THE UNCONSTITUTIONAL USE OF RESTRAINTS IN REMOVAL PROCEEDINGS

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I. INTRODUCTION

Courts have long recognized that a criminal 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.

Similarly, in civil cases, due process demands an individualized determination of the need to restrain a litigant or witness during a jury trial.[1] While the rule governing the use of restraints in jury trials is clear, the Supreme Court has never addressed the constitutionality of indiscriminate restraints in proceedings before a judge, resulting in conflicting decisions by state and federal courts about this issue.[2] Removal proceedings, which take place before an immigration judge, provide an opportunity to clarify procedural due process rights regarding the use of restraints in proceedings that do not involve a jury. Such clarification would benefit not only immigration detainees but also criminal defendants and civil litigants who have bench trials, pretrial hearings, or sentencing hearings before a judge.

Immigration courts are part of the Executive Office of Immigration Review (EOIR) within the Department of Justice. A 1988 memorandum of understanding (MOU) between the EOIR and the former Immigration and Naturalization Service, which is now Immigration and Customs Enforcement (ICE), sets forth guidelines on immigration court security that are still utilized today.[3] The MOU provides that ICE bears the primary responsibility of providing adequate security in courtrooms located within immigration detention facilities.[4] 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.[5] The judge may also adjourn a hearing if ICE fails to comply with a request for increased security.[6] However, if the judge requests a downgrade in security, such as having restraints removed, ICE need not comply, and the judge must commence the hearing.[7] Thus, ICE maintains the authority to make the final decision about the use of restraints in immigration court.[8]

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[1] *See, e.g.*, Maus v. Baker, 747 F.3d 926, 927 (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 (7th Cir. 1993) (addressing the shackling of witnesses who were inmates).

[2] *See infra* Parts III, IV.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

Although ICE's shackling practices vary across the country, in at least some jurisdictions ICE has exercised its authority under the 1988 Memorandum to indiscriminately shackle all detainees. The exact extent of this practice is unknown, but recent litigation suggests that it is not uncommon.[9] In fact, such litigation indicates that ICE has indiscriminately shackled detainees even in courtrooms located outside of detention facilities, such as the San Francisco Immigration Court.[10] Consequently, detained noncitizens frequently appear in immigration court looking like criminals, wearing orange jumpsuits, handcuffs, leg irons, and belly chains, even though there has been no individualized determination that they pose a safety threat or flight risk.

This Article argues that procedural due process requires an individualized judicial determination of the need for restraints in removal proceedings based on the same rationales underlying this prohibition in the criminal context. Specifically, the indiscriminate use of restraints in removal proceedings diminishes the dignity of the proceedings, impairs a litigant's ability to participate fully in his or her defense, and undermines the fairness of the fact-finding process. Individualized judicial determinations about the need for restraints would minimize these infringements on important rights while still protecting the government's security interests. Such determinations would also avoid the high risk of erroneous deprivation that results when an adversarial party is allowed to make self-serving decisions about the use of restraints in the courtroom.

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. Against this backdrop of the quasi-criminal removal process, Part III explains the historical origins and contemporary rationale for the prohibition against the indiscriminate use of restraints in criminal jury trials and explores how some courts have extended this prohibition to criminal proceedings before a judge.

In Part IV, the Article discusses how courts have embraced a similar standard in the civil context, requiring individualized determinations by the

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[9] Recent litigation shows, for example, that ICE is engaged in indiscriminate shackling in California and Massachusetts. *See* Cindy Chang, *Shackling to End at San Francisco Immigration Court*, L.A. TIMES (Jan. 23, 2014), http://articles.latimes.com/print/2014/jan/23/local/la-me-ln-shackling-immigration-20140123; Reid v. Donelan, 2 F. Supp. 3d 38, 46–47, (D. Mass. 2014).

[10] Chang, *supra* note 9.

trial judge and prohibiting the delegation of this duty to a correctional officer that is an adversarial party. Part IV then provides a detailed analysis of whether procedural due process requires an individualized judicial determination of the need for restraints in removal proceedings under the three-part test in *Mathews v. Eldridge*, which requires courts to consider the private interests at stake, the government interest, and the risk of erroneous deprivation with and without the additional procedures.[11]

Part V deepens this procedural due process analysis by examining empirical studies suggesting that restraints may have profound cognitive and behavioral effects on both the restrained individual and the judge. These studies are relevant to understanding the private interests at stake under the first factor of the *Mathews* test, as well as the risk of erroneous deprivation under the third factor. In addition, these studies support an argument that prejudice should be presumed for due process violations involving the use of restraints because the psychological and behavioral impacts are so difficult to measure. The Article offers recommendations in Part VI and concludes in Part VII.

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.[12] Annually, over 400,000 people pass through immigration detention, including individuals with serious health problems, mentally incompetent individuals, and the elderly.[13] These detainees are held in approximately 250 facilities across the

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[11] 424 U.S. 319, 335 (1976).

[12] CIVIC, DETENTION MAP & STATISTICS, http://endisolation.org/about/immigration-detention/ (last visited Dec. 2, 2014); IMMIGRATION AND CUSTOMS ENFORCEMENT, 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), http://www.ice.gov/doclib/foia/dfs/detainee popytd2013.pdf; IMMIGRATION AND CUSTOMS ENFORCEMENT, ERO CUSTODY MANAGEMENT DIVISION, FOIA 14-03470: AUTHORIZED FACILITIES WITH FY03-14 ADP (showing average daily center for FY03-FY14 by detention center), http://www.ice.gov/doclib/foia/dfs/detaineepopfy03-fy14.pdf.

[13] IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: ERO–DETAINEE HEALTH CARE—FY2011, http://www.ice.gov/doclib/news/library/factsheets/pdf/dhc-fy11.pdf.

United States, at a cost of over $5 million per day.[14] 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 that have Intergovernmental Service Agreements with ICE.[15] 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.[16]

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).[17] 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.[18] 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.[19] Finally, many noncitizens remain detained simply because they cannot afford to post the bond set by the judge.

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[14] National Immigration Forum, *Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies* (2013), http://www.detentionwatch network.org/sites/detentionwatchnetwork.org/ files/10.21.2011_MathofImmigrationDetention.pdf.

[15] DEPARTMENT OF HOMELAND SECURITY, FY2013: BUDGET IN BRIEF, http://www.dhs.gov /xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf.

[16] Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, THE WASH. POST (Oct. 14, 2013), http://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2012/10/13/09bb689e-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* DEPARTMENT OF HOMELAND SECURITY, *supra* note 15.

[17] *See* 8 U.S.C. § 1226(c) (2012). In addition, "arriving aliens," those who showed up at a point of entry and asked for admission to the U.S., including asylum-seekers, are not entitled to a bond hearing in court. *See* 8 U.S.C. § 1225 (2012).

[18] Rodriguez v. Robbins, 715 F.3d 1127, 1137–38 (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 unconstitutional. *See* INS v. St. Cyr, 533 U.S. 289, 320–21 (2001).

[19] NYU School of Law Immigrant Rights Clinic, Immigrant Defense Project, Families for Freedom, *Insecure Communities, Devastated Families: New Data on Immigration Detention and*

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.[20] 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.[21] The percent of unrepresented detainees is often much higher, depending on location. In Texas, for example, 83–90% of immigration detainees are unrepresented.[22]

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 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

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Deportation in New York City 9 (2012) [hereinafter *Insecure Communities*], http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf.

[20] 8 U.S.C. § 1229a(b)(4)(A) (2012) ("[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.").

[21] U.S. DEPARTMENT OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, FY 2013 STATISTICS YEARBOOK F1 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf.

[22] *Justice for Immigration's Hidden Population: Protecting the Rights of Persons with Mental Disabilities in the Immigration Court and Detention System*, TEXAS APPLESEED REP., Mar. 2010, at 13, *available at* http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=313&Itemid=.

jurisdictions like Texas and Louisiana.[23] Almost all of those transferred outside of New York and New Jersey were ordered deported.[24]

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."[25] 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."[26] 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.[27]

For an eight a.m. court hearing, detainees are usually awoken well before sunrise, 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.[28] 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.[29] 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

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[23] *See Insecure Communities*, *supra* note 19, at 3.

[24] *Id.* (reporting that 94.5% of those transferred outside the area were deported).

[25] *See* Abadia-Peixoto v. U.S. Dept. of Homeland Sec., 277 F.R.D. 572, 574 (N.D. Cal. 2011); U.S. Immigration & Customs Enforcement, Enforcement and Removal Operations, Use of Restraints, Policy Number ERO 11155.1 ¶ 4, November 19, 2012 (on file with author).

[26] *See Abadia-Peixoto*, 277 F.R.D. at 574.

[27] *Id.*

[28] *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).

[29] *See, e.g.*, *id.*

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 and do not arrive back at the detention center until late, having spent the entire day in restraints.[30]

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.[31] By comparison, 74% of the represented non-detainees and 13% of the unrepresented ones had favorable outcomes.[32] Other studies confirm that detainees fare far worse than non-detainees with almost all types of applications for relief from removal.[33] 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.

