LIKE A BEAR ON A CHAIN: IMPLICATIONS OF SHACKLING DEFENDANTS IN BENCH TRIALS

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I. INTRODUCTION

The U.S. Constitution and its amendments secure a right to a fair trial for all defendants.[1] The American justice system hinges on this axiom, and since the very beginning of our country, courts have made efforts to secure this right for all individuals. U.S. courts are ever vigilant for factors that have the potential to undermine this sacred law and constantly on guard against influences which may declare a defendant's guilt without sufficient evidence. U.S. courts have identified potential barriers to a fair trial as the clothes a defendant wears in the courtroom, the presence of identifiable peacekeepers during a trial, and the use of shackles on a defendant.[2]

The U.S. Supreme Court held that the use of shackles in a courtroom, without due cause, is unduly prejudicial to defendants, as juries are influenced by the sight of an individual being led into the courtroom in chains.[3] Immediately perceiving a shackled defendant as dangerous, regardless of the evidence presented, undermines the foundation of our criminal justice system to presume innocence.[4] Implicitly, jurors fail to account for the evidence presented to them when they see the defendant, chained like an animal, before them.[5]

It is well established that jurors, without adequate justification, are never to see a shackled defendant.[6] However, the Supreme Court has yet to rule on

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[1] U.S. CONST. amend. XIV, § 1.

[2] *See* Estelle v. Williams, 425 U.S. 501 (1976); Holbrook v. Flynn, 475 U.S. 560 (1986); Deck v. Missouri, 544 U.S. 622 (2005).

[3] *See Deck*, 544 U.S. at 629.

[4] *Id.* at 633.

[5] *Id.*

[6] *See id*. at 626.

the constitutionality of shackling in bench trials. Circuits are split on whether a defendant's due process rights require the same justification for shackles in proceedings without juries.[7] Some believe that judges are susceptible to the same implicit biases that juries are,[8] while others believe that judges are the fundamental impartial officers of the court and are thus immune to unconscious influence.[9] U.S. circuit courts that have extended current shackling laws to bench proceedings cite the need to preserve the "presumption of innocence," the importance of ensuring a defendant's ability to "participate meaningfully in his or her defense," and the significance of maintaining dignity and decorum in the courtroom.[10]

Maintaining positive public-perception of the judicial system is important—not only for observers of legal proceedings—but also for the defendants participating in their own trials. At the risk of setting up defendants to reoffend and inflicting long-lasting psychological damage, it is imperative that this issue gets resolved. There are several potential solutions to these unsettled issues. In this article, I discuss how initiatives set out by the American Bar Association (ABA) could encourage judges to take advantage of the power they already possess to ensure that defendants are not shackled without due cause. I then explore how a Supreme Court ruling would provide much needed clarity on this issue and would deliver a consistent standard for lower courts to follow. Lastly, I discuss how preemptive legislation would prevent such legal injuries from taking place and would allow judges to enforce such laws.

II. LITERATURE REVIEW

A. *Shackling Practices in General*

Discussions of shackling pregnant inmates occupy much of the literature regarding shackling practices. Shackling pregnant women before, during, and after labor is an exercise that has elicited significant uproar. Given that "between 5 and 10 percent of women [who] enter prison and jail pregnant, and approximately 2,000 babies are born to incarcerated women[,]" it is no wonder so many are outraged by current shackling practices.[11] More than twenty states

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[7] Tiffany Bryant, *Do the Due Process Restrictions on Shackling Criminal Defendants Apply Equally to Jury and Non-jury Proceedings?*, SUNDAY SPLITS (Mar. 25, 2018), http://sundaysplits.com/2018/03/25/do-the-due-process-restrictions-on-shackling-criminal-defendants-apply-equally-to-jury-and-non-jury-proceedings/ [https://perma.cc/4CAK-4992].

[8] Terry Carter, *Implicit Bias Is a Challenge Even for Judges*, A.B.A. (Aug. 5, 2016, 9:58 PM), http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges [https://perma.cc/36XC-8MWQ].

[9] United States v. Sanchez-Gomez, 859 F.3d 649, 680–81 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 1532 (2018); United States v. Zuber, 118 F.3d 101, 102 (2d Cir. 1997).

[10] People v. Best, 979 N.E.2d 1187, 1189 (N.Y. 2012); *see Sanchez-Gomez*, 859 F.3d at 660.

[11] Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15

have addressed this issue in their legislation.[12] Many women's and prisoner's rights advocates deem current shackling practices unconstitutional and have lobbied for stricter and more comprehensive shackling laws that do not demean or injure pregnant inmates.[13]

Indiscriminate juvenile shackling has also been thoroughly explored in scholarly works. Juvenile shackling presents a particularly unique issue as the juvenile court is "engaged in determining the needs of the child and of society rather than adjudicating criminal conduct."[14] While this analysis relies upon research conducted in juvenile courts to draw similarities in the occurrence of psychological trauma, the juvenile court's rehabilitative nature sets it apart from the typical bench trial this article addresses.[15]

B. *Implicit Bias in the Courtroom*

A growing volume of research has established that judges are susceptible to the same implicit bias as jurors.[16] A 2016 panel for a program hosted by the ABA's Judicial Division highlighted the presence of implicit bias in a judge's decision-making process.[17] The panel presented several racially-based studies that found preferential treatment—in the form of lesser sentences for defendants and higher grades for law students—given to individuals with lighter skin.[18] Another study found that, in race discrimination cases decided in six federal circuits from 1981 to 2003, plaintiffs, when compared to the typical twenty-two percent, had a remarkably high success rate of 45.8 percent when appearing before an African American judge.[19]

These trends persisted through gender-based studies as well. Studies have found that female judges are far more likely than their male counterparts to rule in favor of a plaintiff in sexual harassment and sex discrimination cases.[20] These types of unconscious biases have also been found in studies involving judges who had knowledge of inadmissible information and those who were

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AM. MED. ASS'N J. ETHICS 779, 779 (2013).

