sought a declaration that ICE's policy violated the Fifth Amendment Due Process Clause.[228]

The court certified a class defined as "all current and future adult immigration detainees who have or will have proceedings in immigration court in San Francisco."[229] In denying a motion to dismiss, the court rejected the defendants' objections to ripeness, their argument that

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[221] *Id.* at ¶ 5.5.
[222] U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, Policy Number: ERO 111.55.1, *Use of Restraints* ¶¶ 3.4, 5.1, 5.4 (Nov. 19, 2012) (on file with author).
[223] *Id.* at ¶¶ 3.4, 5.4.
[224] Declaration of Richard McCaffrey, Supervisory Detention and Deportation Officer, U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, ¶ 10, December 5, 2013, submitted in Reid v. Donelan, --F.Supp.2d, 2014 WL 896747 (D. Mass. 2014) (on file with author).
[225] Abadia-Peixoto v. U.S. Department of Homeland Security, 277 F.R.D. 572, 574 (N.D. Cal. 2011).
[226] *Id.* at 574.
[227] *Id.* at 574.
[228] *Id.* at 574.
[229] *Id.* at 575-77.

plaintiffs had to show the policy could not be valid under any circumstances, and the argument that *Howard* foreclosed the plaintiffs' claims.[230] The court reasoned that *Howard* "cannot be read as establishing a rule that blanket shackling is always permissible if no jury is present," explaining that "the *Howard* opinion itself reveals that the permissibility of a blanket shackling policy turns on a number of factors, of which the absence of a jury is only one."[231]

After years of discovery disputes, the parties reached a settlement agreement in April 2014 that provides detainees will not be restrained during bond hearings or merits hearings, except in emergency situations, defined as situations where the detainee becomes combative, disruptive, violent or threatening.[232] Once a detainee is restrained based on behavior, that detainee will automatically be restrained during all future hearings, unless the detainee requests a modification for medical, physical, or psychological reasons.[233] At master calendar hearings, however, detainees will appear in full restraints, although modification is permitted in exigent circumstances or due to physical, psychological or medical conditions.[234] The impact of restraints at master calendar hearings is mitigated by the requirement that ICE provide a visiting room for confidential attorney consultations before and during the hearings.[235]

2. Massachusetts Litigation

While the California case resulted in a settlement agreement, the Massachusetts case resulted in a judicial decision finding that due process requires an individualized determination of the need for restraints. The plaintiff in the Massachusetts case was a noncitizen named Mark Anthony Reid who had been taken to a bond redetermination hearing in full restraints while his appeal was pending with the BIA. He asked the immigration judge to order the restraints removed, but the judge found that ICE was solely responsible for that decision. Due to the restraints, Reid had trouble writing notes and managing his glasses. He sought a permanent injunction from the federal district court prohibiting ICE from shackling him during his hearings without an individualized determination that such restraints were necessary.[236]

In October 2013, while Reid's case was still pending, ICE's Acting Boston Field Office Director issued a new policy memorandum that required ICE officers working in that location to make individualized determinations about the need for restraints in court. The local immigration judges, however, expressed safety concerns about the new policy, which led ICE to hold it in abeyance and revert to the prior practice of blanket shackling. In March 2014, the Honorable Michael J. Posner issued a decision addressing Reid's Motion for Summary Judgment.[237] Although the court denied the motion because Reid had been released from custody and therefore could not show irreparable harm, it held that, as a general matter, due process does require some type of individualized assessment before shackling a noncitizen at a hearing.[238]

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[230] *Id.* at 575.
[231] *Id.* at 575-76 (citing United States v. Brandau, 578 F.3d 1064, 1065 (9th Cir. 2009)).
[232] *See* Class Action Settlement Agreement, *Abadia Peixoto v. U.S. Dep't of Homeland Sec*., available at http://www.justice.gov/eoir/press/2014/FINAL--SettlementAgreement-ExhibitC-Notice(ENGLISH).pdf.
[233] *Id.* The Supervisory Detention and Deportation Office ("SSDO") will make a decision on such a request, which will be documented by ICE and communicated to the detainee and/or counsel. *Id.*
[234] *Id.*
[235] *Id.*
[236] Reid v. Donelan, -- F.Supp.2d – (D. Mass. 2014), 2014 WL 896747 at *1. The plaintiff also brought a class action arguing that detainees are entitled to bond hearings after six months of detention. *Id.* at 1.
[237] *Id.* at *1.
[238] *Id.* at *4-*5.

The court found that Reid had a liberty interest in being free of restraints and applied the three-part test in *Mathews v. Eldridge.*[239] Under the first factor, the court gave great weight to Reid's interest in preserving his dignity, finding it "just as dehumanizing—and, no doubt, demoralizing—to shackle a detainee in an immigration court as it would be to shackle him in criminal court."[240] In addition, the court opined that "[t]o deny or minimize an individual's dignity in an immigration proceeding, or to treat this essential attribute of human worth as anything less than fundamental simply because an immigration proceeding is titularly civil, would be an affront to due process and entirely inconsistent with the values underlying *Deck.*"[241]

The court then balanced Reid's dignity interest against the government's compelling interest in courtroom security.[242] The court noted several safety concerns specific to the Hartford Immigration Court, including "limited officers on the floor where the immigration court is located; the logistical requirements of escorting detainees through multiple floors and public hallways; public waiting areas the detainees are escorted through; the different stationing of officers creating potential difficulties in responding to an emergency; and the public nature of the immigration proceedings."[243] The court also acknowledged the safety concerns of the immigration judges that led ICE to place the new policy on hold. Yet the court found that some type of individualized security determination is required to avoid unnecessary infringement of plaintiff's dignity interest. The third *Mathews* factor further supported this conclusion, as the court reasoned that without an individualized assessment, there is always a risk that someone who does not pose a threat to safety will be shackled.

The court then addressed whether it is ICE or the immigration judge who should make the individualized determination. In Reid's case, the court found it extraordinarily unlikely that the judge would reject ICE's recommendation for restraints, given Reid's lengthy criminal history and multiple instances of failure to appear. The court explained that "[a]lthough an impartial decision-maker may be necessary in some cases as an element of due process, the court cannot conceive of circumstances under which an Immigration Judge, in *this* case, would disregard ICE's opinion."[244]

The California and Massachusetts cases suggest that change is afoot regarding the use of restraints in removal proceedings. These changes have implications that go far beyond immigration detainees. Recognizing a due process right to individualized determinations in this context could expand conceptions of the due process protections required in all kinds of cases where the factfinder is a judge, rather than a jury. Examining empirically how restraints affect the restrained individual, as well as the judge, should further assist courts in understanding the due process implications of restraints in proceedings before a judge.

VI. COGNITIVE AND BEHAVIORAL IMPACT OF RESTRAINTS

A. Impact on Restrained Individuals

[239] *Id.* at *6
[240] *Id.* at *6.
[241] *Id.* at *6.
[242] *Id.* at *6 (quoting Deck, 544 U.S. at 629).
[243] *Id.* at *6.
[244] *Id.* at *7

Courts have long observed that restraints interfere with an individual's mental faculties and therefore impede his or her ability to participate in the proceedings, but usually no evidence is cited to support such assertions. A growing body of research in the field of embodied cognition helps explain why restraints would have this affect and suggests that the impact may be even more profound that courts have imagined. Theories of embodied cognition contend that cognitive representations are based in the brain's sensory systems, so bodily states influence our mental processes.[245] Researchers have also recently coined the term "enclothed cognition" to describe the affect of clothing on the thoughts and behavior of the person who wears it. Studies of both embodied and enclothed cognition are relevant to understanding the psychological and behavioral impact of restraints, which are worn on the body and physically constrain it.

1. Embodied Cognition

Research in embodied cognition indicates that our bodily states forge and shape our thoughts, feelings, memories, and judgments.[246] For example, studies show that the physical experience of cleaning oneself influences judgments of morality;[247] experiencing physical warmth increases feeling of interpersonal warmth;[248] walking slowly activates stereotypes of the elderly;[249] nodding one's head while listening to a persuasive message increases susceptibility to persuasion;[250] carrying a heavy clipboard increases judgments of importance;[251] smelling clean scents increases the tendency to reciprocate trust and offer charitable help;[252] and firming one's muscles helps increase willpower.[253]

Since restraints constrain the body, the most relevant studies for understanding their impact pertain to body posture. Scientists who study animal behavior have long known that there is a strong relationship between body expansiveness and power-related behavior, suggesting that the two are evolutionarily linked.[254] Across species, animals that are big or that make themselves look big act powerful.[255] Body posture has a similar effect on humans. One study found that individuals who were posed into expansive postures reported feeling more powerful, chose risker

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[245] *See* Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 ST. LOUIS U. L.J. 1185 (2010); Barbara A. Spellman and Simone Schnall, Embodied Rationality, 35 QUEEN'S L.J. 117 (2009) (arguing that the concept of embodied cognition can enhance our understanding of decisions involving risk and time, decisions about oneself, and judgments about others).

[246] *Id.* at 1190.

[247] Chen-Bo Zhong and Katie Liljenquist, *Washing Away Your Sins: Threatened Morality and Physical Cleansing*, 313 SCIENCE 1451–1452 (2006); Simone Schnall, Jennifer Benton, and Sophie Harvey, *With a Clean Conscience: Cleanliness Reduces the Severity of Moral Judgments*, 19 PSYCHOLOGICAL SCIENCE 1219–1222 (2008).