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[30] *See, e.g.*, *id.*

[31] NYIR Study Steering Committee, *Accessing Justice: the Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 364 (2011) (Study Report: Part 1).

[32] *Id.* at 363.

[33] *See* DONALD KERWIN, CHARITABLE LEGAL PROGRAMS FOR IMMIGRANTS: WHAT THEY DO, WHY THEY MATTER, AND HOW THEY CAN BE EXPANDED, 04-06 Immigr. Briefings 6 (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.

The pervasive use of restraints in immigration court might be justified if there were evidence that detainees pose a serious threat to safety or are flight risks, but the data indicates that the opposite is true. Statistics provided by ICE indicate that 40% of detainees have no criminal record and only about 10–11% have been convicted of a violent crime.[34] Thus, there appears to be a significant rift between the use of restraints in immigration court and the actual security risk posed by detainees, which raises serious concerns about whether the current use of restraints in removal proceedings is constitutional.

III. THE USE OF 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."[35] 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."[36] 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"[37] during trial in order to "have the use of his reason, and all advantages to clear his innocence."[38] 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."[39]

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[34] *See infra* notes 189–193.

[35] Deck v. Missouri, 544 U.S. 622, 626 (2005) (quoting 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)).

[36] *Id.* at 626 (citing 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)).

[37] *Id.* at 631 (quoting Cranburne's Case, (1696) 13 How. St. Tr. 222 (K.B.)).

[38] Riggins v. Nevada, 504 U.S. 127, 154 n.4 (1992) (quoting Trial of Christopher Layer, (1722) 16 How. St. Tr. 94, 100 (K.B.) ("[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")).

[39] *Deck*, 544 U.S. at 626 (quoting 3 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 34 (1817) ("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.")); *see also* SIR JOHN KELYING, REPORTS OF CROWN CASES 11, (Richard Loveland Loveland ed., 3d ed. 1873) ("It was resolved that when Prisoners come to the Bar to be

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."[40] 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."[41]

State courts in the U.S. followed the common law rule, with published decisions dating back to the late nineteenth century.[42] 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."[43] 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 for his detention to answer the charge."[44] 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."[45] The rationales set forth in these cases

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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.").

[40] 2 HAWKINS, PLEAS OF THE CROWN 434 (8th ed. 1894).

[41] *Layer*, 16 How. St. Tr. at 99.

[42] Parker v. Territory, 52 P. 361, 363 (Ariz. 1898); State v. Williams, 50 P. 580, 581–82 (Wash. 1897); Rainey v. State, 20 Tex. App. 455, 472–73 (1886); State v. Smith, 8 P. 343 (Or. 1883); Poe v. State, 78 Tenn. 673, 674–78 (1882); State v. Kring, 64 Mo. 591, 592 (1877); People v. Harrington, 42 Cal. 165, 167 (1871).

[43] *Harrington*, 42 Cal. at 168–69; *see also* People v. Duran, 545 P.2d 1322, 1322–26 (Cal. 1976).

[44] *See* Criminal Practice Act, § 13 (1872), current version at CAL. PENAL CODE § 688 (West 2008) (cited in Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 370 n.9 (Ct. App. 2007)).

[45] 1 BISHOP, NEW CRIMINAL PROCEDURE § 955, at 572–73 (4th ed. 1895) (internal quotations omitted).

continue to justify the prohibition against the 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 Sixth and Fourteenth Amendments.[46] 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.[47] 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."[48] 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."[49]

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."[50] 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."[51] Third, the defendant's ability to communicate with counsel "is greatly reduced when the defendant is in a condition of total physical restraint."[52] In light of these disadvantages, the Court found that a trial judge is allowed to decide to have a defendant removed from the courtroom.[53] However, the Court did not rule out that "in some situations . . . binding and gagging might possibly

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[46] 397 U.S. 337 (1970); *see also* Deck v. Missouri, 544 U.S. 622, 628 (2005).

[47] *Allen*, 397 U.S. at 340.

[48] *Id.* at 343–44.

[49] *Id.* at 344.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

be the fairest and most reasonable way" to handle a highly disruptive defendant.[54]

In 1976, the Court examined a related issue about whether it was inherently unfair to require a defendant to stand trial in prison garb.[55] *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."[56] The Court was concerned that "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment."[57] 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."[58]

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.[59] The Court found that the conspicuous presence of security personnel during trial was not inherently prejudicial and did not need to be justified by an essential state interest specific to each trial.[60] 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."[61] 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."[62]

Most recently, in its 2005 decision in *Deck v. Missouri*, the Supreme Court addressed in detail the constitutionality of shackling during the guilt

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[54] *Id.*

[55] *See* Estelle v. Williams, 425 U.S. 501, 502 (1976).

[56] *Id.* at 503 (citation omitted).

[57] *Id.* at 504–05.

[58] *Id.* at 505–06.

[59] *See* 475 U.S. 560, 562 (1986).

[60] *See id.* at 568–69.

[61] *Id.* at 569.

[62] *Id.*

and penalty phases of a trial.[63] A jury had sentenced Carman Deck to death for robbing and murdering an elderly couple in their home.[64] During the sentencing proceeding, Deck was shackled with leg irons, handcuffs, and a belly chain.[65] 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."[66] *Deck* made it clear that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial."[67]

According to *Deck*, older cases addressing restraints had emphasized the need to prevent physical suffering, while more modern cases stressed the importance of giving effect to three fundamental legal principles: the presumption of innocence, the right to counsel, and a dignified judicial process.[68] The Court painted the first two principles with broad strokes, rather than depicting them as specific, technical rights in a criminal proceeding. For example, in discussing how visible restraints undermine the presumption of innocence, the Court noted that they also impede "the related fairness of the fact-finding process."[69] In discussing the right to counsel, the Court included "a defendant's ability to participate in his own defense" and quoted *Harrington*'s language about how restraints confuse a defendant's mental faculties.[70]

The Court then found that the reasons for prohibiting shackling during the guilt phase apply with comparable force to the penalty phase of a capital case.[71] Although the presumption of innocence is no longer relevant, the jury must decide between life and death, which the Court described as "no less important than the decision about guilt" due to the "severity and

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[63] *See* 544 U.S. 622, 624 (2005).

[64] *See id.* at 624–25.

[65] *Id.* at 625.

[66] *Id.* at 628.

[67] *See id.* at 629.

[68] *Id.* at 630.

[69] *Id.*

[70] *Id.* at 631.

[71] *See id.* at 630–32.

finality of the sanction."[72] In addition, the Court stressed the need for accuracy, noting 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."[73] 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."[74] 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 on trial.[75]

These Supreme Court precedents leave at least two important questions unanswered: 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.[76]

C. Application of Prohibition to Proceedings Before a Judge

The highest courts of at least three states have applied the prohibition against indiscriminate restraints 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, while the highest court of New York recognizes that the sight of restraints may also have an unconscious prejudicial effect on the judge.[77]

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.[78] 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

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[72] *Id.* at 632 (internal quotation marks omitted).

[73] *Id.* at 632–33.

[74] *Id.* at 633.

[75] *Id.*.

[76] *See infra* Part III.C.

[77] *See* People v. Allen, 856 N.E.2d 349, 353 (Ill. 2006); People v. Fierro, 821 P.2d 1302, 1321-22 (Cal. 1991); People v. Best, 979 N.E.2d 1187 (N.Y. 2012).

[78] *See In re* Staley, 364 N.E.2d 72, 73 (Ill. 1977).

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."[79] Applying this logic, the court found that a concealed electronic stun belt requires the same due process analysis as any visible restraint.[80] In deeming visibility unimportant, the court emphasized the impact of restraints on the defendant, rather than on the fact-finder.[81] 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."[82]

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 trials."[83] 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.[84] 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."[85] 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."[86] 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."[87] Applying these principles, the court

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[79] *Allen*, 856 N.E.2d at 353. 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.*

[80] *Id.* at 352.

[81] *Id.*

[82] *Id.* at 358.

[83] People v. Best, 979 N.E.2d 1187, 1188 (N.Y. 2012).

[84] *See id.* at 1189.

[85] *Id.*

[86] *Id.*

[87] *Id.*

found that the trial judge had violated the defendant's constitutional rights by failing to articulate a justification for his restraint.[88]

The California Supreme Court has held that the prohibition against indiscriminate shackling applies not only at trial, but also at a preliminary examination before a judge.[89] 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."[90] 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."[91] 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."[92] 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."[93] These cases demonstrate that some state courts have recognized the severe impact of restraints on a defendant as well as their impact on the judge.