[12] Morgan Gstalter, *North Carolina to Stop Shackling Pregnant Inmates During Labor*, HILL (Mar. 27, 2018, 2:39 PM), https://thehill.com/blogs/blog-briefing-room/news/380491-north-carolina-to-stop-shackling-pregnant-inmates-during-labor [https://perma.cc/4XPF-BQHJ].

[13] Claire Louise Griggs, *Birthing Barbarism: The Unconstitutionality of Shackling Pregnant Prisoners*, 20 AM. U. J. GENDER & SOC. POL'Y & L. 247, 271 (2011).

[14] Kent v. United States, 383 U.S. 541, 554 (1966).

[15] David Dormont, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 MINN. L. REV. 1769, 1797 (1991).

[16] Carter, *supra* note 8.

[17] *Id.*

[18] *Id.*

[19] Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1138, 1141–43 (2009).

[20] Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decision Making in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1776–78 (2005).

told the cost of incarceration prior to a sentencing hearing.[21]

These studies, although crucial to understanding how implicit judicial bias manifests in legal proceedings, do not address shackling specifically. Although it is only a small logical jump to extend the realm of characteristics that might implicitly affect a judge's decision-making to include shackling defendants, this has yet to be done. This gap in research demonstrates the need for an inquiry into the effect of shackling on factfinders.

Although this literature serves as a valuable background and demonstrates the limits of shackling practices, this article differs significantly from existing literature by taking a deeper look into a lesser-explored aspect of shackling practices: bench trials.

III. BACKGROUND

A. *Early Theories in Shackling Practices That Set the Tone for Today's Conflicting Holdings*

The law has long held that routinely using visible shackles during the guilt phase of criminal proceedings is expressly forbidden.[22] The State is only allowed to shackle a criminal defendant when required by special need.[23] Eighteenth-century English scholars have stated that it is well known that defendants facing an "indictment of the highest nature . . . must be brought to the bar without irons, or any manner of shackles . . ." unless there is clear risk of an escape.[24] These early English authorities even noted the effects of shackling on defendants, forbidding the practice so as to avoid inflicting pain upon them that might take away their mental faculties or their ability to answer.[25]

Courts have long voiced concern that forcing defendants to plead for their lives in shackles before a court undermines the dignity of the criminal justice system.[26] This philosophy manifested early on in our nation's judicial practices, with a 1906 ruling from the Missouri Supreme Court, which stated:

> when the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the

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[21] Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 18–21 (2007).
[22] Deck v. Missouri, 544 U.S. 622, 626 (2005).
[23] *Id.*
[24] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (OXFORD, CLARENDON PRESS 1769).
[25] 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 34 (LONDON, E. & R. BROOKE 1797).
[26] *Id.* at 35.

surveillance of the officers.[27]

A decade later, the Kentucky Court of Appeals analyzed a potential violation of a defendant's due process rights by the extended use of shackles, stating a defendant "'shall not suffer any physical bonds or burdens which might tend to confuse or embarrass his mental faculties.'"[28]

B. *Modern Holdings That Have Shaped Shackling Practices*

In her article, "The Unconstitutional Use of Restraints in Removal Proceedings," Fatma E. Marouf provides a detailed history of the Supreme Court's discussion about undue influence in the courtroom.[29] Anita Nabha provides a similarly extensive background in her article, "Shuffling to Justice: Why Children Should Not Be Shackled in Court."[30] While the instant article provides a cursory look into the history of bias and undue influence in shackling, Marouf and Nabha's exploration of those cases provides a more in-depth overview and serves as an excellent guide in navigating this relatively unexplored area of law.

In the 1970 case *Illinois v. Allen*, the Supreme Court contemplated the effects of binding and gagging a defendant before a judge and jury to decide whether these actions complied with the Sixth Amendment.[31] The Court held that being bound and gagged still complied with the Sixth Amendment, so long as a defendant could remain in the courtroom and was still able to confront witnesses at trial.[32] Despite concerns regarding the restriction of communication and undue influence on the jury, the Supreme Court found that the decision to remove or restrain a defendant should be left to the trial judge's discretion.[33]

In examining other prejudicial actions, the Supreme Court addressed, in *Estelle v. Williams*, the effect of a defendant appearing in court wearing prison attire on a jury.[34] The Court noted that, aside from the convenience for jail administrators, forcing defendants to appear in prison clothing furthers no essential state interest.[35] This clothing, the Court stated, was "so likely to be a continuing influence throughout the trial" that it presented "an unacceptable

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[27] State v. Temple, 92 S.W. 869, 871–72 (Mo. 1906).
[28] Blair v. Commonwealth, 188 S.W. 390, 393–94 (Ky. 1916) (quoting 8 R. C. L. 68).
[29] Fatma E. Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 BAYLOR L. REV. 214, 225–30 (2015).
[30] Anita Nabha, *Shuffling to Justice: Why Children Should Not be Shackled in Court*, 73 BROOKLYN L. REV. 1549, 1555–59 (2008).
[31] Illinois v. Allen, 397 U.S. 337, 344 (1970).
[32] *Id.*
[33] *Id.* at 344–45.
[34] Estelle v. Williams, 425 U.S. 501, 508 (1976).
[35] *Id.* at 505.

risk . . . of impermissible factors coming into play."[36]

Until *Estelle*, "courts have refused to embrace a mechanical rule vitiating any conviction . . . where the accused appeared before the jury in prison garb" and, rather, had merely commented on the malice behind forcing "a defendant, against [their] will, to be tried in jail attire."[37] This refusal was, in part, a result of the idea that defendants believe appearing in prison clothing will garner sympathy from the jury and that "'no prejudice can result'" from seeing what the jury already knows—that the defendant is in custody and is expected to appear as such.[38] Declining to rule out that an individual defendant may prefer to appear in prison clothing, courts chose instead to require defendants to object to appearing in court in prison clothing.[39] Thus, *Estelle* represents an important step in recognizing one of the many factors that affects how individuals in a courtroom perceive the defendant.