[248] Lawrence E. Williams and John A. Bargh, *Experiencing Physical Warmth Promotes Interpersonal Warmth*. 322 SCIENCE 606–607 (2008).

[249] Thoms Mussweiler (2006), *Doing is for Thinking! Stereotype Activation By Stereotypic Movements*. 17 PSYCHOLOGICAL SCIENCE 17–21 (2006).

[250] Gary L. Wells & Richard E. Petty, *The Effects of Overt Head Movements on Persuasion: Compatibility and Incompatibility of Responses*, 1 BASIC AND APPLIED SOC. PSYCHOL. 219–230 (1980).

[251] Nils B. Jostman, Daniël Lakens, & Thomas Schubert, *Weight As an Embodiment of Importance*, 20 PSYCHOLOGICAL SCIENCE, 1169–1174 (2009).

[252] Katie Liljenquist, Chen-Bo Zhong, & Adam D. Galinsky, *The Smell of Virtue: Clean Scents Promote Reciprocity and Charity*, 21 PSYCHOLOGICAL SCIENCE 381–383 (2010).

[253] Iris W. Hung and Aparna A. Labroo, *From Firm Muscles to Firm Willpower: Understanding the Role of Embodied Cognition in Self-Regulation*, 37 J. CONSUMER RESEARCH 1046 (2011).

[254] Huang at 96.

[255] *See, e.g.,* Steve L. Ellyson and John F. Dovidio, *Power, Dominance, and Nonverbal Behavior: Basic Concepts and Issues*, *in* POWER, DOMINANCE, AND NONVERBAL BEHAVIOR 1-27 (Steve L. Ellyson & John F. Dovidio, eds. 1985); Judith A. Hall, Erik J. Coats, and Lavonia Smith LeBeau, *Nonverbal Behavior and the Vertical Dimension of Social Relations: A Meta-Analysis*, 131 PSYCHOLOGICAL BULLETIN 898–924 (2005); FRANS B.M. DE WAAL, CHIMPANZEE POLITICS: SEX AND POWER AMONG APES (1982).

gambles, and experienced higher levels of testosterone and lower levels of cortisol compared with participants in constricted body postures.[256] Another study found that individuals placed in constricted postures developed a sense of learned helplessness more quickly than individuals in expansive postures.[257] In fact, some researchers contend that body posture has a direct impact on behavior, similar to physical sensations such as pain.[258] The physical sensations send messages to the parts of the brain called the thalamus and amygdala along a neural pathway that has very few synapses and therefore results in a rapid transmission from sensation to behavior.[259]

A 2010 study by Li Huang and his colleagues was the first to show that body posture affects abstract thinking as well as behavior, and that the impact of posture is even stronger than actually having a powerful role.[260] In this study, the researchers manipulated role power by randomly assigning participants the role of manager or subordinate. Managers were told that they would direct, evaluate, and reward the subordinates in a two-person puzzle task. Subordinates were told that they would follow the managers' direction, build the puzzle, and be evaluated by the managers.[261] The researchers also manipulated embodied power by placing participants in expansive or constricted postures. The expansive posture involved sitting with one arm on the armrest of a chair and the other arm on the back of a nearby chair, with the ankle of one leg resting on the thigh of the other leg and stretched beyond the edge of the chair. The constricted posture involved sitting with hands placed under the thighs, dropped shoulders, and legs together.[262] After receiving their roles and being seated in one of the postures, but before doing the puzzle, the participants engaged in a decision-making task and an abstraction task.[263]

The decision-making task involved a simulated blackjack game that required participants to decide whether they wanted to take a card. The abstraction task involved identifying pictures in a series of fragmented images. In the blackjack game, participants seated in the expansive posture took a card more often than those in the constricted posture. By contrast, neither role nor the interaction between role and posture had a statistically significant effect.[264] On the abstract thinking task, participants in the expansive posture correctly identified more pictures than participants in the constricted posture. Again, neither the effect of role nor the interaction between role and posture was statistically significant.[265] Participants in the expansive posture also reported having a greater sense of power than those in the constrictive posture during both of these tasks.[266] A separate experiment that was part of the same study similarly found that participants seated in the expansive posture took action more often than those in the constricted posture in three scenarios: deciding to speak first in a debate, leaving the site of a plane crash to find help, and joining a movement to free someone who was wrongly imprisoned.[267] The researchers concluded that the body has an intimate connection to important psychological

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[256] Dana R. Carney, Amy J.C. Cuddy, and Andy J. Yap, *Power Posing: Brief Nonverbal Displays Affect Neuroendocrine Levels and Risk Tolerance,* 21 PSYCHOLOGICAL SCIENCE 1363–1368 (2010).
[257] John H. Riskind and Carolyn C. Gotay, *Physical Posture: Could it Have Regulatory or Feedback Effects on Motivation and Emotion?* 6 MOTIVATION AND EMOTION 273–298 (1982).
[258] *See* Li Huang, Adam D. Galinsky, Deborah H. Gruenfeld, & Lucia E. Guillory, *Powerful Postures Versus Powerful Roles: Which is the Proximate Correlate of Thought and Behavior?* 22 PSYCHOLOGICAL SCIENCE 96-97 (2010).
[259] *Id.* at 97 (citing JOSEPH E. LEDOUX, THE EMOTIONAL BRAIN (1996)).
[260] Huang et al, *supra* note 258.
[261] *Id.* at 97.
[262] *Id.* at 97.
[263] *Id.* at 97.
[264] *Id.* at 98-99.
[265] *Id.* at 98-99.
[266] *Id.* at 99.
[267] *Id.* at 100.

processes and is the most direct correlate of power-related behavior, mattering more than actually having a powerful role.[268]

This study provides much guidance for understanding the impact of restraints on respondents in removal proceedings and other types of cases. The types of restraints commonly used for courtroom security constrain the human body much more than the constrictive posture in the experiment. Restraining the body with handcuffs, leg irons, and a belly chain may therefore have a significant impact on mental processes and behavior. In the immigration context, a respondent may be less likely to request relief, which, like asking for a card in the blackjack game, represents a gamble. Instead, the detainee may remain passive and take voluntary departure or a removal order. Restraints may also affect other decisions, such as whether or not to admit the factual allegations, concede the charges of deportability, and file an appeal. Furthermore, like piecing together images into a picture, immigration cases involve gathering and analyzing evidence and telling a coherent story. Understanding complex immigration laws and applying them to a particular case also requires abstract thinking skills. Since constrictive body posture interferes with such abstract thinking, restraints may well affect a respondent's ability to present his or her case.

2. Enclothed Cognition

Studies about the impact of clothing on cognitive processes similarly provide a framework for understanding the impact of restraints. Most people intuitively know that what you wear affects how others perceive you. Numerous studies confirm this, showing, for example, that women who dress in a masculine fashion during job interviews are more likely to be hired;[269] students perceive teaching assistants who wear formal attire as more intelligent than those who dress casually;[270] and defendants dressed in black are perceived as more dangerous than those wearing light clothes.[271] These studies provide relevant background for understanding the effect that seeing a defendant in restraints may have on a jury or perhaps even a judge.

What is equally important, however, is that clothing also has profound psychological and behavioral effects on the person who wears it. For example, studies have shown that wearing hoods and capes makes people more likely to administer electric shocks to others, whereas wearing a nurse's uniform makes people less likely to do so;[272] wearing a bikini makes women feel ashamed, eat less, and perform worse at math;[273] and professional sports teams that wear black uniforms are more aggressive than teams that wear other colors.[274] A recent study coined the term "enclothed cognition" to describe this phenomenon.[275] This study, which was profiled in

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[268] *Id.* at 100.
[269] Sandra M. Forsythe, *Effect of Applicant's Clothing on Interviewer's Decision to Hire*, 20 J. APPLIED SOC. PSYCHOL. 1579–1595 (1990).
[270] Tracy L. Morris, John Gorham, Stanley H. Cohen, and Drew Huffman, *Fashion in the Classroom: Effects of Attire on Student Perceptions of Instructors in College Classes*, 45 COMMUNICATION EDUCATION 135–148 (1996).
[271] Aldert Vrij, *Wearing Black Clothes: The Impact of Offenders' Clothing on Impression Formation*, 11 APPLIED COGNITIVE PSYCHOL. 47-53 (1997).
[272] Phillip G. Zimbardo, (1969), *The Human Choice: Individuation, Reason, and Order vs. Deindividuation, Impulse and Chaos*, 17 NEBRASKA SYMPOSIUM ON MOTIVATION 237–307 (1969); R.D. Johnson, L.L. Downing, *Deindividuation and Valence of Cues: Effects on Prosocial and Antisocial Behavior*, 37 J. PERSONALITY AND SOC. PSYCHOL. 1532–1538 (1979).
[273] Barbara L. Fredrickson et al., *That Swimsuit Becomes You: Sex Differences in Self-Objectification, Restrained Eating and Math Performance*, 75 J. PERSONALITY AND SOC. PSYCHOL. 269–284 (1998).
[274] Mark G. Frank and Thomas Gilovich, *The Dark Side of Self and Social Perception: Black Uniforms and Aggression in Professional Sports*, 54 J. PERSONALITY AND SOC. PSYCHOL. 74-85 (1988).
[275] Hajo Adam and Adam D. Galinsky, *Enclothed Cognition*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 918-25 (2012).