The two federal courts that have addressed the constitutionality of indiscriminate shackling in proceedings before a judge reached different

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[88] *Id.* 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.*

[89] People v. Fierro, 821 P.2d 1302, 1320–22 (1991). The Supreme Court of California addressed shackling of defendants during proceedings before a jury in detail in a 1976 decision called *People v. Duran*. 545 P.2d 1322, 1322–23. *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." *Id.* at 1327. 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*, 177 Cal. Rptr. 1, 3 (Ct. App. 1981). The court therefore concluded that physical restraints could not be applied at a preliminary examination without a showing of good cause. *Id.*

[90] *Fierro*, 821 P.2d at 1321 (internal quotation marks omitted).

[91] *Id.* at 1322.

[92] *Id.* (footnote omitted).

[93] *Id.*

conclusions than these state courts, but neither of them involved the use of restraints during a trial. In *Zuber*, the Second Circuit held that a judge was not required to make an independent evaluation of the need for restraints during a sentencing hearing, reasoning 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."[94] Thus, the court permitted the judge to defer to the recommendation of the Marshals Service on the need to restrain the defendant at the sentencing hearing.[95] Similarly, in *Howard*, the Ninth Circuit upheld a general policy of restraining defendants during pretrial hearings, which had been implemented by the Marshals Service for the Central District of California, reasoning that "a judge in a pretrial hearing presumably will not be prejudiced by seeing the defendants in shackles."[96]

Judge Cardamone's concurring opinion in *Zuber*, however, disagreed with the court's analysis, finding that an independent judicial determination is necessary because restraints degrade the defendant, interfere with the dignity of the proceedings, and impair the defendant's ability to assist counsel—concerns that exist whether the case is before a judge or jury.[97] Furthermore, the Ninth Circuit has construed its decision in *Howard* narrowly, stressing that the court has 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."[98] Thus, *Howard* did not establish a rule that shackling is always permissible if no jury is present. As a district court judge found in the California litigation challenging the blanket use of shackling in the San Francisco Immigration Court, "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."[99] These factors included the size of the courtroom, the number of defendants present, and the shortage of

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[94] United States v. Zuber, 118 F.3d 101, 103–105 (2d Cir. 1997).

[95] *Id.* at 103.

[96] *See* United States v. Howard, 480 F.3d 1005, 1012–14 (9th Cir. 2007).

[97] *Id.* at 105–06 (Cardamone, J., concurring).

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

[99] Notice of Proposed Class Action Settlement at 2, De Abadia-Peixoto v. U.S. Dep't of Homeland Sec., 277 F.R.D. 572, 575–76 (No. 3:11-cv-4001 RS) (citing United States v. Brandau, 578 F.3d 1064, 1065 (9th Cir. 2009)).

officers to secure the space. It should also be noted that the magistrate judge at the pretrial hearing in *Howard* was not the ultimate trier of fact.[100]

There is good reason to think the Ninth Circuit would rule differently in the context of a trial, where the impact of restraints on a defendant is much greater. In a case involving a defendant who was tried while wearing a concealed stun belt, for example, the Ninth Circuit underscored procedural due process concerns around the use of restraints that were completely unrelated to prejudicing the jury.[101] The court held that the trial judge had violated due process by failing to make an individualized determination of the need for the restraints, because the stun belt could interfere with the defendant's ability to participate fully in his defense, communicate with counsel, and concentrate on the proceedings.[102] Thus, the court recognized several substantial impediments caused by restraints that exist whether the trial is before a judge or jury.

IV. THE USE OF RESTRAINTS IN REMOVAL PROCEEDINGS

Although issues around the use of restraints tend to come up most frequently in criminal cases, restraints may actually pose a much greater concern in other areas, such as immigration, since over ninety percent of criminal cases are resolved through plea agreements.[103] Criminal defendants have a well-established due process right not to be subjected to trial in restraints without an individualized judicial determination of necessity, but they usually receive no more than the "bare-bones" procedures that govern guilty pleas.[104] By contrast, less than ten percent of immigration cases are

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[100] *See Howard*, 480 F.3d at 1012.

[101] *See* Gonzalez v. Pliler, 341 F.3d 897, 900–05 (9th Cir. 2003).

[102] *Id.* at 900, 903; *see also* United States v. Durham, 287 F.3d 1297, 1305–06 (11th Cir. 2002) (finding that a stun belt may 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, 340 (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).

[103] *See* Lindsey Devers, Bureau of Justice Assistance, *Research Summary: Plea and Charge Bargaining* 3 (2011), available at https://www.bja.gov/Publications/PleaBargainingResearch Summary.pdf; Lafler v. 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").

[104] *See* Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 826, 829–41 (2014) (discussing the largely unregulated nature of plea bargaining and

resolved informally through prosecutorial discretion, so judicial adjudication of cases remains the norm.[105] Noncitizens facing deportation are therefore routinely affected by the indiscriminate use of restraints and are well positioned to challenge this practice.

In addition, since immigration proceedings do not offer the possibility of a jury trial, they provide fertile ground for formulating standards regarding the use of restraints in bench trials and pretrial hearings, which have been underdeveloped in the criminal arena. 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.[106]

Since immigration proceedings are technically civil, this section first examines how the rationales behind the prohibition against indiscriminate restraints have been applied to civil cases and then argues that the 1988 Memorandum governing the use of restraints in removal proceedings violates procedural due process by failing to require individualized and independent judicial determinations of the need for restraints.

A. The Prohibition Against Indiscriminate Restraints in Civil Cases

Federal appellate courts have recognized that many of the Supreme Court's concerns about shackling, articulated in *Allen* and *Deck*, apply

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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).

[105] Syracuse University, *ICE Rarely Uses Prosecutorial Discretion to Close Immigration Cases*, TRAC (Apr. 24, 2014), http://trac.syr.edu/whatsnew/email.140424.html (finding that only 6.7% of immigration cases were closed based on prosecutorial discretion between October 2012 and March 2014).

[106] *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") (emphasis in original); 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).

equally to civil cases, as all persons have the right to a fair trial under the Fifth and Fourteenth Amendments' due process guarantee.[107] The issue of shackling often comes up in the civil context in involuntary commitment proceedings or in civil rights actions brought by prisoners.[108] In these cases, courts have consistently held that the judge must make an individualized determination of the need for restraints and cannot delegate this responsibility to anyone else.[109] Courts balance the interests of the litigant against the government's need to maintain safety or security in the courtroom.[110] Judges must "impose no greater restraints than are necessary," and they "must take steps to minimize the prejudice resulting from the presence of the restraints."[111] When there are genuine disputes of material facts regarding the threat to security, the trial court must hold an evidentiary hearing.[112] Thus, in the civil context, as in the criminal one, "[s]hackling, restraining or even removing a respondent from the courtroom must be limited to cases urgently demanding that action."[113]

Some state courts 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

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[107] *See, e.g.*, Davidson v. Riley, 44 F.3d 1118, 1122 (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, 581 (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.'").

[108] *See supra* note 102 for examples.

[109] *See, e.g.*, *Davidson*, 44 F.3d at 1122; *Tyars*, 709 F.2d at 1284–85; *Woods*, 5 F.3d at 246–47; *Holloway*, 957 F.2d at 530; *Sides*, 609 F.3d at 581; Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993).

[110] *See, e.g.*, *Sides*, 609 F.3d at 581.

[111] *Davidson*, 44 F.3d at 1122–23.

[112] *See Sides*, 609 F.3d at 582; *Davidson*, 44 F.3d at 1125; *Lemons*, 985 F.2d at 358.

[113] *Tyars*, 709 F.2d at 1284.

the need for restraints in involuntary commitment proceedings before a judge.[114] Furthermore, a growing number of states prohibit indiscriminate shackling during juvenile adjudications, where there is no right to a jury trial.[115] So far, twelve states have prohibited indiscriminate shackling of juveniles through case law,[116] legislation,[117] or court procedures and policies.[118] Recent legislative efforts to address this issue may reflect a growing awareness of the especially harmful impact of restraints on children and adolescents.[119] The rationale set forth in some state court decisions does not, however, depend on any unique characteristics of juveniles and therefore can be extended to other types of proceedings, including immigration.

Decisions from Illinois and California provide particularly relevant reasoning. In a case 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

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[114] *See In re* T.J.F., 248 P.3d 804, 810 (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."); *In re* Hoff, 830 N.W.2d 608, 612–13 (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); *In re* F.C. III, 2 A.3d 1201,1221–23 (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., 932 N.E.2d, 481 485–86 (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.").

[115] *See* McKeiver v. Pennsylvania, 403 U.S. 528, 548 n.7 (1971).

[116] *See* Tiffany A v. Superior Court, 59 Cal. Rptr. 3d 363 (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 v. Millican, 906 P.2d 857, 861 (Or. Ct. App. 1995); State v. E.J.Y., 55 P.3d 673, 675 (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).

[117] FLA. R. JUV. P. 8.100(b) (2014); N.C. GEN. STAT. § 7B-2402.1 (2013); N.Y. Comp. Codes R. & Regs. tit.9, § 168.3(a) (2011); 237 PA. CODE § 139 (2011). Legislation is pending in Alaska, Connecticut and South Carolina. *See* McLaurin, *supra* note 116, at 232 n.123.