In *Holbrook v. Flynn*, the Supreme Court evaluated whether the presence of identifiable security officers was inherently prejudicial.[40] While shackling and prison clothing are clearly identifiable markers that separate the defendant from the other individuals in the courtroom, the Court noted the presence of guards in a courtroom is not immediately perceived by jurors as a sign of imminent danger since "our society has become inured to the presence of armed guards in most public places[.]"[41] Importantly, in holding that the defendants were not unduly prejudiced by the presence of four guards in the courtroom, the *Flynn* court also recognized that despite a practice being inherently prejudicial, "jurors *will not necessarily be fully conscious* of the effect it will have on their attitude" toward the defendant.[42] The Court's recognition and acceptance of the possibility of implicit bias in judicial proceedings illustrates a problematic gap in the progression toward eliminating implicit bias in a juror's decision-making in criminal proceedings.

C. *The Precedent Set by the Supreme Court*

Notably, in *Deck v. Missouri*, the Supreme Court examined the issue of a defendant appearing in shackles during the penalty phase of criminal proceedings.[43] In *Deck*, the Court again noted the longstanding notion that shackling defendants should only be used in extreme circumstances.[44] The Court asserted that modern judges emphasize three crucial legal principles in

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[36] *Id.*
[37] *Id.* at 507–08.
[38] *Id.* at 507 (quoting United States *ex rel.* Stahl v. Henderson, 472 F.2d 556, 557 (1973)).
[39] *Estelle*, 425 U.S. at 508.
[40] *See* Holbrook v. Flynn, 475 U.S. 560, 562 (1986).
[41] *Id.* at 569.
[42] *Id.* at 570 (emphasis added).
[43] Deck v. Missouri, 544 U.S. 622, 624 (2005).
[44] *Id.* at 626.

justifying their opposition to shackling in the courtroom.[45]

First, the Court asserted the notion of presumed innocence until proven guilty is undermined by visible shackling because "it suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'"[46] Second, a defendant's right to counsel is unconstitutionally interfered with when physical restraints are used; such restraints inevitably diminish a defendant's "ability to communicate" with his or her attorney.[47] Third, much like early scholars, judges endeavor to maintain a dignified judicial process, an objective that is unachievable when a defendant is visibly chained.[48] The decision in *Deck*—that shackling in the courtroom is inherently prejudicial and jurors are never to see a defendant in shackles without due cause[49]—was a substantial step in fully recognizing the magnitude of jurors' implicit biases in the courtroom.

What the Supreme Court has yet to address is whether this rationale extends to proceedings exclusively before a judge. The *Estelle* court asserted that allowing unconscious influence into judicial proceedings is an "impairment of the presumption so basic to the adversary system."[50] If the Court has established that these unconscious influences are unequivocally and absolutely inappropriate in a courtroom, why, then, are there no safeguards in place to prevent this influence in proceedings without juries?

D. *Disputes Between the Circuits*

What little law exists around the matter of shackling in bench trials is relatively recent. In *United States v. Zuber*, the defendant entered a guilty plea on one count of cocaine distribution but appealed his sentence on the grounds of a due process violation, which he claimed was caused by the judge's deferral to the U.S. Marshals Service's (Marshals Service) use of arm and leg restraints during his sentencing hearing.[51] The defendant claimed that the judge failed to make an independent evaluation about the need to use such restraints.[52]

The U.S. Court of Appeals for the Second Circuit held that the court will not allow the presence of a shackled defendant to alter its decision-making.[53] Having long required an "independent, judicial evaluation of the need to restrain a party in court . . . [,]" the Second Circuit declined to extend this rule

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[45] *Id.* at 630.
[46] *Id.* (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986)).
[47] *Id.* at 631 (quoting Illinois v. Allen, 397 U.S. 337, 344 (1970)).
[48] *Deck*, 544 U.S. at 631.
[49] *See generally id.* at 635.
[50] Estelle v. Williams, 425 U.S. 501, 504 (1976).
[51] United States v. Zuber, 118 F.3d 101, 102–03 (2d Cir. 1997).
[52] *Id.*
[53] *Id.* at 104.

to proceedings without a jury present.[54] In their brief discussion of the issue, the *Zuber* court cited only two reasons for its decision. First, district judges typically defer to the professional judgment of the Marshals Service because the Marshals Service is charged with moving the defendant and, as a result, is in the best position to make an informed decision about the defendant's ability to be in the courtroom unfettered.[55] Second, the court assumes that "judges . . . are not prejudiced by impermissible factors" in the same manner that jurors may be.[56] Primarily relying upon a judge's ability to be unbiased, the Second Circuit declined to establish any procedural safeguard for a defendant's due process rights.[57]