The New York Times, found that participants who wore a white lab coat, believing that it belonged to a doctor, demonstrated significant improvement in their ability to pay attention.[276] Participants who believed that the coat belonged to a painter, on the other hand, showed no such improvement. The authors theorized that wearing a piece of clothing influences psychological processes by triggering associated abstract concepts through the clothing's symbolic meaning.[277] Thus, both the physical experience of wearing the clothing--seeing it on one's body, feeling it on one's skin--and knowing its symbolic meaning are critical to enclothed cognition.

Restraints, including handcuffs and shackles, both create physical sensations and are imbued with symbolic meaning. Physically, respondents can see and feel the restraints around their hands, legs, and waists. They can also hear the clinking of the chains whenever they move, especially when they are led into the courtroom and when they approach the counsel table for their hearings. Symbolically, the types of metal chains used as restraints represent criminality, oppression, submission, and powerlessness. In the United States, chains are associated with slavery, which involved egregious forms of oppression and dehumanization. Judge Cardamone's comment in *Zuber* comparing a prisoner in chains to "a dancing bear on a lead" analogizes the restrained defendant to an animal in captivity or at a circus, images that invoke both oppression and submission.[278] Judge Posner also recognized the dehumanizing quality of restraints in *Maus*, stating, "The sight of a shackled litigant is apt to make jurors think they're dealing with a mad dog."[279] Respondents in removal proceedings are likely to be aware that chains represent powerlessness while physically seeing, feeling, and hearing the chains on their bodies. The study of enclothed cognition discussed above suggests that this combination may well influence a respondent's mental processes and generate feelings of helplessness and corresponding behaviors. In removal proceedings, helplessness may manifest as accepting deportation without exploring possible forms of relief, not making the effort to gather supporting documents for an application, or not working actively with counsel to ensure that all the relevant facts are introduced into evidence.

Published cases support this theory about the cognitive and behavioral impact of restraints. In *Spain v. Rushen*, which involved a habeas petition brought by a member of the Black Panther Party who was imprisoned at San Quentin for murder and restrained during his seventeen-month trial, the expert psychologist testified, "Spain was so depressed and pessimistic and beaten by the chains, that I don't believe he was capable of cooperating [in his defense] in a reasonable way."[280] Spain himself submitted a declaration with his habeas petition describing the effect of the restraints, stating, "I get exasperated and cannot concentrate."[281] He also filed an affidavit explaining that the restraints exacted "a severe physical and psychological strain."[282] The Ninth Circuit took note of these cognitive effects and found that "[s]hackles may impair the defendant's mental faculties."[283] The court also observed that the magistrate judge below had found that "the subject of shackles practically consumed Spain's attention and significantly detracted from his ability to prepare for his own defense."[284]

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[276] *Id.*; Sandra Blakeslee, THE NEW YORK TIMES, *Mind Games: Sometimes a White Coat Isn't Just a White Coat*, April 2, 2012.
[277] Adam & Galinsky, *supra* note 275, at 919.
[278] U.S. v. Zuber, 118 F.3d 104 (2d Cir. 1997) (Cardamone, J., concurring).
[279] Maus v. Baker, 747 F.3d 926, 927 (7th Cir. 2014).
[280] Spain v. Rushen, 883 F.2d 712, 717 (1989).
[281] *Id.* at 722.
[282] *Id.* at 722.
[283] *Id.* at 721 (citing Kennedy v. Cardwell, 487 F.2d 101, 105-06 (6th Cir. 1973), cert. denied, 416 U.S. 959 (1974)).
[284] *Id.* at 722.

3. Impact of Restraints in Other Contexts

The argument that the use of restraints in the courtroom has serious cognitive and behavioral impacts is also supported by studies on the effects of restraints in other contexts, such as in nursing homes and psychiatric hospitals, as well as studies examining acute restraint stress in experiments conducted with mice and rats. In nursing homes, common examples of restraints include chairs that prevent rising, belts or vests that secure an individual to a chair or bed, and devices that prevent moving an arm, leg, foot, or hand. Physical restraints in this context are used primarily for individuals who are at risk of falling, have motor unrest and agitated behavior, or manifest an intention to harm themselves.[285] Studies have shown that restrained residents in nursing homes are more likely to experience cognitive declines, decreased self-esteem and social engagement, increased confusion and forgetfulness, depression, humiliation, fear, anger, agitation, anxiety, and resistance to care.[286] Similarly, in psychiatric settings, the negative emotions related to the use of restraints commonly reported by patients include "anger, helplessness, powerlessness, confusion, loneliness, desolation, and humiliation."[287] The use of restraints is particularly damaging for individuals who have experienced past trauma. Women with histories of childhood sexual abuse, for example, recalled the experience of being physically restrained in a hospital as representing a reenactment of their original trauma and reported traumatic emotional reactions, such as fear, rage and anxiety.[288] Professor Elyn Saks and others have advocated allowing psychiatric patients choice among various restraint measures because "they are most likely to know their own state of mind about how various measures will affect them."[289]

Studies of acute restraint stress also shed light on the impact of restraints. Acute restraint stress is a widely used experimental model to study emotional and autonomic responses to stress. The procedure usually involves placing a mouse or rat in a container that restricts its movement. This stress model leads to autonomic, behavioral, cognitive, and neurological changes. The autonomic changes include hormonal changes, elevated blood pressure, elevated heart rate, and increased body temperature.[290] Behavioral changes include reduced exploration of the open arms

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[285] Andrea M. Berzlanovich, Jutta Schöpfer, Wolfgang Keil, *Deaths Due to Physical Restraint*, 109 DEUTSCHES ÄRZTEBLATT INT. 27 (2012).

[286] Nicholas G. Castle, *Mental Health Outcomes and Physical Restraint Use in Nursing Homes, Administration & Policy*, 33 MENTAL HEALTH AND MENTAL HEALTH SERVICES 696 (2006); Eliana S. Chaves et al., *Review of the Use of Physical Restraints and Lap Belts with Wheelchair Users*, 19 ASSISTIVE TECHNOLOGY 94 (2007); Lorraine C. Mion et al., *Effect of Situational and Clinical Variables on the Likelihood of Physicians Ordering Physical Restraints*, 58 J. AM. GERIATRIC SOC. 1279, 1287 (2010); Sarah Mott et al., *Physical and Chemical Restraints in Acute Care: Their Potential Impact on the Rehabilitation of Older People*, 11 INT'L J. NURSING PRACTICE 85 (2005).

[287] Raija Kontio et al., *Seclusion and Restraint in Psychiatry: Patients' Experiences and Practical Suggestions on How to Improve Practices and Use Alternatives, Perspectives in Psychiatric Care*, 48 PERSPECTIVE IN PSYCHIATRIC CARE 16, 17 (2012) (citing Tieti Hoekstra et al., *Seclusion: The Inside Story*, 11 J. PSYCHIATRIC AND MENTAL HEALTH NURSING 276 (2004)); *see also* Sharon R. Aschen, *Restraints: Does Position Make a Difference*, 16 ISSUES MENTAL HEALTH NURSING 87, 90 (1995) (stating that the feeling of powerlessness was a "main objection" to the use of restraints).

[288] R. Gallop, E. McKay, M. Guha M, and P. Khan, *The Experience of Hospitalization and Restraint of Women Who Have a History of Childhood Sexual Abuse*, 20 HEALTH CARE FOR WOMEN INT'L 401 (1999).

[289] Elyn R. Saks, Note, The Use of Mechanical Restraints in Psychiatric Hospitals, 95 YALE L.J. 1836, 1853 (1986); *see also* Zoe Sussman, Note, *Mechanical Restraints: Is This Your Idea of Therapy?* 21 CAL. REV. L. & SOC. JUST. 109, 124 (2012).

[290] *See, e.g.,* Cristiane Busnardo et al., *Paraventricular Nucleus Modulates Autonomic and Neuroendocrine Responses to Acute Restraint Stress in Rats*, 158 AUTONOMIC NEUROSCIENCE 51 (2010) (discussing hormonal changes); Rodrigo F. Tavares and Fernando M. Corrêa, *Role of the Medial Prefrontal Cortex in Cardiovascular Responses to Acute Restraint in Rats*,142 NEUROSCIENCE 231 (2006) (describing changes in heart rate); Takao Kubo et al., *The Lateral Septal Area is Involved in Mediation of Immobilization Stress Induced Blood Pressure Increase in Rats*, 318 NEUROSCIENCE LETTERS 25 (2002) (describing changes in blood pressure); Daniel M. Vianna and Pascal Carrive, *Changes in Cutaneous and Body Temperature During and*

of a maze,[291] reduced exploratory activity in an open field,[292] increased immobility in a forced swimming test,[293] and enhanced fear conditioning.[294] Cognitive and neurological changes include anxiety, depression, fear, impaired memory, and dendritic atrophy.[295] While the impact of restraints will obviously depend on the type of restraint used and its duration, the common themes that emerge across various contexts is that restraints affect both thoughts and behavior, generally resulting in feelings of powerlessness, impairing cognition, and impeding action. As discussed below, restraints may also have a significant impact on the judge's perceptions of the restrained individual.