[118] *See* Mary Berkheiser, *Unchain the Children*, NEV. LAW., June 2012, at 30; Amy Kingsley, *Why the Practice of Shackling Juvenile Defendants is Coming to an End*, LAS VEGAS CITY LIFE (Aug. 8, 2012), http://lasvegascitylife.com/sections/news/why-practice-shackling-juvenile-defendants-coming-end.html.; Trial Court of the Commonwealth Court Officer Policy & Procedures Manual ch. 4, § 6 (2010); N.M. CHILD CT. R. 10-223A.

[119] McLaurin discusses the special characteristics of adolescents that make them especially vulnerable to being harmed by physical restraints. *See* McLaurin, *supra* note 116, at 227–31.

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.[120] Accordingly, the court held that an 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."[121] The court further found that concerns about courtroom security do not provide sufficient justification for requiring restraints where there is no evidence of a threat of escape.[122]

Two California appellate courts similarly prohibited indiscriminate shackling in juvenile proceedings but adopted a lower standard than applies during a criminal jury trial.[123] 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."[124] 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.[125] 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.[126] 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.[127] These principles are useful for considering how restraints should be handled in immigration proceedings, which share the quasi-criminal qualities of juvenile adjudications.[128]

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[120] *See In re* Staley, 364 N.E.2d at 73.

[121] *Id.* at 74.

[122] *Id.*

[123] *In re* Deshaun M., 56 Cal. Rptr. 3d 627, 630 (Ct. App. 2007) ("some showing of necessity for the use of physical restraints at a juvenile jurisdictional hearing should be required"); Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 371, 373 (Ct. App. 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").

[124] *Deshaun M.*, 56 Cal. Rptr. 3d at 630.

[125] *Tiffany A.*, 59 Cal. Rptr. 3d, at 371–72.

[126] *Id.* at 372.

[127] *Id*.

[128] *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).

B. A Procedural Due Process Analysis of Restraints in Removal Proceedings

ICE's practice of indiscriminately shackling immigration detainees raises two important procedural due process concerns. First, it permits detained noncitizens to be restrained in court without any type of individualized determination. Second, the 1988 MOU allows ICE, an adversarial party, to make the final decision about the need for restraints. Only one court so far has addressed the use of restraints in removal proceedings. In *Reid*, Judge Michael Posner of the U.S. District Court in Massachusetts held that procedural due process requires an individualized determination of the need for restraints.[129] However, the court did not find a due process violation based on the judge's delegation of decision-making authority to ICE in that case because the court concluded that the judge would have reached the same decision given the respondent's criminal record. The only other litigation involving the use of restraints in removal proceedings was a California class action that challenged the indiscriminate use of restraints in the San Francisco Immigration Court. Since that case resulted in a settlement agreement, it did not yield judicial guidance about the due process analysis.[130]

In determining whether government action violates procedural due process, courts generally apply the three-part test in *Mathews v. Eldridge*.[131] This test requires the court to consider: (1) the private interest that will be affected; (2) the government's interest, including the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (3) the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any,

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[129] Reid v. Donelan, 2 F. Supp. 3d 38, 48 (D. Mass. 2014).

[130] De Abadia-Peixoto v. U.S. Dep't of Homeland Sec., 277 F.R.D. 572, 574 (N.D. Cal. 2011); Notice of Proposed Class Action Settlement at 2, De Abadia-Peixoto v. U.S. Dep't of Homeland Sec., 277 F.R.D. 572 (No. 3:11-cv-4001 RS). The California class action raised both procedural and substantive due process claims. The Supreme Court has recognized freedom from restraints as a fundamental right in other contexts. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (recognizing, in a case involving the use of restraints during involuntary civil commitment, that freedom from physical restraints "always has been recognized as the core of the liberty protected by the Due Process Clause" but declining to apply strict scrutiny); Reno v. Flores, 507 U.S. 292, 315 (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.").

[131] 424 U.S. 319, 335 (1976).

of additional or substitute procedural safeguards.[132] Each of these three factors is discussed below.

1. The Private Interest at Stake

In *Allen* and *Deck*, the Supreme Court identified several ways that the use of restraints during a jury trial negatively affects a defendant's liberty interests. These include: (1) undermining the dignity of the proceedings; (2) preventing the defendant from participating fully in his or her defense, including impeding the ability to communicate with counsel; and (3) biasing the jury against the defendant and thereby undermining the presumption of innocence and the related fairness of the fact-finding process.[133] These same interests are jeopardized when a noncitizen is forced to appear in restraints in immigration court. Although there is no right to a jury in removal proceedings, restraints can still jeopardize the fairness of the fact-finding process.

a. The Detainee's Interest in a Dignified Proceeding

Placing a person in shackles is dehumanizing and diminishes the dignity of any type of proceeding. In describing the degradation that restraints inflict, Judge Cardamone on the Second Circuit painted a vivid picture of a defendant being "needlessly paraded about a courtroom, like a dancing bear on a lead, wearing belly chains and manacles."[134] Similarly, Judge Posner on the Seventh Circuit has recognized that a restrained defendant has the appearance of a "mad dog."[135] In *Reid*, the court's procedural due process analysis of the indiscriminate use of restraints in removal proceedings focused primarily on the dignity interest, 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 a criminal court."[136] The court stated 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

[132] *Id.*

[133] Deck v. Missouri, 544 U.S. 622, 630–31 (2005); Illinois v. Allen, 397 U.S. 377, 344 (1970).

[134] United States v. Zuber, 118 F.3d 101, 105–106 (2d Cir. 1997) (Cardamone, J., concurring).

[135] Maus v. Baker, 747 F.3d 926, 927 (7th Cir. 2014).

[136] Reid v. Donelan, 2 F. Supp. 3d 38, 45 (D. Mass. 2014).

civil, would be an affront to due process and entirely inconsistent with the values underlying *Deck*."[137]

In describing removal proceedings as "titularly civil," *Reid* recognized the significance of what is at stake, rendering the need for a dignified proceeding all the more important. The Supreme Court has long noted that deportation may result in the loss of life or "of all that makes life worth living" and more recently described it as "an integral part—indeed, sometimes the most important part—of the penalty" that results from a conviction.[138] Given that deportation can be a more draconian consequence than criminal punishment, the need to protect dignity in a removal proceeding is no less important than in a criminal proceeding.

Yet the indignity of restraints may be felt more acutely by detainees in removal proceedings than criminal defendants because of the striking rift between the informal surroundings of immigration court and the seriousness of what is at stake. Immigration judges themselves have decried the undignified system in which they work, where they hear "what amount to death penalty cases . . . in traffic court settings."[139] Dana Leigh Marks, who has served as an Immigration Judge in San Francisco since 1987 and is president of the National Association of Immigration Judges, describes the immigration courts as the "mistreated stepchildren" of the Department of Justice or "Cinderella" courts.[140] For respondents to appear in restraints in this downtrodden system is an indignity within an indignity, which amplifies the appearance of injustice.

b. The Detainee's Interest in Participating Fully in the Proceedings

Since the court in *Reid* found that an immigration detainee's dignity interest alone demanded some type of individualized determination of the need for restraints, it did not need to analyze the other liberty interests at stake. However, in characterizing the dignity interest as "[t]he factor most clearly present in the immigration context," the court may also have

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[137] *Id.*

[138] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922); Padilla v. Kentucky, 130 S. Ct. 1473, 1480 (2010).

[139] Dana Leigh Marks, Opinion, *Immigration Judge: Death Penalty Cases in a Traffic Court Setting*, CNN (June 26, 2014), http://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system/.

[140] *Id.*

underestimated the relevance of the other factors to immigration proceedings.[141] Restraints affect the ability of immigration detainees to participate in their defense at least as much as they affect criminal defendants. The Immigration and Nationality Act, as well as procedural due process, guarantees a detainee's rights to testify, cross-examine witnesses, examine the evidence, and have counsel at one's own expense.[142] In addition, respondents in removal proceedings almost always testify, making the presence of restraints more salient than in criminal cases, where the defendant usually invokes the right to remain silent and therefore has a more passive presence in the courtroom.

For detainees who are lucky enough to be represented, the impediment to communicating with counsel remains the same as in criminal cases. The impact of restraints is even worse, however, for the majority of immigration detainees who are unrepresented, as the detainee alone must carry out all the functions of counsel, including taking the testimony of any witnesses, handling documents, and arguing the case.[143] In *Davidson*, a civil rights case brought by a prisoner, the Second Circuit recognized the heightened impact of restraints on an unrepresented litigant, expressing dismay 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" and had to "hobble in leg-irons from counsel table to the bench" after each round of questioning.[144]

Not only do restraints physically interfere with a litigant's ability to participate fully in the hearing, but they also create psychological impairments to participation. Nineteenth century cases such as *Harrington* recognized that restraints impair a defendant's mental faculties, but this line of reasoning has received less attention in modern cases because judges attribute the concern over mental impairment in early cases to the physical pain that restraints inflicted at that time.[145] Courts now tend to note the psychological impact of restraints primarily in situations where an extreme type of restraint is used or where the restraints are applied for a particularly

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[141] Reid v. Donelan, 2 F. Supp. 3d 38, 45 (D. Mass. 2014).