The U.S. Court of Appeals for the Ninth Circuit recently deferred back to its eighteenth-century English counterparts in *United States v. Sanchez-Gomez*, when a group of defendants whose objections to the new "district-wide policy of allowing the Marshals Service to produce all in-custody defendants in full restraints for most non-jury proceedings" had all been routinely denied without substantial explanation.[58] By exploring the bounds and influence of early commentaries on the practice of shackling in the courtroom, the Ninth Circuit arrived at a dramatically different conclusion than the Second Circuit.[59] Noting that early scholars did not "draw the bright line" between the arraignment and trial phases of a proceeding, the Ninth Circuit extended current shackling laws to include all phases of a criminal proceeding.[60] The *Sanchez-Gomez* court relied heavily upon the justifications set forth by these early commentators, citing the need to free defendants from any mental impediment and physical pain that shackling might bring upon them.[61] "Criminal defendants," the court said, "like any other party appearing in court, are entitled to enter the courtroom with their heads held high."[62] The court held that this philosophy persists regardless of a jury's presence or the phase of the proceedings.[63]

Like the Ninth Circuit, the New York Court of Appeals, in *People v. Best*, chose to rule on shackling procedures in regard to trials solely before a factfinder.[64] The defendant in *Best* was convicted of endangering a child's welfare.[65] Despite numerous objections to appearing in handcuffs throughout

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[54] *Id.*
[55] *Id.*
[56] *Id.* (citing LiButti v. United States, 107 F.3d 110, 124 (2d Cir. 1997); Anderson v. Smith, 751 F.2d 96, 106 (2d Cir. 1984)).
[57] *See* United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997).
[58] United States v. Sanchez-Gomez, 859 F.3d 649, 653–54, 662–63 (9th Cir. 2017) (Ikulta, J., dissenting) (internal quotations omitted), *vacated on other grounds*, 138 S. Ct. 1532 (2018).
[59] *See id.* at 663.
[60] *Id.* 663–66.
[61] *Id.* at 662.
[62] *Id.* at 666.
[63] *Id.*
[64] *See* People v. Best, 979 N.E.2d 1187, 1188 (N.Y. 2012).
[65] *Id.*

each phase of the trial, the court repeatedly directed the defendant to appear in restraints.[66] Upon evaluation under the defendant's appeal, the court held that the unexplained and routine use of shackles on a defendant assaults the three essential pillars of a fair and civilized criminal justice system set out in *Deck*.[67] The court summarized these three fundamental pillars as: "(1) preserving the presumption of innocence to which every criminal defendant is entitled; (2) ensuring that the defendant is able to participate meaningfully in his or her defense; and (3) maintaining the dignity of the judicial process[.]"[68] Judges are humans, the court stated, susceptible to unconscious influence at the sight of a shackled defendant.[69]

Relying in part on the Second Circuit decision in *United States v. Lafond*, the U.S. Court of Appeals for the Eleventh Circuit declined to extend current shackling laws to "sentencing hearings before a district judge."[70] Despite the multitude of cases and secondary authorities covering various aspects of shackling practices, the extent of the discussions that delve into the potential for implicit bias in bench proceedings is quite limited. The Supreme Court recently granted a writ of certiorari to review the Ninth Circuit's *Sanchez-Gomez* judgment but declined to address the issue of shackling in bench trials.[71] With only the Second, Ninth, and Eleventh Circuits addressing the issue, the constitutionality of shackling defendants in bench trials remains undecided, and the fundamental components of our judicial system hinge on receiving a definitive answer.

IV. DISCUSSION

A. *Maintaining the "Palaces of Justice"*[72]

Legal proceedings are largely synonymous with courtrooms. When most people think of the law, they imagine gavels firmly striking decades-old wood and grand tribunals upon which an officer of the court hears eloquent arguments and makes an informed and fair ruling. This sense of grandeur and decorum seems to persist through countless media portrayals of courtroom proceedings and is essential to the public's faith in the justice system. Courtrooms are often "the most visible and public manifestation of [the] criminal justice system."[73] A substantial number of people report that their

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[66] *Id.*
[67] *Id.* at 1189.
[68] *Id.* (citing Deck v. Missouri, 544 U.S. 622, 630–32 (2005)).
[69] *Id.*
[70] United States v. Lafond, 783 F.3d 1216, 1225 (11th Cir. 2015).
[71] Bryant, *supra* note 7. The case was later vacated and remanded with instruction to dismiss as moot. United States v. Sanchez-Gomez, 859 F.3d 649, 662 (9th Cir. 2017), *vacated on other grounds*, 138 S. Ct. 1532, 1542 (2018).
[72] *Sanchez-Gomez*, 859 F.3d at 662 (Ikulta, J., dissenting).
[73] *Id.*

own personal experience, in the form of participation or observation, is the largest source of their knowledge of the justice system.[74] Knowing that public perception frequently and substantially affects public policy,[75] should we not be more concerned with how the public perceives treatment of defendants in legal proceedings?

A lack of faith in the justice system can have devastating consequences. With the recent spate of cases surrounding police brutality toward minorities and the subsequent trials largely regarded as miscarriages of justice, many individuals have been voicing their concerns for the judicial system's future.[76] Part of this voice comes from police protests, which can, at times, turn into deadly rioting as part of a racially-fueled cycle of oppression.[77]

The public's reaction to these cases serves as an alarming example of the extreme consequences resulting from a lack of faith in the criminal justice system. The lack of publicly perceived adequate sentences and convictions in police brutality cases is just one example of how the public can lose faith in the justice system. For those who witness judicial proceedings, shackling is no different.