B. Impact on Judges

Courts have readily accepted the idea that restraints prejudice the jury, but they generally assume that judges are immune to such prejudice.[296] This assumption could be based on several factors, which are rarely articulated. To begin with, judges are legally trained and have professional experience in making decisions, which distinguishes them from laypeople. Judges may even be more intelligent, on average, than laypeople. Judges also have repeated exposure to similar types of decision-making tasks, which may improve their performance, at least where there is some type of feedback in the form of appellate review.[297] Furthermore, judges usually need to state the rationale for their decisions, which requires deliberative thinking.[298] Finally, judges, unlike jurors, are held individually accountable for their decisions.[299] Unfortunately, there are no empirical studies examining the impact of restraints on either juries or judges to test whether the assumptions made about either group are true. Judge Posner has therefore critiqued "[t]he speculative nature of the inquiry into prejudice" in these types of cases.[300]

After Conditioned Fear to Context in the Rat, 21 EUROPEAN J. NEUROSCIENCE 2505 (2005) (describing changes in body temperature).

[291] Claudia M. Padovan et al., *Behavioral Effects in the Elevated Plus Maze of an NMDA Antagonist Injected into the Dorsal Hippocampus: Influence of Restraint Stress*, 67 PHARMACOLOGY BIOCHEMISTRY AND BEHAVIOR 325 (2000); Francisco S. Guimarães et al., *Hippocampal 5-HT Receptors and Consolidation of Stressful Memories*, 58 BEHAVIOURAL BRAIN RESEARCH 133 (1993).

[292] Guy A. Kennett et al., *Enhancement of Some 5-HT-dependent Behavioural Responses Following Repeated Immobilization in Rats*, 330 BRAIN RESEARCH 253 (1985); Guy A. Kennett et al., *Antidepressant-Like Action of 5-HT1A Agonists and Conventional Antidepressants in an Animal Model of Depression*, 134 EUROPEAN J. PHARMACOLOGY 265 (1987); S. Mechiel Korte and Sietse F. De Boer, *A Robust Animal Model of State Anxiety: Fear-Potentiated Behaviour in the Elevated Plus-Maze*, 463 EUROPEAN J. PHARMACOLOGY 163 (2003).

[293] S. Sevgi, Mehmet Ozek, and Lutfiye Eroglu, *L-NAME Prevents Anxiety-Like and Depression-Like Behavior in Rats Exposed to Restraint Stress*, 28 METHODS AND FINDINGS IN EXPERIMENTAL & CLINICAL PHARMACOLOGY 95 (2006).

[294] Cheryl D. Conrad et al., *Repeated Stress Facilitates Fear Conditioning Independently Causing Hippocampal CA3 Dendritic Atrophy*, 113 BEHAVIORAL NEUROSCIENCE 902 (1999).

[295] *Id.*; *see also* Guimarães et al., *supra* note 291; Sevgi, *supra* note 293.

[296] *See*, e.g., U.S. v. Zuber, 118 F.3d 101 (2d Cir. 1997); U.S. v. Howard, 480 F.3d 1005, 1012 (9th Cir. 2007).

[297] *See* Erica Beecher-Monas, *Heuristics, Biases, and the Importance of Gatekeeping*, 2003 MICH. ST. L. REV. 987, 1002 (2003); Christopher Jepson et al., *Inductive Reasoning: Competence or Skill?*, 6 BEHAV. & BRAIN SCI. 494, 498 (1983) (discussing studies indicating that training in reasoning improves performance).

[298] Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV 1, 36-38 (2007).

[299] Beecher-Monas, *supra* note 297, at 1002.

[300] Stephenson v. Wilson, 619 F.3d 664, 673 (7th Cir. 2010) (Posner, J.) ("There are rigorous empirical studies of jury behavior . . . But no studies that the parties have cited or that we have found address the impact of visible restraints on jury deliberations.") The opinion cites the following empirical studies of jury behavior: Jeffrey S. Neuschatz et al., *The Effect of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making,* 32 LAW & HUMAN BEHAVIOR 137 (2007); Dennis J. Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMPIRICAL L. STUD. 273 (2007); Theodore Eisenberg et al., *Judge–Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's* The American Jury, 2 J. EMPIRICAL L. STUD. 171 (2005); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998); Theodore Eisenberg & Martin T. Wells, *Deadline Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L.

Although this Article does not supply the missing empirical evidence on the impact of restraints, it draws on various studies of judicial behavior to theorize why the sight of shackles is likely to have a prejudicial impact on the judge. The Article contends that even though judges may be less prejudiced than jurors, any amount of prejudice is relevant to the due process analysis. Furthermore, immigration judges are particularly susceptible to being prejudiced by the sight of restraints given the conditions and manner in which they must render decisions.

1. Overconfidence

Courts that assume judges are not prejudiced by the sight of a shackled litigant may be demonstrating overconfidence in judicial objectivity. Such overconfidence, which is also a heuristic known as "egocentric bias," has been studied among real judges. Professor Theodore Eisenberg, for example, found that bankruptcy judges were overconfident about how fairly they treat the attorneys who appear before them.[301] Jeffrey Rachlinski, Chris Guthrie, and Andrew Wistrich also found evidence of overconfidence among the judiciary. One of their studies showed that federal magistrate judges exhibited strong egocentric bias regarding the likelihood of being overturned on appeal.[302] Another study found that administrative law judges displayed overconfidence in their ability to avoid racial prejudice in decision-making relative to other judges; 97% of the judges placed themselves in the top half and 50% placed themselves in the top quartile, while not a single judge placed herself in the bottom quartile.[303] These studies demonstrate that judges tend to overestimate the fairness and accuracy of their decisions, which suggests good reason to be cautious about relying on judges' own estimations of their ability to remain impartial at the sight of a shackled litigant.[304]

Assuming that the sight of restraints does not prejudice a judge may not only ignore existing biases but may actually exacerbate them. Believing oneself to be objective makes one more susceptible to act on implicit biases.[305] For example, one experiment found that individuals primed to think of themselves as objective evaluated male job candidates higher than female candidates, whereas a control group that was not primed in this manner treated them the same.[306] Doubting one's own objectivity therefore represents the first step towards breaking the link between implicit bias and behavior.[307] Doubt also increases motivation to be fair.[308] Trainings with the judiciary on implicit bias educate judges about unconscious forms of prejudice to instill doubt in objectivity and increase motivation to be fair. After going through such trainings, judges are more likely to report that implicit biases can affect their behavior.[309]

REV. 1 (1993); *see also* Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993) (Easterbrook, J.) ("social science has challenged may premises of the jury system").

[301] Theodore Eisenberg, *Differing Perceptions of Attorneys Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 985 (1994).

[302] Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 814 (2001).

[303] See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?,* 84 NOTRE DAME L. REV. 1195, 1225 (2009); *see also* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The Hidden Judiciary: An Empirical Examination of Executive Branch Justice*, 58 DUKE L. J. 1477, 1519 (2009).

[304] Rachlinski et al., *supra* note 303, at 1226.

[305] *See* Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORG. BEHAV. & HUM. DECISION PROCESSES 207, 210-11 (2007).

[306] *Id.*

[307] Jerry Kang et al, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1172-73 (2012).

[308] *Id.* at 1174-75.

[309] *Id.* at 1175; *see also* Pamela M. Casey et al., Nat'l Ctr. for State Courts, *Helping Courts Address Implicit Bias: Resources for Education* 12 fig. 3 (2012), available at http://www.ncsc.org/IBReport (finding that 90% of the judges in California and 97% of the judges in North Dakota reported they would apply the training to their work).

2. The Representativeness Heuristic

The representative heuristic refers to how people tend to base their judgment about whether someone fits into a given category on the degree to which that person is representative of the category.[310] This leads people to place too much weight on whether the evidence matches their mental picture of a particular category.[311] In other words, people tend to "reason by anecdote and stereotype rather than through the use of group-based knowledge."[312] Legal scholars have long argued that the representativeness heuristic may lead judges and juries to convict certain defendants and acquit others.[313] For example, Russell Korobkin and Thomas Ulen have argued that "[u]sing the representativeness heuristic, many jurors are likely to conclude that because the defendant has the appearance of a criminal (in that he has a felony conviction), he therefore must have committed the crime for which he is charged."[314] Conversely, Gregory Mitchell observes, "when considering whether to convict a small, elderly woman accused of committing a violent crime, a juror might intuitively compare this woman to the juror's image of a violent criminal and resist inculpatory evidence because the defendant is not representative of this category."[315]

Physical appearance, mannerisms, personal history, and economic, social, and racial background may all be taken as evidence of guilt when consistent with stereotypes of guilty people, or they may be taken as evidence of innocence when consistent with stereotypes of innocent people.[316] In fact, studies have shown that juries are more lenient toward an attractive defendant, than an unattractive one, which reflects the notion that beauty is representative of innocence and ugliness is representative of evil.[317] Since restraints are representative of danger and criminality, the sight of a restrained litigant may lead fact-finders to infer guilt.

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[310] *See* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?* 79 OR. L. REV. 61 (2000); Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 84-87, 98 (Daniel Kahneman, Paul Slovic & Amos Tversky eds. 1982) (explaining that, due to the representativeness heuristic, a jury may fail to understand that the event, "the defendant left the scene of the crime," must be more likely than the event, "the defendant left the scene of the crime for fear of being accused of murder").

[311] Chris William Sanchirico, Evidence, Procedure, and the Upside of Cognitive Error, 57 STAN. L. REV. 291 295 (2004); *see also* Nancy Leong, *Improving Rights*, 100 VA. L. REV. 377, 406 (2014) (arguing that since Fourth Amendment violations are rarely alleged in Section 1983 lawsuits for money damages, but commonly alleged in criminal proceedings, "the prevailing prototypical individual criminal defendant--one not entitled to exclusion as a remedy--will trump even relatively uncontroversial background data in judges' minds").