[142] 8 U.S.C. § 1229a(b)(4)(B) (2012).

[143] *Legal Representation Needed to Fill Justice Gap, Says Immigration Panel*, A.B.A. (Aug. 10, 2014, 10:15 AM), http://www.americanbar.org/news/abanews/aba-news-archives/2014/08/representation_isla.html (stating that 83% of immigration detainees are unrepresented).

[144] Davidson v. Riley, 44 F.3d 1118, 1126 (2d Cir. 1995).

[145] People v. Harrington, 42 Cal. 165, 168 (1891); Deck v. Missouri, 544 U.S. 622, 630 (2005).

long time and therefore may become quite physically painful. For instance, the Ninth Circuit has recognized that being forced to wear a stun belt in court prevents a defendant from "concentrate[ing] adequately on his testimony because of the stress, confusion and frustration."[146] Likewise, the Eleventh Circuit has found that a stun belt impairs "the defendant's ability to take an active interest in the presentation of his case."[147]

An example of a case where the court recognized the psychological impact of restraints that had been applied for a long time is *Spain v. Rushen*, which involved a member of the Black Panther Party imprisoned at San Quentin and restrained during his seventeen-month trial.[148] 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."[149] Spain himself submitted a declaration with his habeas petition describing the effect of the restraints, stating, "I get exasperated and cannot concentrate."[150] He also filed an affidavit explaining that the restraints exacted "a severe physical and psychological strain."[151] The Ninth Circuit accordingly found that "[s]hackles may impair the defendant's mental faculties."[152] The court further 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."[153]

In immigration cases, restraints involve at most handcuffs, leg irons, and belly chains, not stun belts, and the average length of detention is one month, which is much shorter than the seventeen-month trial in Spain's case.[154] But this does not mean that restraints have an insignificant psychological impact. On the contrary, the discussion in Part V below suggests that courts may be grossly underestimating how much restraints affect both cognition and behavior even when there is no physical pain

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[146] Gonzalez v. Pliler, 341 F.3d 897, 900-903 (9th Cir. 2003).

[147] United States v. Durham, 287 F.3d 1297, 1305–06 (11th Cir. 2002).

[148] Spain v. Rushen, 883 F.2d 712 (1989).

[149] *Id.* at 717.

[150] *Id.* at 722.

[151] *Id.*

[152] *Id.* at 721 (citing Kennedy v. Cardwell, 487 F.2d 101, 105–06 (6th Cir. 1973)).

[153] *Id.* at 722.

[154] *Legal Noncitizens Receive Longest ICE Detention*, TRAC IMMIGRATION (June 3, 2013), http://trac.syr.edu/immigration/reports/321/ (stating that 70 percent of ICE detainees were released within the first 30 days, although thousands remained detained for much longer).

involved. That discussion is therefore highly relevant to understanding how restraints affect an individual's ability to participate fully in the proceedings.

c. The Detainee's Interest in a Fair and Unbiased Process

Although there is no right to a jury trial in immigration court, restraints may bias the immigration judge, which would undermine the fairness of the fact-finding process. As discussed above, some courts have recognized that procedural due process requires an individualized assessment of the need for restraints even when the adjudicator is a judge. Most of these cases reach that conclusion by emphasizing the need to protect the litigant's dignity and ability to participate in the proceedings, ignoring the possibility of prejudice by the judge. But there are some exceptions, such as New York's highest court, which acknowledged that "judges are human" and vulnerable to unconscious biases.[155]

In the immigration context, the risk of unconscious or implicit bias by the judge is especially high due to the difficult conditions in which immigration judges work, their high rates of stress and burnout, and the types of decisions they make.[156] Studies have shown that the conditions of decision-making play a critical role in the behavioral expression of implicit biases by either promoting or impeding deliberative thinking.[157] Judges are more likely to think deliberatively when they take their time to make decisions, provide written opinions, and receive feedback.[158] Unfortunately, immigration judges have none of these luxuries.[159] They carry enormous caseloads and normally issue oral decisions as soon as a merits hearing is over. [160] Written decisions are rare, even in complex cases.[161] Feedback is also uncommon, since only a small fraction of cases are appealed.[162]

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

[156] This argument was discussed in detail in an earlier article. *See* Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 417 (2011) [hereinafter *Implicit Bias*].

[157] *See* Jerry Kang et al, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1175 (2012) [hereinafter *Bias in the Courtroom*]; Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV 1, 33 (2007) [hereinafter *Blinking on the Bench*].

[158] *Blinking on the Bench*, *supra* note 157, at 33–35.

[159] *Implicit Bias*, *supra* note 156, at 428–41.

[160] *Id.* at 431, 433.

[161] *Id.* at 433.

[162] *Id.* at 440–41.

A single immigration judge handles, on average, 1,500 cases per year, which is over three times the average caseload of federal judges.[163] In Houston, one of the busiest immigration courts, six judges have about 6,000 cases each.[164] 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.[165] Lawyers call this type of schedule a "rocket docket."[166] Making matters worse, immigration judges have little support staff to help manage these huge caseloads, and four judges often share a single law clerk.[167]

Consequently, immigration judges suffer from extremely high levels of stress and burnout.[168] A 2007 survey found that immigration judges "reported more burnout than any other group of professionals . . . including prison wardens and physicians in busy hospitals."[169] Immigration judges complained about the amount of work, the constant pressure to complete cases, the extemporaneous nature of oral decisions, and the denial of access to transcripts.[170] One judge succinctly stated, "There is not enough time to think."[171] Not surprisingly, judges reported low motivation, depression, and exhaustion; they also demonstrated significant symptoms of secondary traumatic stress.[172] One judge described the job as a "factory assembly line" while another compared it to the "drip-drip-drip of Chinese water torture . . . ."[173]

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[163] Daniel Costa, *Overloaded Immigration Courts: With Too Few Judges, Hundreds of Thousands of Immigrants Wait Nearly Two Years for a Hearing*, ECON. POL'Y INST. (July 24, 2014), http://www.epi.org/publication/immigration-court-caseload-skyrocketing/.

[164] Laura Wides-Munoz, *Nearly Half Immigration Judges Eligible to Retire*, ASSOCIATED PRESS, Dec. 22, 2013, http://bigstory.ap.org/article/nearly-half-immigration-judges-eligible-retire.

[165] Eli Saslow, *In a Crowded Immigration Court, Seven Minutes to Decide a Family's Future*, WASH. POST, Feb. 2, 2014, http://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html.

[166] *Id.*

[167] *Implicit Bias*, *supra* note 156, at 433.

[168] *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, 58–59 (2008).

[169] *Id.* at 60.

[170] *Id.* at 64–65.

[171] *Id.* at 66.

[172] *Id.* at 57, 66, 71, 74.

[173] *Id.* at 65, 72.

These conditions and emotions all encourage reliance on intuition, rather than conscious, deliberative thought, which takes more time and energy.[174] When humans make judgments under pressure, they tend to 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.[175] Feeling tired, distracted, or rushed also increases the chance of responding based on automatic impulses.[176] The less motivation an individual has, the harder it becomes to suppress implicit biases.[177] 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.[178] Many decisions are discretionary, requiring minimal justification. Decisions about whether to grant bond and many types of applications, including asylum, cancellation of removal, and various waivers, are all discretionary.[179] When judges are exercising discretion, they often do not go through the exercise of explaining their reasoning, which eliminates one of the checks on implicit bias.[180] 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.[181] Immigration judges also make critical determinations about credibility that are very difficult to reverse on appeal.[182] 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.[183]

These background conditions make immigration judges particularly vulnerable to implicit biases, including being biased by the sight of

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[174] *See Implicit Bias*, *supra* note 156, at 430–31.

[175] *See id.* at 431.

[176] *Id.* at 431–32.

[177] *Id.* at 436.

[178] *See id.* at 437.

[179] *See id.*

[180] *See id.* at 437–38.

[181] *See Blinking on the Bench*, *supra* note 157, at 28–29; *see also Implicit Bias*, *supra* note 156, at 437–38.

[182] *See Implicit Bias*, *supra* note 156, at 438, 440–41.

[183] *See id.* at 438–39.

restraints. Part V deepens this analysis by examining a range of empirical studies that help show why the sight of restraints, specifically, might have a prejudicial effect on a judge.

2. The Government's Interest in Security

Balanced against the detainee's hefty liberty interests is the government's interest in maintaining security. Security in federal, state, and local courts has become an increasingly important issue over the past decade. 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.[184] In state and local courts, the number of violent incidents has increased every year since 1970, reaching 67 in 2011.[185] Maintaining security in immigration courts is particularly challenging due to overcrowded courtrooms and the absence of any bailiffs.[186] These two factors arguably make it especially difficult to prevent incidents of violence and flight without the use of restraints.