The way the image of a shackled defendant affects public perception of that individual and the criminal justice system cannot be ignored.[78] Dragging defendants into the courtroom in chains without due cause "offends the dignity" of the justice system.[79] How can individuals have faith in a system that so clearly falls short of the "palace of justice" by shackling defendants like dangerous animals?

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[74] AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 11 (1999), https://www.americanbar.org/content/dam/aba/publishing/abanews/1269460858_20_1_1_7_upload_file.authcheckdam.pdf [https://perma.cc/X3YU-ZUJU].

[75] Paul Burstein, *The Impact of Public Opinion on Public Policy: A Review and an Agenda*, 56 POL. RES. Q. 29, 33 (2003).

[76] Susan K. Smith, *When You Have No Faith In 'The System'*, HUFFINGTON POST (Aug. 25, 2017), https://www.huffingtonpost.com/entry/when-you-have-no-faith-in-the-system_us_599f36b4e4b0d0ef9f1c1287 [https://perma.cc/QJA4-XDN6] ("There are too many people, black and white, who have no faith in our judicial system; it is not set up to assure justice for 'the least of these,' but is rather designed to protect law enforcement officers who too often break the law themselves. All an officer has to do is *say* he or she was 'in fear for' his or her life and indictment is pretty much assured of not happening. The system has, for the most, part dehumanized the people it is supposed to protect and the result is a lack of confidence and trust from individuals in police officers, and vice versa.").

[77] George Joseph, *From Ferguson to Charlotte, Why Police Protests Turn into Riots*, CITYLAB (Sept. 22, 2016), https://www.citylab.com/equity/2016/09/from-ferguson-to-charlotte-why-police-protests-turn-into-riots/500981/ [https://perma.cc/39TE-JG6Y].

[78] People v. Best, 979 N.E.2d 1187, 1189 (N.Y. 2012).

[79] Vicki Ortiz, *Youth Advocates Seek to Limit Use of Shackles for Juveniles in Court*, CHI. TRIB. (Aug. 1, 2016, 6:02 AM) (quoting Era Laudermilk, deputy director for the Illinois Justice Project), https://www.chicagotribune.com/news/local/breaking/ct-juvenile-shackles-illinois-courts-met-20160731-story.html [https://perma.cc/3ATN-TYLN].

B. *Psychological Effects Brought on by the Use of Shackles*

How the justice system treats defendants in the public setting of a courtroom matters, not only for public perception, but also for the defendant.[80] Although public perception is vital to maintaining faith in the justice system, it is also vital to the defendant's perception of the painful and distinctive process in which they are involved. "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."[81] These damaging psychological effects may force minorities to relive traumatic practices endured by their ancestors or may increase their likelihood of reoffending.[82]

Children who have been put in shackles for criminal proceedings report feeling "like a slave, an animal or a criminal."[83] Given the racial disparities in the criminal justice system,[84] the parallels between slavery and shackling are closely drawn and startling. In 2016, "African Americans were incarcerated in local jails at a rate 3.5 times that of non-Hispanic whites" and, together with Latinos, comprised fifty-seven percent of the U.S. prison population.[85] Due to ongoing mental development and painful histories, youths and marginalized individuals arguably feel the effects of shackling more than white defendants.

With such a large portion of minority individuals in the criminal justice system, it is essential that we are more sensitive to the trauma inflicted upon these individuals with the use of shackles. Being brought into a courtroom where defendants face a single individual who will ultimately decide their legal outcome is already a stressful and traumatic experience. Adding shackles to that experience can cause people to disassociate with the proceedings, ultimately limiting a defendant's ability to actively participate in his or her own trial.[86] So many recent decisions emphasize how shackles impede defendants' abilities to communicate with their attorneys and actively participate in their own defenses; no defendant can meaningfully participate when forced to mentally disassociate from his or her own trial because of the trauma shackling has caused.[87]

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[80] United States v. Sanchez-Gomez, 859 F.3d 649, 665 (9th Cir. 2017) (Ikulta, J., dissenting), *vacated on other grounds*, 138 S. Ct. 1532 (2018).
[81] *Best*, 979 N.E.2d at 1189.
[82] *See* Patricia Puritz, *Shackling Juvenile Offenders Can Do Permanent Damage to Our Kids*, WASH. POST (Nov. 13, 2014), https://www.washingtonpost.com/opinions/shackling-juvenile-offenders-can-do-permanent-damage-to-our-kids/2014/11/13/55561dfe-602e-11e4-9f3a-7e28799e0549_story.html?utm_term=.4cc44f6e2b77 [https://perma.cc/CKG2-ANVA].
[83] *Id.*
[84] *See generally* THE SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ [https://perma.cc/KUR9-JFQ7].
[85] *Id.* at 6.
[86] Ortiz, *supra* note 79.
[87] *Id.*

Children who feel they have been treated unfairly by the juvenile justice system, as often happens when defendants are forced to appear shackled in court, are more likely to reoffend.[88] Consequently, recidivism rates for incarcerated children are as high as eighty percent in some states.[89] Appearing in shackles made these children feel like criminals.[90] Although much of the literature regarding the psychological effects of shackling pertain to children, it is clear that other vulnerable or marginalized individuals may be equally susceptible to this demeaning practice. The tragic, self-fulfilling prophecy that shackling creates must not be disregarded.