[312] Slobogin, *supra* note 313.

[313] *See, e.g.,* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 528 (1983) (explaining that a trier of fact may improperly employ the representativeness heuristic in finding that a defendant's economic, social, ethnic and racial background, along with past criminal acts, fit the stereotype of a criminal); Elizabeth Kessler, *Pattern of Sexual Conduct Evidence and Present Consent: Limiting the Admissibility of Sexual History Evidence in Rape Prosecutions*, 14 WOMEN'S RIGHTS. L. REP. 79, 93-96 (1992) (arguing that the representativeness heuristic will lead juries to overreact to evidence of a rape victim's sexual history, thereby justifying suppression of it); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 403-04 (1999) (arguing that the representativeness heuristic makes it difficult for finders of fact to "maintain allegiance to high-minded constitutional values" during criminal trials).

[314] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumptions from Law and Economics*, 88 CAL. L. REV. 1051, 1087 (2000); *see also* James S. Liebman, Shawn Blackburn, David Mattern, and Jonathan Waisnor, *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 IOWA L. REV. 577, 665 (2013) (explaining that, due to the representativeness heuristic, a "defendant's prior record and the scenario itself cast the defendant as someone who resembles a criminal, obscuring the base rate of other possible suspects").

[315] Gregory Mitchell, *Mapping Evidence Law*, 2003 MICH. ST. L. REV. 1065, 1070-71 (2003).

[316] *See* Gold, *supra* note 313; Kessler, *supra* note 313; Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 805 (2001) (describing how the representativeness heuristic leads people to take a defendant's nervous and shifty behavior as evidence of guilt whereas the appearance of ease is taken as evidence of innocence).

[317] *See* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 679 (2001) (citing mock jury studies by R.R. Izzet & W. Leginski, *Group Discussion and the Influence of*

A 2001 study by Professors Guthrie, Rachlinski, and Wistrich conducted with 167 federal magistrate judges found that the judges did, in fact, exhibit representativeness bias, along with several other heuristic biases.[318] Only 40% of the judges in the study chose the correct answer on a task designed to test for representativeness bias, and the vast majority of those who got it wrong tended to pick the most erroneous answer, the one that would be reached by relying on intuitive thinking.[319] However, despite the large number of errors made by the judges, they still performed much better at the task than other types of experts.[320] For example, a similar experiment conducted with doctors found that only 18% of the doctors selected the correct answer.[321] These results indicate that legal training or experience on the bench may well give judges an advantage in counteracting the representativeness bias. A study finding that graduate training in law reduces the likelihood of committing the representativeness heuristic further supports this theory.[322] Overall, these studies suggest that judges are susceptible to being biased by the sight of shackles, but the prejudicial effect may be less than on jurors.

3. Intuitive vs. Deliberative Thinking

In a separate study that explored how judges think and make decisions, Professors Rachlinski, Guthrie, and Wistrich gave over two hundred trial judges a Cognitive Reflection Test (CRT).[323] The CRT involves just three questions designed to distinguish intuitive from deliberative processing.[324] While the test measures some component of intelligence, it more specifically measures "the capability and willingness to think deliberatively to solve a problem when relying on intuition would be misleading."[325] The authors were interested in examining whether "judges' education, intelligence, and on-the-job training as professional decision makers might distinguish them from most of the rest of the population."[326] The results showed that the judges used a predominantly intuitive approach.[327] Their average score on the test was slightly higher than the average of students at the University of Michigan and slightly lower than the average of students at Harvard.[328] About one-third of the judges failed to answer any of the questions correctly, one-third answered just one correctly, less than one-quarter answered two

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Defendant Characteristics in a Simulated Jury Setting, 93 J. SOC. PSYCHOL. 271 (1974)); Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 714-15 (1996).

[318] Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787-815 (2001) (finding evidence of anchoring, framing, representativeness, and hindsight bias among the judges); *see also* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1256-57 (2006) (finding, based on a study involving 113 bankruptcy judges, that these specialists were susceptible to anchoring and framing biases and that more experienced judges performed no better than less experienced ones, indicating that more time on the bench does not protect against psychological influences).

[319] Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 809-10 (2001).

[320] *Id.* at 818.

[321] *Id.* at 818 (citing Ward Casscells, Arno Schoenberger, & Thomas B. Graboy, *Interpretations by Physicians of Clinical Laboratory Results*, 299 NEW ENG. J. MED. 999, 999-1000 (1978) (finding that 18% of doctors facing a nearly identical problem in the medical context answered correctly)).

[322] *See* Darrin R. Lehman, Richard O. Lempert, & Richard E. Nisbett, *The Effects of Graduate Training on Reasoning*, 43 AM. PSYCHOL. 431, 440 (1988) (finding that graduate training in law reduces the likelihood of committing the inverse fallacy, which is a form of the representativeness heuristic).

[323] Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 10, 13, 17 (2007).

[324] *Id.* at 10.

[325] *Id.* at 11.

[326] *Id.* at 13.

[327] *Id.* at 19.

[328] *Id.* at 14.

correctly, and only one-seventh answered all three correctly.[329] The incorrect answers that the judges selected tended to be the intuitive ones.[330] These results again suggest that judges may be more deliberative than the average layperson, but they still rely frequently on intuition.

4. Implicit Consideration of Irrelevant Facts

Related to these studies examining judges' cognitive processes are studies exploring whether judges are susceptible to implicit racial biases. One study found that trial court judges exhibited strong implicit attitudes favoring Whites over Blacks, as measured by the Implicit Association Test (IAT).[331] The authors attempted to examine the influence of this bias on decisionmaking by giving the judges three different vignettes and asking their views on questions such as the likelihood of a defendant's recidivism and the recommended verdict.[332] They found that judges who had a higher degree of implicit bias against Blacks were harsher on defendants when primed with words designed to trigger the social category African American, whereas judges who implicitly favored Blacks were more lenient with defendants after being primed with such words, suggesting that implicit biases influenced judicial decisions.[333]

In general, however, without taking into account how the judges scored on the IAT, the primes did not prompt harsher responses from judges.[334] This finding was different from the results of a similar study conducted with laypersons, which found that such primes prompted harsher responses across the board.[335] Specifically, when researchers Sandra Graham and Brian Lowery subliminally primed police officers and juvenile probation officers with words such as "Harlem" or "dreadlocks," the officers recommended harsher sentences.[336] These studies once again indicate that implicit biases do affect judicial behavior, but not always to the same extent that they affect the behavior of non-judges.

Judicial susceptibility to implicitly considering irrelevant facts such as race has also been documented in a number of other contexts. For example, studies have shown that bail determinations are influenced by race.[337] One study found that judges were 15% more likely to require African American defendants to post bail than White defendants, even though African Americans were less likely to flee before their court date.[338] Similarly, race, gender, income, and education appear to influence sentencing decisions.[339] Nationality has also been shown to influence judicial decisions, as U.S. citizen offenders "receive shorter sentences for most crimes, are less likely to be incarcerated, are more likely to receive downward departures, and typically

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[329] *Id.* at 18.
[330] *Id.* at 16.
[331] See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?,* 84 NOTRE DAME L. REV. 1195, 1210 (2009).
[332] See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?,* 84 NOTRE DAME L. REV. 1195, 1210 (2009).
[333] Rachlinski, *supra* note 331, at 1215.
[334] Rachlinski, *supra* note 331, at 1216.
[335] *Id.* at 1217; Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 Law & Hum. Behav. 483, 493-94, 496 (2004).
[336] Graham & Lowery, *supra* note 335, at 493-94, 496.
[337] Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination*, *in* BAIL SETTING, IN PERVASIVE PREJUDICE? 233, 236-37 (Ian Ayres ed., 2001).
[338] MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 207 tbl.7.3, 231 tbl.7.6 (1979).
[339] See, e.g. David B. Mustard, Racial, *Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 312 (finding large disparities in sentences across offense types on the basis of race, gender, education, income, and citizenship, even after controlling for numerous factors); *see also id.* at 286-88 n. 1-19 (citing other studies discussing disparities in sentencing).

receive larger downward departures than noncitizens."[340] These studies all undercut the notion that judges are immune from considering legally irrelevant facts. Thus, although restraints, like race, are legally irrelevant, judges may unconsciously consider them in making decisions.