In fact, immigration judges themselves have expressed concerns about courtroom security. In October 2013, after litigation was initiated in Massachusetts challenging ICE's indiscriminate use of restraints, the local ICE office actually changed its policy to provide for individualized assessments by ICE of the need for restraints.[187] The immigration judges in that area, however, expressed safety concerns about the new policy, which led ICE to hold it in abeyance and revert to its prior practice of blanket shackling.[188] The fact that the immigration judges did not feel safe with individualized determinations suggests that this procedure may not be adequate to protect the government's interest in security.

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[184] Tim Fautsko, Steve Berson, and Steve Swensen, *Courthouse Security Incidents Trending Upward: The Challenges Facing State Courts Today*, 2012 FUTURE TRENDS IN STATE COURTS 102, http://ncsc.contentdm.oclc.org/cdm/ref/collection/facilities/id/163.

[185] *Id.* at 103.

[186] The National Association of Immigration Judges, *The State of Our Courts: A View from the Inside*, (2013), http://journalism.berkeley.edu/conf/2014/immigration/wp-content/uploads/2014/04/NAIJ-The-State-of-Our-Courts-4-13-13.pdf; Kevin Diaz, *Overburdened and Underfunded, Immigration Judges Decry 'Cinderella' Court System*, HOUSTON CHRONICLE, Aug. 27, 2014, *available at* http://www.houstonchronicle.com/news/article/Overburdened-and-under funded-immigration-judges-5717090.php.

[187] Reid v. Donelan, 2 F. Supp. 3d 38, 42 (D. Mass. 2014).

[188] *Id.*

Yet several persuasive counterarguments can be made that individualized determinations are indeed sufficient to maintain security in the courtroom. These arguments highlight: (1) the overwhelmingly nonviolent background of immigration detainees; (2) existing classification systems for detainees based on security risk; and (3) ICE's historical practice of using restraints only when an individualized assessment indicated necessity. Each of these arguments is discussed below.

a. Characteristics of the Detained Population

While some immigration judges may feel unsafe unless all detainees are restrained in the courtroom, the characteristics of the detained population suggest that such fears are largely unfounded. In 2013, ICE reported that 40.5% of the immigration detainees in custody had no criminal record whatsoever.[189] Likewise, data from 2011 demonstrate that 40.8% of immigration detainees had no criminal record.[190] Of the 59.2% with a criminal record, most had been convicted of nonviolent offenses, such as DUIs (13.5%), traffic offenses (7.0%), marijuana possession (5.4%), cocaine possession (5.1%), larceny (3.8%); cocaine sale (2.9%), and illegal entry (2.9%).[191] Only 4.6% of immigration detainees had been convicted of assault, 2.6% of robbery, and 4.8% of "dangerous drugs."[192] An internal review conducted by the Department of Homeland Security in 2009 confirmed that only a small percentage of immigration detainees (11%) had been convicted of a violent crime and described "the majority of the population" as "low custody, or having a low propensity for violence."[193]

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[189] *See* Miroff, *supra* note 16 (stating that ICE reported that only 19,864 of the 33,391 detainees in its custody on September 9, 2013 were convicted criminals).

[190] *Issue Brief: Interior Immigration Enforcement By the Numbers*, BIPARTISAN POLICY CENTER 8 (2014), http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/files/Interior%20Immigration%20Enforcement.pdf.

[191] *Id.*

[192] *Id.*

[193] U.S. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION AND CUSTOMS ENFORCEMENT, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 2 (2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf; *see also Few ICE Detainers Target Serious Criminals*, TRAC IMMIGRATION (Sept. 17, 2013), http://trac.syr.edu/immigration/reports/330/. The data 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

Furthermore, even if a detainee has been convicted of a violent crime, the conviction alone may not justify the need for shackles. In a decision holding that a past felony conviction was not a sufficient reason to impose restraints on the defendant at trial, the Ninth Circuit explained that "[i]n all the cases in which shackling has been approved, there has also been evidence of disruptive courtroom behavior, attempts to escape from custody, assaults or attempted assaults while in custody, or a pattern of defiant behavior toward corrections officials and judicial authorities."[194] Thus, it is an individual's behavior while in custody, rather than prior crimes, that is most important in determining whether restraints are necessary in the courtroom.

Finally, there are no publicly available reports of violence or flight 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.[195] These data cumulatively indicate that only a small fraction of immigration detainees pose a risk to security.

b. Efficient Assessments of Individualized Risk

Even if only one in ten detainees has a violent background, immigration judges and ICE may still support blanket restraints if they do not have confidence that they can identify those who do pose a risk. Specifically, they may worry that they do not have the capacity, in terms of time and resources, to conduct sufficiently thorough assessments of the risk posed by each detainee. One response to these capacity-based concerns is that ICE already classifies detainees based on security risk.[196] ICE's Risk

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intoxicated, and marijuana possession are omitted, two thirds of all detainers were for individuals with no record of conviction.

[194] Duckett v. Godinez, 67 F.3d 734, 749 (9th Cir. 1995).

[195] Steven K. Swensen, CTR. FOR JUDICIAL & EXEC. SEC., *Disorder in the Court: Incidents of Courthouse Violence: List of Court-Targeted Violence 2005-Present* (2012), http://www.cjes consultants.com/assets/documents/CJES-JCVI-Disorder-in-the-Court-Incidents-IV.pdf.

[196] *See* ICE, INS DETENTION STANDARD: DETAINEE CLASSIFICATION SYSTEM, at 2 (2002), http://www.ice.gov/doclib/dro/detention-standards/pdf/classif.pdf; ICE, ICE/DRO DETENTION STANDARD: CLASSIFICATION SYSTEM (2008), http://www.ice.gov/doclib/dro/detention-standards /pdf/classification_system.pdf; ICE, PERFORMANCE BASED DETENTION STANDARDS § 2.2, at 70–89 (2011), https://www.ice.gov/doclib/detention-standards/2011/classification_system.pdf.

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."[197] This information should help assess whether a detainee presents a safety or flight risk and is therefore highly relevant to evaluating the need for restraints.

c. ICE's Past Practices and Policies Regarding Restraints

Finally, ICE's own past policies and practices around restraints indicate that individualized determinations of the need for restraints sufficiently protect the government's interest in security. Prior to 2012, ICE required individualized determinations of the need for restraints during transportation, where safety concerns are comparable to a courtroom in that detainees are taken outside of secure facility.[198] A 2004 memo instructed 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."[199] This assessment had to 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."[200] Officers also had to "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."[201]

Similarly, a 2008 memo required officers to make an individualized determination about the need for restraints "based on an articulated reason," taking into consideration "all known information of escape risks, criminal background or involvement, potential threat to national security, violence,

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[197] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, RISK CLASSIFICATION ASSESSMENT (RCA) OVERVIEW, 2013 (on file with author).

[198] *See infra* notes 199–202 and accompanying text.

[199] Memorandum from Victor Cerda, Acting Director of ICE, entitled *Use of Restraints* (Jul. 20, 2004).

[200] *Id.*

[201] *Id.*

victim of sex crimes, or medical indications to escorting officers."[202] Although in 2012 ICE issued a new memo calling for the blanket use of restraints during transportation, there is no indication that this change was due to inadequate security during the preceding years when individualized determination were used.[203] The change could have been made for the sake of convenience or as a precautionary measure to ensure that no security breaches would occur in the future.

Furthermore, no changes have been made to ICE's three sets of detention standards, issued in 2000, 2008, and 2011, which continue to require an individualized analysis of the need for restraints during transportation.[204] Currently, different detention facilities around the country currently follow different sets of standards, since the newer ones are being rolled out slowly. The standards on land transportation all indicate that detainees should be restrained only if their "documents or behavior in transit indicate a security risk."[205] Officers must document the reason for using restraints, the type of restraints, and the times when the restraints are applied and removed.[206] The only categorical approach to the use of restraints in these standards pertains to protecting vulnerable groups. Specifically, the standards provide that women and children should not be restrained during transportation absent an exceptional situation.[207] If a case-by-case analysis of security risk is good enough for transportation outside

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[202] Memorandum from 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).

[203] 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).

[204] *See infra* note 205.

[205] INS, NATIONAL DETENTION STANDARDS: TRANSPORTATION 7 (2000) [Transportation 2000], http://www.ice.gov/doclib/dro/detention-standards/pdf/transp.pdf; PERFORMANCE BASED NATIONAL DETENTION STANDARDS: TRANSPORTATION (by Land) 9 (2008) [Transportation 2008], http://www.ice.gov/doclib/dro/detention-standards/pdf/transportation_by_land.pdf; PERFORMANCE BASED NATIONAL DETENTION STANDARDS: TRANSPORTATION (by Land) 49 (2011) [Transportation 2011], https://www.ice.gov/doclib/detention-standards/2011/transportation_by_land.pdf.