C. *The Kink in the System: Judicial Bias and How Easy It Is to Miss*

The *Zuber* court declined to extend shackling limits to bench trials, holding that judges are not susceptible to the same impermissible biases as juries.[91] Despite the high esteem to which they are held, judges are people too and are accordingly subject to implicit bias.[92] Consequently, judges are vulnerable to the "same unconscious influences and decision-making shortcuts as jurors."[93] Pretending that judges are able to be perfectly impartial regardless of the defendant's appearance benefits no one and consistently injures defendants. The ABA released an "Implicit Bias Initiative," which includes a ninety-minute presentation and suggested reading aimed at encouraging judges to explore what potential implicit biases influence their decision-making.[94] If the ABA has recognized that judges are susceptible to bias, much like jurors, then it is time for the courts to do the same.

Judges are often unsuccessful when tasked with "ignoring information they have been told to disregard," and, in fact, judges often "*make* decisions based on factors other than those that they *believe* influence their decisions."[95] Research has shown that "race, perceived attractiveness, affability," and a defendant's nervous behavior can affect outcomes such as conviction rates and

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[88] Robert May, *Why Do We Still Put Kids in Shackles When They Go to Trial?*, WASH. POST (May 8, 2015, 5:00 AM), https://www.washingtonpost.com/posteverything/wp/2015/05/08/why-do-we-still-put-kids-in-shackles-when-they-go-to-trial/?noredirect=on&utm_term=.6c1a86c2753d [https://perma.cc/NA2L-T23].

[89] *Id.*

[90] *Id.*

[91] United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997).

[92] Carter, *supra* note 8.

[93] Leslie Ellis, *Are Juries Really Such a Wildcard with Judges?*, A.B.A. (July 16, 2015) (citing Amos Tversky et al., *Judgment under Certainty: Heuristics and Biases*, 185 SCI. 1124 (1974); Ruud Custers et al., *The Unconscious Will: How the Pursuit of Goals Operates Outside of Conscious Awareness*, 329 SCI. 47 (2010)), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2015/summer2015-0715-are-juries-such-wildcared-compared-with-judges/ [https://perma.cc/2WTV-EY6K].

[94] *Implicit Bias Initiative*, A.B.A., https://www.americanbar.org/groups/litigation/ initiatives/task-force-implicit-bias/ [https://perma.cc/E98F-XS6U].

[95] Brian H. Bornstein, *Judges vs. Juries*, 43 CT. REV. 56, 58 (2006).

sentencing lengths.[96] These subconscious judgments can be made in a variety of ways, one of which is the identification of an "out-group."[97] Individuals in an out-group are those who do not "share our particular qualities[.]"[98] These qualities can be varied by race, age, birthplace, or more arbitrary qualities like the sports teams we support.[99]

Given that "75-90 percent of whites, 65 percent of Asian and Latino Americans, and 35-60 percent of blacks harbor automatic, implicit negative judgments of blacks and positive ones of whites[,]" it is easy to see how a white judge may automatically consider a black defendant as a member of an out-group.[100] "Social scientific literature [shows] that blacks . . . are implicitly perceived as a threat and hostile[.]"[101] Placing an individual who is already statistically likely to be perceived as a member of an out-group in shackles—forcing them to appear as a dangerous criminal—only reaffirms that perception and diminishes that individual's right to a fair trial.

When race did not play a prominent role in a case, judges still gave heavier sentences to black defendants.[102] Although race is a well-established issue that illustrates this problem, implicit bias is not limited to this characteristic alone. The importance of these studies is that judges are not at all immune to implicit bias. Regardless of the role played in a trial, "we are all remarkably bad at understanding what influences us when we make decisions."[103]

"Mental shortcuts" are another cognitive function that can prove to be influential in judges' decision-making.[104] One shortcut is the way our System One and System Two interact.[105] System One is fast, "unconscious," "emotional," our gut reaction.[106] System Two is slower, more analytical,

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[96] Jill Suttie, *How Bias Warps Criminal Justice*, GREATER GOOD MAG. (Sept. 22, 2015), https://greatergood.berkeley.edu/article/item/how_bias_warps_criminal_justice [https://perma.cc/W9SG-Z96H].

[97] Gregory S. Parks & Andre M. Davis, *Confronting Implicit Bias: An Imperative for Judges in Capital Prosecutions*, 42 HUM. RTS. 22, 22–23 (2016).

[98] Susan Krauss Whitbourne, *In-groups, Out-groups, and the Psychology of Crowds*, PSYCHOL. TODAY (Dec. 7, 2010), https://www.psychologytoday.com/us/blog/fulfillment-any-age/201012/in-groups-out-groups-and-the-psychology-crowds [https://perma.cc/U5VP-WNPQ].

[99] *Id.*

[100] Parks & Davis, *supra* note 97.

[101] *Id.*

[102] *Id.* However, when race was a main issue in a case, judges appeared capable of overcoming their implicit biases and handing down more equitable sentences. *Id.*

[103] Ellis, *supra* note 93 (referencing Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974)); Ruud Custers & Henk Aarts, *The Unconscious Will: How the Pursuit of Goals Operates Outside of Conscious Awareness*, 329 SCI. 47 (2010)).

[104] Ellis, *supra* note 93.

[105] *Id.* (referencing DANIEL KAHNEMAN, THINKING FAST, THINKING SLOW (2011)).

[106] *Id.*

deliberate,[107] and the system we would like to think dictates most of our decision-making. System One, by default, makes a decision faster than System Two; these are our mental shortcuts.[108] When anyone—especially judges and juries who are under a high "cognitive load" due to stress, the weight of a decision, or any other number of factors that come into play in the courtroom—is faced with a decision requiring a substantial amount of mental effort, there is a natural tendency to let System One do more of the cognitive work through a mental shortcut.[109]

Although harmless in some situations, the factors our System One picks up on become increasingly important in a courtroom. Seeing an individual in an out-group may trigger an overworked or exhausted judge's System One into making a less-informed decision that reflects that individual judge's implicit bias more than the actual facts presented to what should be an impartial factfinder. Inevitably, a judge who sees many cases with many different and complex fact patterns each day will be susceptible to System One decision-making. Combining this with a defendant appearing in shackles presents an opportunity for a judge's System One to take control, much to the defendant's detriment.