5. Implicit Consideration of Inadmissible Evidence

Studies examining whether judges can ignore inadmissible evidence are similarly relevant to the question of whether judges are prejudiced by sight of a litigant in restraints. Unfortunately, there are few such studies. One study from 1994 found that judges were unable to disregard evidence that a tort defendant had undertaken remedial measures, even when told that a prior judge had found that evidence inadmissible.[341] The study further found that the judges' response to the inadmissible evidence was similar to that of jury-eligible adults.[342] A more recent study involving 252 judges concluded that judges often cannot ignore information they know, but they are better able to do so in some situations than others.[343] The researchers gave the judges seven scenarios that were designed to test the ability to disregard certain types of inadmissible evidence.[344] In five of the scenarios, the judges had difficulty disregarding the information, whereas in two of the scenarios, the judges managed to ignore the inadmissible evidence.[345] The authors found that these results defied easy explanation, but suggested that judges may be worse at ignoring inadmissible information when making factual determinations, which are less likely to be scrutinized on appeal than legal determinations.[346] Thus, in proceedings where appeals are rare, like immigration proceedings, judges may be particularly susceptible to unconsciously considering inadmissible evidence.[347]

In addition, two studies conducted with non-judges found that the effect of inadmissible evidence is moderated by race.[348] One study tested the impact of incriminating wiretap evidence on conviction rates of Black and White defendants in a simulated criminal trial.[349] When the participants were told that the wiretap evidence was admissible and could be considered, there was no difference in conviction rates whether the defendant was White or Black.[350] But when subjects were told the wiretap evidence was inadmissible and should be disregarded, they were harsher on the Black defendant than the White defendant.[351] Thus, when subjects could justify convicting the Black defendant on nonracial grounds (i.e. not letting a guilty person go free), they did so, even though the conviction was based on inadmissible evidence.[352] The study also

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[340] Mustard, *supra* note 339, at 312.
[341] Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effects of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994).
[342] Landsman & Rakos, *supra* note 341, at 125.
[343] Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1279-80 (2005).
[344] *Id.* at 1282-83.
[345] The judges had difficulty ignoring information disclosed during a settlement conference, a conversation protected by attorney-client privilege, the prior sexual history of an alleged rape victim, the prior criminal convictions of a plaintiff, and information on which the government had promised not to rely at sentencing. *Id.* at 1285-1312. However, the judges were able to ignore a criminal confession obtained in violation of a defendant's right to counsel and the outcome of a search when determining whether there was probable cause. *Id.* at 1313-1322.
[346] *Id.* at 1323-24.
[347] *See infra* Part VI.C (discussing the special susceptibility of immigration judges).
[348] *See* James D. Johnson et al., *Justice is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY AND SOC. PSYCHOL. BULLETIN 893, 896 (1995).
[349] *Id.* at 896.
[350] *Id.* at 896.
[351] *Id.* at 896.
[352] *Id.* at 897.

found that participants reported being less affected by the inadmissible evidence when the defendant was Black.[353] This finding is consistent with research showing that people believe they are less influenced by information consistent with previously held expectations.[354] Since the participants may have expected Black male defendants to be guilty based on stereotypes, they underestimated the effects that the inadmissible evidence had on their judgments.[355]

A British study similarly found that the effects of DNA evidence varied based on the race of the defendant.[356] The study involved White participants who read a legal scenario involving a Black or White defendant, which included incriminating DNA evidence that was described as 98.5% accurate. Afterwards, the participants were asked to provide ratings about guilt, sentencing recommendations, the likelihood that the defendant would reoffend, and the likelihood of rehabilitation. When the participants were instructed to disregard the DNA evidence because it was inadmissible, they rated the Black defendant as more guilty than the White defendant, recommended longer sentences to the Black defendant, and rated the Black defendant as more likely to re-offend and less likely to be rehabilitated. Furthermore, the participants tended to judge Black defendants more harshly when the incriminating evidence was inadmissible than when it was admissible.[357] The authors proposed that certain thoughts may become more accessible as an ironic consequence of trying to suppress them, citing prior research showing that people who are told to suppress stereotypic thoughts about Blacks exhibit a "rebound effect" that makes them more likely to rely on those stereotypes.[358]

The impact of race on the ability to ignore inadmissible evidence is especially relevant to removal proceedings where most respondents are racial or ethnic minorities, the majority being Latino. The studies above suggest that it may be harder for immigration judges to ignore restraints when the respondent is a person of color. In addition, judges may be less aware of the influence that restraints have on them when their decisions are consistent with previously held stereotypes about immigrants from certain racial or ethnic groups, and any attempts to suppress those stereotypes may simply amplify them.

6. Misremembering Facts Due to Stereotypes

Compounding these racial effects, Professor Justin Levinson has argued that judges and jurors misremember case facts in racially biased ways, which impacts case outcomes.[359] His study, which was conducted with undergraduate students rather than actual judges, found that the participants were more likely to remember aggressive facts in a story when the actor was African American than when the actor was Caucasian.[360] Specifically, when participants read a story about an African-American male named Tyronne, they remembered eighty percent of the facts

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[353] *Id.* at 897.
[354] *Id.* at 897
[355] *Id.* at 897.
[356] Gordon Hodson et al., *Adverse Racism in Britain: The Use of Inadmissible Evidence in Legal Decisions*, 35 EUR. J. SOC. PSYCHOL. 437 (2005).
[357] *Id.* at 445.
[358] *Id.* at 445 (citing Gordon Hodson and John F. Dovidio, *Racial Prejudice As a Moderator of Stereotype Rebound: A Conceptual Replication*, 25 REPRESENTATIVE RESEARCH IN SOC. PSYCHOL. 1 (2001); C. Neil Macrae et al., *Out of Mind But Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY AND SOC. PSYCHOL. 808 (1994); and Margo Monteith et al., *Consequences of Stereotype Suppression: Stereotypes on AND Not on the Rebound*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 355 (1998)).
[359] Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, (2007).
[360] *Id.* at 398-99.

accurately relating to his aggressive actions, but when they read the same story about a Caucasian named William, they recalled less than seventy percent of these aggressive facts.[361] This study is consistent with research showing that people often recall stereotype-consistent information more easily than stereotype-inconsistent information.[362] Thus, stereotypes drive the ways in which people misremember facts. Since restraints are stereotypically associated with criminality and dangerousness, the sight of a restrained litigant may lead a judge to unconsciously misremember facts in a manner that has a negative impact on the detainee's case.

C. The Special Case of Immigration Judges

Immigration Judges are especially susceptible to acting on cognitive shortcuts and implicit biases because of the difficult conditions in which they work.[363] The conditions of decision-making play a critical role in the behavioral expression of implicit biases by either promoting or impeding deliberative thinking.[364] Professor Guthrie and his colleagues point out in *Blinking on the Bench* how judges may be induced to think deliberatively by taking time to make decisions, writing opinions, and receiving feedback.[365] Immigration judges have none of these luxuries. They carry enormous caseloads and normally issue oral decisions as soon as a merits hearing is over. Written decisions are rare, even in complex cases involving difficult legal issues. Feedback is also uncommon, since less than 10% of Immigration Judge decisions are appealed to the BIA, and only about 25% of BIA decisions are appealed to the federal courts.[366]

A single Immigration Judge handles, on average, 1,500 cases per year, which is over three times the average caseload of federal judges.[367] In Houston, one of the busiest immigration courts, six judges have about 6,000 cases each.[368] An article published in *The Washington Post* described a judge on the Arlington Immigration Court who had to decide 26 cases before lunch, which meant spending just seven minutes per case.[369] Lawyers began calling this schedule the "rocket docket."[370] Making matters worse, immigration judges have little support staff to help manage these huge caseloads, and three or more judges often share a single law clerk.[371]

Consequently, Immigration Judges suffer from extremely high levels of stress and burnout. According to a 2007 survey of Immigration Judges by Dr. Stuart Lustig, M.D., M.P.H., and his colleagues, immigration judges found the job "impossibly stressful" and "reported more burnout than any other group of professionals to whom the [Copenhagen Burnout Inventory] had been administered, including prison wardens and physicians in busy hospitals."[372] Immigration judges complained about the amount of work, the constant pressure to complete cases, the

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[361] *Id.* at 399.
[362] *Id.* at 376-77 (citing studies).
[363] This argument was discussed in detail in an earlier article, Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417 (2011).
[364] Kang et al, *supra note* 307, at 1175; *see also* Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 35-42 (2007).
[365] Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 33-40 (2007).
[366] Marouf, *supra* note 363, at 440-41.
[367] Daniel Costa, Economic Policy Institute, *Overloaded Immigration Courts: With Too Few Judges, Hundreds of Thousands of Immigrants Wait Nearly Two Years for a Hearing*, July 24, 2014, available at http://www.epi.org/publication/immigration-court-caseload-skyrocketing/.
[368] Laura Wides-Munoz, *Nearly Half of Immigration Judges Ready to Retire*, ASSOCIATED PRESS, Dec. 22, 2013.
[369] Eli Saslow*, In a Crowded Immigration Court, Seven Minutes to Decide a Family's Future*, WASHINGTON POST Feb. 2, 2014.
[370] *Id.*
[371] Marouf, *supra* note 363, at 433.
[372] *See* Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L. J. 57, 60 (2008).

extemporaneous nature of oral decisions, and the denial of access to transcripts.[373] One judge succinctly stated, "There is not enough time to think."[374] Not surprisingly, Judges reported low motivation, depression, and exhaustion; they also demonstrated significant symptoms of secondary traumatic stress.[375] One judge described the job as a "factory assembly line" while another compared it to the "drip-drip-drip of Chinese water torture"[376]

These conditions and emotions all encourage reliance on intuition, rather than conscious, deliberative thought, which takes more time and energy. When humans make judgments under pressure, they tend rely more on stereotypes, consider less information and fewer kinds of information, use the information in a shallower way, give more weight to negative information, and make less accurate decisions.[377] Feeling tired, distracted, or rushed also increases the chance of responding based on automatic impulses. The less motivation an individual has, the harder it becomes to suppress implicit biases.[378] Thus, the general state of immigration judges paints a dire picture for making deliberative and objective judgments.