[206] Transportation 2000, *supra* note 205; Transportation 2008, *supra* note 205; Transportation 2011, *supra* note 205.

[207] Transportation 2000, *supra* note 205, at 14; Transportation 2008, *supra* note 205, at 12.

of the detention center, then it should also be sufficient to address security concerns when detainees are taken to court.[208]

3. The Risk of Erroneous Deprivation

The third factor of the *Mathews* test requires examining the risk of erroneous deprivation of the private interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Indiscriminate shackling poses a high risk of erroneous deprivation for the simple reason that most immigration detainees pose no safety threat or flight risk. As previously noted, over 40% of immigration detainees have no criminal record and only about 10-11% have been convicted of a violent crime.[209] Restraining all detainees therefore leads to depriving the vast majority of them of their liberty interests even though they pose no threat to security. Providing individualized determinations would dramatically reduce the wrongful deprivation of liberty just by identifying and shackling only the small fraction of detainees who actually pose a safety or flight risk.

A procedure that requires individualized determinations but permits them to be made by ICE is better than allowing indiscriminate shackling but

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[208] The use of restraints inside detention facilities also requires an individualized determination, but there may be fewer security concerns within a detention facility than when detainees are taken outside. *See* INS, NATIONAL DETENTION STANDARDS: USE OF FORCE 1, 2, 5 (2000), http://www.ice.gov/doclib/dro/detention-standards/pdf/useoffor.pdf; ICE, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2008: USE OF FORCE AND RESTRAINTS 3, 9 (2008) [Restraints 2008], http://www.ice.gov/doclib/dro/detention-standards/pdf/use_of_force_and_restraints.pdf; ICE, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011: USE OF FORCE AND RESTRAINTS 210, 216 (2011) [Restraints 2011], https://www.ice.gov/doclib/detention-standards/2011/use_of_force_and_restraints.pdf. 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. *See* Restraints 2008 at 6. Under the 2011 standard, 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. *See* Restraints 2011 at 213. These developments appear related to increased attention to the harms caused by shackling pregnant prisoners. *See, e.g.*, Nelson v. Corr. Med. Servs., 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 CALIF. L. REV. 1239, 1255–58 (2012).

[209] *See supra* notes 189–193 and accompanying text.

still carries a significant risk of erroneous deprivation. Allowing ICE, an adversarial party, to determine whether restraints are needed carries an inherent risk of error for at least two reasons. First, ICE has a motive to restrain detainees simply to make its own job of maintaining security in the courtroom easier. Second, as the party seeking deportation, ICE may decide to shackle detainees just to make it harder for them to fight their cases.

In other types of civil cases, courts have squarely held that a judge cannot delegate the responsibility to determine the need for physical restraints to security officers who are an adversarial party.[210] Judge Posner on the Seventh Circuit, for example, has described a trial judge's abdication of this responsibility as an absence and abuse of discretion, not an exercise of discretion.[211] 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."[212] 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."[213] 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 decision maker could hardly be called impartial.[214]

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[210] *See, e.g.*, Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993).

[211] *Id*.

[212] *Id.* at 356 (quoting magistrate judge).

[213] *Id.*

[214] *Id.*; *see also* Woods v. Thieret, 5 F.3d 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

Similarly, in *Davidson*, which also involved a civil rights lawsuit against correctional personnel, the Second Circuit found 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."[215] The Second Circuit stressed that it was the trial court's duty to engage in the due process analysis that required balancing the litigant's interest in being free of shackles against considerations of security.[216]

Lemons and *Davidson* are particularly helpful 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.[217] These cases provide more relevant guidance than criminal cases like *Zuber* and *Howard*, where the trial judge was allowed to defer to the recommendations of the Marshals Service, because the Marshals Service was not an adversarial party in the criminal proceedings.[218] Immigration cases are analogous to *Lemons* and *Davidson* because the issue is whether ICE, an adversarial party, is allowed to make self-serving decisions about the use of restraints.

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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); Sides v. Cherry, 609 F.3d 576, 581 (3d Cir. 2010).

[215] Davidson v. Riley, 44 F.3d 1118, 1125 (2d Cir. 1995); *see also Hameed*, 57 F.3d at 222 ("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.").

[216] *Davidson*, 44 F.3d at1125 (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.

[217] *See id.* at 1125; *Lemons*, 985 F.3d at 358. 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 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 posed 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." Washington v. Harper, 494 U.S. 210, 231 (1990) (emphasis added). *See also* Parham v. J.R., 442 U.S. 584, 607–09 (1979) ("[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").

[218] United States v. Zuber, 118 F.3d 101, 103 (2d Cir. 1997); United States v. Howard, 480 F.3d 1005, 1012–14 (9th Cir. 2007).

In other contexts, the BIA and federal appellate courts have recognized that the immigration judge may not delegate authority to ICE because it is an adversarial party, and the regulations require the judge to exercise "independent judgment and discretion."[219] For example, in holding that ICE's opposition to a motion to reopen cannot be the sole basis for denial, several appellate courts have reasoned that an adversarial party may not be given this type of unilateral power, which also prevents meaningful review.[220] The BIA has agreed that an immigration judge cannot be required to defer to ICE's position on a motion to reopen, although the judge should take it into consideration.[221] Similarly, the BIA has held that an immigration judge must independently evaluate the basis of ICE's position regarding whether a continuance is appropriate to apply for adjustment of status, which is the process of becoming a lawful permanent resident.[222] The BIA has also concluded that an immigration judge must exercise independent judgment in deciding whether to administratively close removal proceedings over ICE's objection, which results in the case being taken off the active docket.[223]

These decisions all indicate that it is just as improper to defer to an adversarial party in removal proceedings as in any other type of case. While the use of restraints can be distinguished from other types of decisions because of ICE's expertise in matters related to security, allowing ICE to have the final word on whether a detainee will be shackled creates a serious risk of erroneous deprivation. Requiring the immigration judge to make an independent determination after understanding the basis of ICE's security concerns and listening to the detainee's response would significantly reduce

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[219] 8 C.F.R. § 1003.10(b) (2014).

[220] *See* 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) (finding that "affording such importance to [DHS opposition to a motion to reopen] 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").

[221] *In re* Lamus-Pava, 25 I. & N. Dec. 61, 65 (BIA 2009) (clarifying 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").

[222] *In re* Hashmi, 24 I. & N. Dec. 785, 790–91 (BIA 2009).

[223] Matter of Avetisyan, 25 I. & N. Dec. 688, 691 (BIA 2012).

the risk of error that stems from allowing an adversarial party, with all of its inherent biases, to make this critical decision.

Part V below adds another lawyer to the analysis of the risk of erroneous deprivation by explaining the potential cognitive and behavioral impact of restraints on both the litigant and the judge. Specifically, the empirical studies discussed in Part V suggest that restraints may increase the likelihood that a deportation order will be issued in error by making the respondent more passive and triggering the judge's implicit biases. If these studies were taken into consideration when applying the *Mathews* test, the risk of erroneous deprivation would be even greater.

4. Analysis of the Three *Mathews* Factors

This discussion has shown that immigration detainees have private interests that are just as compelling, if not more compelling, than the private interests at stake in criminal and other types of civil cases. At the same time, the government has a compelling interest in maintaining security, with the special challenges presented by overcrowded and understaffed immigration courtrooms. Requiring individualized determinations of the need for restraints is a procedural solution that fairly balances these competing interests, especially since around 90% of detainees have not been convicted of a violent crime and a classification system already exists to help identify those who do pose security risks. Furthermore, it is critical that immigration judges, not ICE, make these individualized determinations to reduce the risk of erroneous deprivation. This conclusion is consistent with the holdings of numerous civil cases requiring the trial judge to make individualized determinations about the need for restraints and prohibiting delegation of this duty to correctional officers who are an adversarial party.

C. The Issue of Prejudice

If an individual challenges a deportation order based on a due process violation, reversal would normally require a showing of prejudice, which means the individual must demonstrate that the violation may have affected the outcome of the proceedings.[224] Of course, if a noncitizen seeks to enjoin the due process violation from occurring in the first place, no showing of

[224] *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).

prejudice is required.[225] In determining whether a due process violation involving the use of restraints constituted prejudicial or harmless error, appellate courts have considered 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."[226] Courts have paid particular attention to whether dangerousness or credibility is a central issue in the case, reasoning that errors involving the use of restraints in these situations are unlikely to be harmless.[227] These cases are useful in analyzing the issue of prejudice in immigration cases, where dangerousness and credibility commonly play critical roles.

In *Lemons*, the excessive force case discussed above, the Seventh Circuit rejected the defendant's argument that any error regarding the use of restraints was harmless, because "[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."[228] Similarly, in *Tyars*, an involuntary commitment case, 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.[229]

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[225] *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 instance.") (emphasis in original); Reid v. Donelan, 2 F. Supp. 3d 38, 44 (D. Mass. 2014).