While jurors and judges are extraordinarily similar in terms of implicit bias, there is one major distinction worth noting: jurors are much more likely to recognize and correct each other's biases than a judge who is completely unaware of his or her own biases and errors.[110] In this lies the importance of resolving this issue—shackling is already prejudicial enough in jury trials where jurors may help each other to recognize bias; imagine how much more damaging this practice becomes when implicit bias runs unfettered in the courtroom. Allowing a judge's implicit bias to affect a defendant's outcome undoubtedly offends the idea of innocent until proven guilty.[111]

V. RESOLUTIONS

Knowing the importance of maintaining the public's faith in the judicial "palace of justice," recognizing the mental and emotional effect that shackling has on a defendant, and appreciating how easily implicit bias can influence decision-making, it is extremely important that steps be taken to remedy the due process violations caused by unnecessary shackling practices in bench trials. There are a number of ways to improve upon the current shackling practices, each with their own distinct advantages and disadvantages. However, some solutions are more feasible than others.

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[107] *Id.*
[108] *Id.*
[109] *Id.* (referencing Katherine L. Milkman et al., *How Can Decision-making Be Improved?*, 4 PERSP. PSYCHOL. SCI. 379 (2009)).
[110] Ellis, *supra* note 93.
[111] People v. Best, 979 N.E.2d 1187, 1189 (N.Y. 2012).

A. *A Ruling by the Supreme Court Would Ensure Consistency in All Courts*

With circuits split on the use of shackling in bench trials, ambiguity still exists as to whether due process bars the use of shackles on a defendant before a single factfinder. One resolution to this issue would be a Supreme Court ruling that mirrors the New York Court of Appeals in *People v. Best*. The court in *Best* directly addressed the factors laid out in the *Deck* decision.[112] Acknowledging that the use of visible restraints in the presence of the jury must be "'justified by an essential state interest . . . specific to the defendant on trial'[,]" the court held that if the State fails to provide a justification, such as potential security problems or escape risks,[113] the defendant does not need to demonstrate actual prejudice to claim a due process violation.[114]

The *Best* court also recognized that judges are "uniquely capable . . . of making an objective determination based upon appropriate legal criteria," but then the court went on to concisely state that "judges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder."[115] Furthermore, this holding ensures that defendants are able to participate meaningfully in their own defense and the dignity of the judicial process will not be tainted by the appearance of a shackled defendant before the public.[116]

As evidenced by the *Zuber* decision, it remains uncertain whether the Supreme Court would rule that judges are incapable of being wholly unbiased in bench trials; however, bringing this issue to our nation's highest court would at the very least provide a definitive answer. Even in the event of a Supreme Court ruling similar to that in *Zuber*, there are alternative avenues through which to pursue a permanent solution.

B. *Legislative Action May Be Worth the Process*

A Supreme Court ruling extending the *Deck* decision to bench trials seems to be the next logical step in resolving this issue. However, because the Supreme Court declined to take up the issue of whether due process prohibits the use of restraints in bench trials in *Sanchez-Gomez*, it seems unlikely that a ruling will be made on the issue soon. Educating judicial factfinders about the role that implicit bias plays in bench trials is important, but ultimately, more drastic steps need to be taken. Instead, this issue may be resolved in the legislature.

Very few authorities govern shackling, and, of those that do, the practice of shackling defendants in the courtroom is not addressed in non-jury

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[112] *Id.* at 1189.
[113] Deck v. Missouri, 544 U.S. 622, 628 (2005).
[114] *Best*, 979 N.E.2d at 1188 (quoting Deck v. Missouri, 544 U.S. 622 (2005)).
[115] *Id.* at 1189 (quoting People v. Moreno, 516 N.E.2d 200 (N.Y. 1987)).
[116] *See id.*

proceedings.[117] Enacting statutes that address the issue of shackling defendants in bench trials would be a proactive approach to any potential due process violation. Instead of waiting for a defendant to appear in court and to potentially suffer a due process violation, "preemptive legislation" provides a far better method of evaluating the need to keep a defendant in shackles.[118]

Additional considerations include whether the legislative action is taking place at the federal or state level. Legislative action at the federal level may involve Congress amending the federal rules to include anti-shackling provisions. Addressing this issue in state courts would require the painstaking process of fifty separate states passing fifty separate laws.

At either level, it will come as no surprise that enacting legislation is often a long and draining process that seems to rarely yield the fruits of any advocate's labor. The beauty of our checks and balances system can prove to be burdensome considering an average of only 4.5 percent of bills are actually enacted in each two-year Congressional term.[119] Bills often become entangled in the web of committees, subcommittees, and hearings before they are unceremoniously laid to rest in the congressional "graveyard."[120]

Despite the unlikely odds, special interest groups and lobbyists can influence this process to ensure a higher likelihood of success. Garnering support from organizations, such as the American Civil Liberties Union and the American Psychological Association, who spoke out against the use of restraints during childbirth,[121] would aide in the effort of moving legislation through the long and arduous law-making process. These statutes could potentially prevent such cases from even entering the court system.[122]

There has been sharp criticism of the legislation enacted barring the use of restraints on pregnant women.[123] Much of this criticism stems from the lack of enforcement of such statutes with many advocates saying women are still subjected to this barbaric practice despite the current laws in place.[124] In part, the lack of implementing these anti-shackling laws may be because the laws