The types of decisions that Immigration Judges make only exacerbate this situation. Many decisions are discretionary, requiring minimal justification. For example, decisions about whether to grant applications such as asylum and cancellation of removal or certain types of waivers are all discretionary. When judges are exercising discretion, they often do not go through the exercise of explaining their reasoning in detail, which eliminates one of the checks on implicit bias. Just as trial court judges have been found to rely more on intuitive processing when they have greater discretion and less when bound by a web of rules, immigration judges operating in the arena of discretion are more likely to express implicit attitudes.[379] Immigration judges also make critical determinations about credibility, as discussed above, which are very difficult to reverse on appeal. An immigration judge may easily rely on intuition and reference demeanor as the reason for an adverse credibility decision, without even realizing how implicit biases affected his or her perceptions of the respondent.[380]

Finally, respondents in removal proceedings are likely to trigger multiple types of implicit biases related to race, nationality, skin color, speech, and immigration status. The vast majority of individuals in removal proceedings are Latino, from Mexico, Honduras, Guatemala, or El Salvador.[381] As a group, Latino immigrants are perceived less favorably than European or Asian immigrants.[382] Studies show negative implicit attitudes towards Latinos not only among laypersons but also among professionals, such as primary care providers, who exhibit no explicit

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[373] *Id.* at 64-65.
[374] *Id.* at 66.
[375] *Id.* at 57, 71-72, 74-75, 79.
[376] *Id.* at 72, 65.
[377] *See* Marouf, *supra* note 363, at 431.
[378] *Id.* at 431-32.
[379] Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 28-29 (2007); *see also* Marouf, *supra* note 363, at 440-41.
[380] *See* Marouf, *supra* note 363, at 438-39.
[381] TRAC Immigration, U.S. Deportation Proceedings in Immigration Courts by Nationality, Geographic Location, Year and type of Charge, available at http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (showing that in FY 2013, 196,512 individuals were in removal proceedings, of whom 74,394 were Meixcan, 24,020 were Guatemalan, 23,945 were Salvadoran, and 21,720 were Honduran).
[382] Efrén O. Pérez, *Explicit Evidence on the Import of Implicit Attitudes: The IAT and Immigration Policy Judgments*, 32 POL. BEHAV. 517, 528-29 (2010); *see also* Benjamin R. Knoll, *Implicit Nativist Attitudes, Social Desirability, and Immigration Policy Preferences*, 47 INT'L MIGRATION REV. 132 (2013) ((finding that implicit nativist attitudes--i.e. preference for a traditional American culture as opposed to a Latino-American culture--are fairly common in the United States).

bias towards this group.[383] Not only are Hispanics implicitly perceived as less intelligent than Whites, but Hispanics with the darkest skin are less likely to be perceived as intelligent than Hispanics with the lightest skin.[384] Hispanics are also less likely to be perceived as successful than Whites and Asians.[385] Latinos with accents are particularly likely to trigger implicit biases. For example, on study found that in an interview setting, individuals with Spanish accents and names that signal Hispanic ethnicity were regarded less favorably than those without these characteristics.[386] Finally, just as frequent exposure to African-American criminal defendants is likely to perpetuate negative stereotypes of this group among the judges who handle their cases, frequent exposure to noncitizens in removal proceedings is likely to perpetuate negative stereotypes of Latinos.[387]

In sum, the conditions in which immigration judges work, their general emotional state, the types of decisions they make, and the population in their courtrooms all undermine the assumption that they will remain immune to being prejudiced by the sight of a respondent in restraints.

VII. Recommendations

A. Require Individualized Determinations at Bond and Merits Hearings

In light of the due process issues discussed above, restraints should only be applied in bond and merits hearings if the immigration judge makes an individualized determination that the restraints are necessary because the detainee poses a threat to safety or a flight risk. Furthermore, instead of defaulting to "full restraints," which includes handcuffs, leg irons, and belly chains, judges should impose no more restraints than are necessary in a particular case. When there is a genuine dispute of material fact about the threat to security, the court should hold an evidentiary hearing, which will help ensure that the judge considers all of the evidence instead of blindly accepting a recommendation made by ICE. This type of hearing will also help minimize the influence of implicit bias by requiring the judge to make findings of fact on the record. In order to reduce the burden on the court, ICE could adopt a general presumption that restraints are not necessary and argue for restraints only in exceptional cases where there is evidence that a particular detainees presents a safety or flight risk, as in the settlement agreement that applies to the San Francisco Immigration Court.

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[383] Irene V. Blair et al., *An Assessment of Biases Against Latinos and African Americans Among Primary Care Providers and Community Members*, 103 AM. J. PUBLIC HEALTH 1 (2013) (finding implicit bias against Latinos in health care); *see also* Irene V. Blair et al., *Clinicians' Implicit Ethnic/Racial Bias and Perceptions of Care Among Black and Latino Patients*, 11 ANNALS OF FAMILY MEDICINE 43 (2013).

[384] James Weyant, *Implicit Stereotyping of Hispanics: Development and Validity of a Hispanic Version of the Implicit Association Test*, 27 HISPANIC J. BEHAVIORAL SCIENCES 355 (2005); Lance Hannon, *Hispanic Respondent Intelligence Level and Skin Tone: Interviewer Perceptions from the American National Election Study*, 36 HISPANIC J. BEHAVIORAL SCIENCES 265 (2014).

[385] Beth G. Chung-Herrera and Melanie J. Lankau, *Are We There Yet? An Assessment of Fit Between Stereotypes of Minority Managers and the Successful-Manager Prototype*, 35 J. APPLIED SOC. PSYCHOL. 2029 (2005).

[386] Sharon Segrest Purkiss et al., *Implicit Sources of Bias in Employment Interview Judgments and Decisions*, 152 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 152 (2006); *see also* Andrew J. Pantos and Andrew W. Perkins, *Measuring Implicit and Explicit Attitudes Toward Foreign Accented Speech*, 32 J. LANGUAGE AND SOC. PSYCHOL. 3 (2012).

[387] Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1227 (2009).

B. Require a Lesser Showing for Master Calendar Hearings

Bond hearings and merits hearings require a high level of participation by immigration detainees, as they involve substantial testimony. Since restraints affect mental processes and behavior, they are most likely to be harmful during these trial-like proceedings. A respondent who feels disempowered may give weak testimony or crumble under cross-examination. Restraints are also most likely to prejudice the judge during bond and merits hearings because these proceedings often require determinations about dangerousness and credibility. Master hearings do not raise the same level of concern, since a much lower level of participation is generally required.

However, important decisions are still made at master calendar hearings. At the initial master hearing, the respondent normally admits or denies the factual allegations in the Notice to Appear and concedes or denies removability. Sometimes, denying the charges and making the government prove its case is the best course of action for a respondent who may not be eligible for any form of relief. A respondent who does this may succeed simply because the government does not have the proper documents to support the charge. A restrained respondent who feels powerless may be especially likely to concede removability instead of making the government prove its case. Similarly, the decision of whether or not to apply for relief occurs at a master calendar hearing, and restraints may impair a respondent's motivation to submit an application. Furthermore, the sight of a respondent in restraints at multiple master calendar hearings may prejudice the judge even if the respondent subsequently appears free of restraints on the day of the merits hearing.

For all of these reasons, courts should still require individualized determinations of the need for restraints at master calendar hearings, but a lesser showing of necessity may be appropriate. This approach would be consistent with the California Supreme Court's decision requiring a lesser showing for pretrial hearings.[388] In addition, ICE should provide a room for detainees to meet with counsel before and after master hearings to mitigate the impact of restraints on the ability to confer with counsel.

C. Take Steps to Minimize Prejudice

In the same way that judges must take steps to minimize prejudice during a jury trial by hiding restraints as much as possible so that the jury will not be aware of them, judges should take steps to minimize their own implicit bias. Keeping the restraints out of sight might help but is not enough, since the judge will know that the respondent is restrained. More systemic changes are therefore necessary to reduce the influence of implicit bias.[389] To begin with, immigration judges should be educated about implicit bias and the research on judicial susceptibility to such bias.[390] As part of this educational training, judges should be required to take an Implicit Association Test (IAT) to become more aware of how implicit bias affects them

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[388] *See* People v. Fierro, 1 Cal.4th 173, 220, 821 P.2d 1302 (Cal. 1991)

[389] *See generally* Cheryl Staats, Kirwan Institute for the Study of Race and Ethnicity, Ohio State University, *State of the Science: Implicit Bias Review* 53-63 (2013) (discussing debiasing techniques), available at http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf.

[390] *See* Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1228 (2009); Hon. John F. Irwin & Daniel I. Real, *Unconscious Influences on Judicial Decision-Making: the Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 7-9 (2010).

personally. Taking this test may motivate them to combat implicit bias, which has been shown to reduce the impact of implicit bias on behavior.[391]

Second, the Department of Justice should audit discretionary decisions by individual judges, such as bond determinations and asylum decisions, to check for patterns of implicit bias.[392] Auditing not only provides data that is useful in examining implicit bias, but it also increases accountability in a system where only a small percentage of decisions are reviewed by the BIA.[393] Research has already shown widespread variation in immigration judges' grant rates for asylum.[394] This variation exists even within a given courthouse and even when the cases are limited to a particular nationality.[395] Auditing could help identify patterns of bias, as well as spot specific judges who would benefit the most from de-biasing interventions.