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[117] *See, e.g.*, E.D. Cal. R. 401; OKLA. STAT. tit. 22, § 15 (West 1953).
[118] Griggs, *supra* note 13, at 268.
[119] *Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics [https://perma.cc/46J9-QVPH]. This number is an average of all "Enacted Laws" from January 3, 1973 to January 3, 2019. During this time, the 112th Congress had the lowest number of enacted laws (two percent), and the 100th Congress had the highest number of enacted laws (seven percent). *Id.*
[120] John Lauritsen, *Good Question: Why Is It So Hard To Pass A Law?*, CBS MINN. (June 26, 2013, 10:56 PM), https://minnesota.cbslocal.com/2016/06/23/good-question-passing-bills/ [https://perma.cc/2MS7-VY65].
[121] Ginette G. Ferszt et al., *Where Does Your State Stand on Shackling of Pregnant Incarcerated Women?*, 22 NURSING FOR WOMEN'S HEALTH 17, 19 (2018).
[122] Griggs, *supra* note 13, at 268.
[123] *Id.* at 269; Amanda Glenn, *Shackling Women During Labor: A Closer Look at the Inhumane Practice Still Occurring in Our Prisons*, 29 HASTINGS WOMEN'S L.J. 199, 220 (2018).
[124] Griggs, *supra* note 13, at 268.

are often enforced by corrections officers who may not be fully aware of the specifics of the laws.[125] Educating corrections officers and local law enforcement about when defendants need to be shackled and what factors need to be taken into consideration could help remedy these existing issues. In the case of shackling in bench trials, such laws would be enforced by judges, who are well-versed in the complexities of these issues. Although a risk, it seems unlikely that judges will encounter the same interpretive issues as corrections officers.

C. *Encouraging Factfinders to Make Judgments about the Use of Shackles in Their Courtrooms*

Perhaps the most feasible of all resolutions lies solely within the courtroom. Just as the ABA has released initiatives with the goal of helping judges recognize and address their implicit bias,[126] so too can similar initiatives begin to tackle shackling in bench trials.

Standard 6-3.2 of the *ABA Standards for Criminal Justice: Special Functions of the Trial Judge* states that "the trial judge should endeavor to maintain secure court facilities. In order to protect the dignity and decorum of the courtroom, this should be accomplished in the least obtrusive and disruptive manner, with an effort made to minimize any adverse impact."[127]

Accompanying commentary to the above standard calls for trial judges to confer with personnel charged with the defendant's security so as "to use the least imposing means possible" when ensuring individuals' safety within the courtroom.[128] Judges are clearly meant to be in control of their courtrooms, and, although it is important at times to defer to those who may have spent more time with the defendant and may be more aware of potential security concerns, judges have the ability to prevent a defendant from appearing in shackles.

Educating judges, and even attorneys, about how unnecessary shackling and implicit bias work together to create a due process violation is a vital step in addressing this issue. Education can begin in law school—where all legal professionals develop the essential skills necessary to successfully represent their clients—to ensure each legal professional is aware of his or her own implicit bias. Recognizing and addressing one's own implicit bias over time is essential to providing outstanding legal representation. Continuing legal education courses provide an opportunity to remind legal professionals about the importance of addressing implicit bias in their day-to-day business practices.

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[125] *See id*. at 270.
[126] *Implicit Bias Initiative*, *supra* note 94.
[127] CRIMINAL JUSTICE STANDARDS COMMITTEE, ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 7 (3d ed. 2000).
[128] *Id.* at 53.

Both a Supreme Court decision and preemptive legislation have their advantages. A Supreme Court decision would provide a consistent answer on the issue, while legislation would potentially prevent such cases from entering the court system in the first place. Through either avenue, educating all individuals involved in the trial process about how shackling affects implicit bias is imperative.

VI. CONCLUSION

The use of shackles in bench trials presents an emerging legal issue that begs a resolution. As set out in *Deck*, this practice offends the three fundamental legal principles that are so vital to our criminal justice system.[129] First, the practice of shackling defendants like dangerous, wild animals regardless of previous behavior in court or criminal history chips away at the foundation of the "palace of justice" that is so crucial to our criminal justice system.[130] Second, in addition to the physical barriers shackles present between a defendant and his or her legal representation, the psychological trauma shackles inflict upon a defendant may prevent adequate communication and participation in the trial.[131] Lastly, shackling a defendant before a sole factfinder offends the concept of innocent until proven guilty by allowing an opportunity for unchecked judicial bias to influence a defendant's outcome.[132]

This important constitutional question can, but should not, be delegated to providers of security, such as the Marshals Service.[133] A court-instituted rule reflecting a presumption of the need for the routine use of shackles in bench trials presents a dangerous avenue through which a judge's implicit bias may subtly influence an individual's outcome.[134] Judges are "the guardians of the presumption of innocence, the indispensable foundation for our system of justice."[135] Without safeguards in place to ensure this notion for defendants in non-jury trials, we jeopardize demolishing our palaces of justice brick by brick.

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[129] Deck v. Missouri, 544 U.S. 622, 630–32 (2005).
[130] *Id.*
[131] *Id.*
[132] People v. Best, 979 N.E.2d 1187, 1189 (N.Y. 2012).
[133] United States v. Sanchez-Gomez, 859 F.3d 649, 661 (9th Cir. 2017) (Ikulta, J., dissenting), *vacated on other grounds*, 138 S. Ct. 1532 (2018).
[134] *Id.*
[135] Parks & Davis, *supra* note 97.