Third, changes should be made in courtroom practice.[396] Currently, some immigration courts are located inside detention facilities and only hear detained cases. Others have separate detained and non-detained dockets, which are typically assigned to different judges, so that some judges only hear detained cases. The practice of having certain judges hear all of the detained cases will amplify negative stereotypes about immigrants for those judges. Mixing detained and non-detained cases, on the other hand, will increase exposure to positive counter-stereotypes, which helps minimize implicit bias.[397]

Fourth, the conditions of decision-making could be vastly improved to give judges greater opportunity for deliberative thought. Funding for the immigration courts should be increased to hire more judges. This will help reduce caseloads and give judges more time on each case, which will allow them to issue more thoughtful, written decisions and alleviate stress and burnout. Emotional states such as anger and sadness influence the activation of implicit bias and increase prejudice.[398] Providing more time for deliberation will improve judges' emotional states, which, in turn, should reduce the impact of implicit bias on decision-making.

Finally, hiring immigration judges from diverse racial and ethnic backgrounds should help reduce implicit bias. Studies have long shown that intergroup contact can decrease implicit bias.[399] For example, one study found that having an African-American roommate decreased implicit bias among Caucasian college students.[400] Another study found that working with a

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[391] Jerry Kang and Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 486-87, 500-01 (2010).
[392] *See* Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1230-31(2009);
[393] *Id.* at 1230-31.
[394] *See* Jaya Ramji-Nogales, Andrew I. Schoenholtz, Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).
[395] *Id.* at 339.
[396] *See* Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1231 (2009);
[397] *See* Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1226-27 (2009); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L.J. 345, 411-13 (2007); Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. LAW & SOC. SCI. 427 (2007); Dale Larson, *Unconsciously Regarded as Disabled: Implicit Bias and the Regarded-As Prong of the Americans with Disabilities Act*, 56 UCLA L. REV. 451, 474-75 (2008); Jerry Kang and Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1062, 1105-06 (2006).
[398] *See* Nilanjana Dasgupta et al., *Fanning the Flames of Prejudice: The Influence of Specific Incidental Emotions on Implicit Prejudice*, 9 EMOTION 585 (2009); David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 PSYCHOLOGICAL SCIENCE 319 (2004).
[399] GORDON ALLPORT, THE NATURE OF PREJUDICE (1954); Thomas F. Pettigrew, *Generalized Intergroup Contact Effects on Prejudice*, 23 PERSONALITY & SOC. PSYCHOL. 173 (1997); Thomas F. Pettigrew and Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006); THOMAS F. PETTIGREW AND LINDA R. TROPP, WHEN GROUPS MEET: THE DYNAMICS OF INTERGROUP CONTACT (2011).
[400] Natalie J. Shook and Russ H. Fazio, *Interracial Roommate Relationships: An Experimental Field Test of the Contact Hypothesis*, 717 PSYCHOLOGICAL SCIENCE 717 (2008).

Mexican American peer on a cultural task reduced implicit bias among non-Latinos.[401] Hiring minority immigration judges, especially Latinos, with whom other judges will interact regularly as colleagues should similarly help reduce implicit bias.

D. Increase Courthouse Security to Alleviate Judges' Concerns

Immigration courts currently have minimal security. There is no bailiff and no law enforcement presence, besides a few ICE officers who bring the detainees to court. Typically, everyone entering the courthouse must walk through a metal detector, and some courts also have x-ray machines that scan bags and briefcases for weapons. Improving these security measures would help alleviate security concerns among judges and court personnel without infringing on the due process rights of respondents. Experts on courthouse security advise that, in addition to weapons screening, law enforcement officers should be present on the interior and exterior of the courthouse to prevent violence.[402] Having a plan in place to handle any violent incidents and training courthouse personnel on the plan through practice "drills" is also important.[403] Risk-assessments are also useful in understanding the specific security risk and vulnerabilities of each courthouse.[404] The courts and ICE should both be involved in those assessments.[405] Funding these types of security measures is critical, not only to increase the safety of court personnel, litigants, and witnesses, but also to protect the rights of detainees. With these measures in place, judges are less likely to reassure themselves by relying on restraints.

VIII. Conclusion

Immigration proceedings, which do not offer the possibility of a jury trial, provide fertile ground for developing standards regarding the use of restraints in bench trials and pretrial hearings. While scholars have aptly criticized the asymmetric relationship between the immigration and criminal systems, whereby the immigration system "absorb[s] the theories, methods, perceptions, and priorities of the criminal enforcement model" without incorporating its constitutional protections, far less attention has been paid to the unique opportunities that immigration proceedings provide to develop the contours of constitutional rights in ways that could benefit criminal defendants.[406]

Furthermore, although courts most frequently address the issue of restraints in criminal cases, restraints may really pose a much greater concern in other areas, such as immigration, since over ninety percent of criminal cases are resolved through plea agreements.[407] In other

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[401] Tiffany N. Brannon and Gregory M. Walton, *Enacting Cultural Interests: How Intergroup Contact Reduces Prejudice by Sparking an Interest in an Out-Group's Culture*, 24 PSYCHOLOGICAL SCIENCE 1947 (2013).
[402] *See* National Center for State Courts, *Courthouse Violence in 2010-2012: Lessons Learned* 5 (2013).
[403] *Id.* at 6-7.
[404] *Id.* at 13.
[405] U.S. Dept. of Justice, Executive Office for Immigration Review, *Operating Policies and Procedures Memorandum 88-9: Courtroom Security*, Nov. 29, 1988.
[406] *See, e.g.,* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (arguing that "immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal enforcement model while rejecting the criminal adjudication model in favor of a civil regulatory regime"); Jennifer M. Chacón, Unsecured Borders: Immigration Restrictions, Crime Control and National Security, 39 Conn. L. Rev. 1827, 1873 (2007) (describing the "asymmetric" relationship between the immigration system and criminal system).
[407] *See* Lindsey Devers, Bureau of Justice Assistance, U.S. Department of Justice, Please and Charge Bargaining: Research Summary 3 (2011), available at https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf; *see also* Lafler v.

words, criminal defendants have many constitutional rights, including the right not be subjected to trial in restraints without an individualized determination, but they usually receive no more than the "bare-bones" procedures that govern guilty pleas.[408] By contrast, less than ten percent of immigration cases are resolved informally through prosecutorial discretion, so judicial adjudication of cases remains the norm.[409] Noncitizens facing deportation are therefore routinely affected by the indiscriminate use of restraints and are well positioned to challenge this practice on due process grounds.

Empirical studies examining the impact of restraints on both litigants and judges would be extremely useful in developing legal standards for the use of restraints in all types of proceedings. The research discussed above underscores the profound effects of constraining the body on cognition and behavior. Future research that considers the kinds of restraints typically used in courtrooms, the amount of time these restraints tend to be applied during legal proceedings, and the types of decisions that litigants must make while restrained would shed even more light on the issue. Empiricists should also examine whether—or to what extent--judges are susceptible to prejudice by the sight of restraints. This research should explore the influence of race, gender, and legal status on judges' decisions to apply restraints as well as judges' unconscious responses to restrained litigants.[410] Finally, it would be helpful to examine whether the practice of shackling immigration detainees reinforces stereotypes of immigrants as dangerous and "illegal" human beings.[411] If so, then challenging the indiscriminate use of restraints in immigration court not only helps ensure that process does not become a covert form of punishment, but it also provides a way to subvert the very stereotypes that contribute to implicit bias.

Cooper, 132 S.Ct. 1376, 1388 (2012) (recognizing that the criminal justice system "is for the most part a system of pleas, not a system of trials").

[408] *See* Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 829-41 (2013) (discussing the largely unregulated nature of plea bargaining and how it undercuts constitutional values); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 43-44, 166 (2007); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536-37, 557-58 (2001).

[409] TRAC, Syracuse University, ICE Rarely Uses Prosecutorial Discretion to Close Immigration Cases (finding that only 6.7% of immigration cases were closed based on prosecutorial discretion between October 0212 and March 2014), available at http://trac.syr.edu/whatsnew/email.140424.html.

[410] Racial disparities are known to exist in the use of physical restraints in other contexts, such as nursing homes. *See* Kimberly M. Cassie and William Cassie, *Disparities in the Use of Physical Restraints in U.S. Nursing Homes*, 38 HEALTH SOC. WORK 207 (2013) (finding that Black nursing home residents are more likely to be restrained than White residents, after controlling for characteristics such as dementia, behavior problems, falls and activities of daily living, which places Black residents at greater risk of death, physical harm, and psychological harm due to restraint usage); *see also* Ocen, *supra* note 208 (discussing the structural role of race and gender in the shackling of Black women prisoners); Elizabeth L. MacDowell, *Theorizing From Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER RACE & JUST. 531, 547-50 (2013) (discussing the intersection of race and gender in stereotypes of Latinos and Latinas).

[411] DOUGLAS S. MASSEY & MAGALY SANCHEZ R., BROKERED BOUNDARIES: CREATING IMMIGRANT IDENTITY IN ANTI-IMMIGRANT TIMES 68-80 (2010) (arguing that the media and political discussions portray Latinos as a threat to the country); Anita Ortiz Maddali, *The Immigrant "Other": Racialized Identity and the Devaluation of Immigrant Family Relations*, 89 IND. L. J. 643, 677-78 (2014); Chacón, *supra* note 405, at 1838-43; *See* David Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts,* 11 TEX. HISP. J.L. & POL'Y 45, 54-55 (2005); Maddali, *supra* note 411, at 650.