[226] *See* Davidson v. Riley, 44 F.3d 1118, 1124–25 (2d Cir. 1995).

[227] *See id.* at 1125.

[228] Lemons v. Skidmore, 985 F.2d 354, 359 (7th Cir. 1993); *see also* Maus v. Baker, 747 F.3d 926, 927–28 (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).

[229] 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). By contrast, in *Woods v. Thieret*, where the § 1983 action focused on living conditions in a prison, the Ninth Circuit found any err or to be harmless because the central issue was unrelated to the presence of physical restraints. 5 F.3d 244, 249; *see also Davidson*, 44 F.3d at 1124–25.

In the immigration context, dangerousness is always a critical issue in bond hearings and is also often relevant to merits hearings.[230] Bond hearings require the judge to address two key questions: whether the noncitizen is a flight risk and whether he or she is a danger to the community.[231] 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 some forms of relief require showing good moral character, while others are discretionary and unlikely to be granted if the judge thinks the individual 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."[232]

Restraints can also have a profound effect on cases that hinge on credibility assessments.[233] In *Davidson*, which involved a civil rights 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 Corrections'] witnesses."[234] As the Ninth Circuit has explained, restraints increase anxiety, which may impact demeanor on the stand and therefore affect assessments of the testimony.[235]

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[230] *See supra* Part IV.B.

[231] *See* 8 U.S.C. § 1226(c)(2) (2012).

[232] *See* 8 U.S.C. § 1231(b)(3)(B) (2012); *In re* Frentescu, 18 I. & N. Dec. 244, 247 (BIA 1982).

[233] *See Davidson*, 44 F.3d at 1126.

[234] *Id*. 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).

[235] *See* Gonzalez v. Pliler, 341 F.3d 897, 901 (9th Cir. 2003).

In removal proceedings, credibility is often a crucial issue. Establishing credibility is especially important in applications for asylum, withholding of removal, and protection under the Convention Against Torture.[236] In these cases, the main evidence is usually the respondent's own testimony about any past harm and his or her fear of future harm. 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.[237] 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."[238] Being restrained impacts many of these aspects of demeanor and may therefore influence a crucial credibility determination.[239]

Since assessments of dangerousness and credibility both play a major role in removal proceedings, in many cases it should not be difficult to establish prejudice as a result of being restrained without an individualized judicial determination of necessity. In cases that do not raise these issues, however, the task of demonstrating prejudice becomes much harder, since the ways that restraints affect a case often remain invisible. The Supreme Court has recognized that some types of errors should be presumed prejudicial because a defendant "cannot make a specific showing of prejudice."[240] This could be due to the difficulty in measuring the effects of an error or because the error undermined the structural integrity of the

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[236] *See* Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments*, 44 TEX. 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).

[237] REAL ID Act of 2005, 8 U.S.C. §§ 1229a(c)(4)(C), 1158(b)(1) (2012).

[238] Shrestha v. Holder, 590 F.3d 1034, 1042 (9th Cir. 2010) (quoting Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir. 2003)).

[239] *See Gonzalez*, 341 F.3d at 901 (discussing the impact of restraints on demeanor).

[240] United States v. Olano, 507 U.S. 725, 735 (1993). For examples of cases where the Court has presumed prejudice, *see* Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986) (involving racial discrimination in the selection of a grand jury); Tumey v. Ohio, 273 U.S. 510, 535 (1927) (involving a judge who had a financial interest in a criminal conviction); Estes v. Texas, 381 U.S. 532, 541–44 (1965) (involving pretrial publicity); Mullaney v. Wilbur, 421 U.S. 684, 702–04 (1975) (involving the improper shifting of the burden of proof); Jackson v. Denno, 378 U.S. 368, 389 (1964) (no judicial determination of the voluntariness of a confession).

proceeding.[241] Both of these rationales are applicable to errors involving the use of restraints.[242] As explained in Part V below, restraints can influence the behavior of the respondent and the judge through subtle psychological processes, making it hard to measure or demonstrate their impact in a particular case. Establishing a presumption of prejudice that would shift the burden to the government to demonstrate harmless error would therefore be an appropriate framework in these cases.

V. COGNITIVE AND BEHAVIORAL IMPACT OF RESTRAINTS

A. Impact on Restrained Individuals

While 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, 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 than 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.[243] Researchers have also recently coined the term "enclothed cognition" to describe the effect of clothing on the thoughts and behavior of the person who wears it.[244] 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.

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[241] *Olano*, 507 U.S. at 743 (1993) (Stevens, J., dissenting) (quoting Vasquez v. Hillery, 474 U.S. 254, 263–64 (1986)).

[242] Holbrooke v. Flynn, 475 U.S. 560, 567, 570 (1986) (quoting Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).

[243] *See* Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 ST. LOUIS U. L.J. 1185, 1190 (2010); Barbara A. Spellman & Simone Schnall, *Embodied Rationality*, 35 QUEEN'S L.J. 117, 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).

[244] *See* Hajo Adam & Adam D. Galinsky, *Enclothed Cognition*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 918, 918–19 (2012).

1. Embodied Cognition

Research in embodied cognition indicates that our bodily states forge and shape our thoughts, feelings, memories, and judgments.[245] For example, studies show that the physical experience of cleaning oneself influences judgments of morality;[246] experiencing physical warmth increases feeling of interpersonal warmth;[247] walking slowly activates stereotypes of the elderly;[248] nodding one's head while listening to a persuasive message increases susceptibility to persuasion;[249] carrying a heavy clipboard increases judgments of importance;[250] smelling clean scents increases the tendency to reciprocate trust and offer charitable help;[251] and firming one's muscles helps increase willpower.[252]

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.[253] Across species, animals that are big or that make themselves look big act powerful.[254] Body posture has a similar effect on

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[245] Benforado, *supra* note 243, at 1190.

[246] Chen-Bo Zhong & Katie Liljenquist, *Washing Away Your Sins: Threatened Morality and Physical Cleansing*, 313 SCI. 1451, 1452 (2006); Simone Schnall et al., *With a Clean Conscience: Cleanliness Reduces the Severity of Moral Judgments*, 19 PSYCHOL. SCI. 1219, 1221 (2008).

[247] Lawrence E. Williams & John A. Bargh, *Experiencing Physical Warmth Promotes Interpersonal Warmth*, 322 SCI. 606, 607 (2008).

[248] Thomas Mussweiler, *Doing Is for Thinking! Stereotype Activation by Stereotypic Movements*, 17 PSYCHOL. SCI. 17, 20 (2006).

[249] Gary L. Wells & Richard E. Petty, *The Effects of Overt Head Movements on Persuasion: Compatibility and Incompatibility of Responses*, 1 BASIC & APPLIED SOC. PSYCHOL. 219, 228 (1980).

[250] Nils B. Jostmann et al., *Weight as an Embodiment of Importance*, 20 PSYCHOL. SCI. 1169, 1173 (2009).

[251] Katie Liljenquist et al., *The Smell of Virtue: Clean Scents Promote Reciprocity and Charity*, 21 PSYCHOL. SCI. 381, 382 (2010).

[252] Iris W. Hung & Aparna A. Labroo, *From Firm Muscles to Firm Willpower: Understanding the Role of Embodied Cognition in Self-Regulation*, 37 J. CONSUMER RES. 1046, 1058 (2011).

[253] Li Huang et al., *Powerful Postures Versus Powerful Roles: Which Is the Proximate Correlate of Thought and Behavior?*, 22 PSYCHOL. SCI. 95, 96 (2011).

[254] *See, e.g.*, STEVE L. ELLYSON & JOHN F. DOVIDIO, *Power, Dominance, and Nonverbal Behavior: Basic Concepts and Issues*, *in* POWER, DOMINANCE, AND NONVERBAL BEHAVIOR 1 (Steve L. Ellyson & John F. Dovidio eds., 1985); Judith A. Hall et al., *Nonverbal Behavior and*

humans.[255] One study found that individuals who were posed into expansive postures reported feeling more powerful, chose riskier 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.[261] Managers were told that they would direct, evaluate, and reward the subordinates in a two-person puzzle task.[262] Subordinates were told that they would follow the managers' direction, build the puzzle, and be evaluated by the managers.[263] The researchers also manipulated embodied power by placing participants in expansive or constricted postures.[264] 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.[265] The constricted posture

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the Vertical Dimension of Social Relations: A Meta-Analysis, 131 PSYCHOL. BULL. 898, 898 (2005); FRANS DE WAAL, CHIMPANZEE POLITICS: SEX AND POWER AMONG APES 86 (1982).

[255] *See* Dana R. Carney et al., *Power Posing: Brief Nonverbal Displays Affect Neuroendocrine Levels and Risk Tolerance*, 21 PSYCHOL. SCI. 1363, 1366 (2010).

[256] *Id.*

[257] John H. Riskind & Carolyn C. Gotay, *Physical Posture: Could It Have Regulatory or Feedback Effects on Motivation and Emotion?*, 6 MOTIVATION & EMOTION 273, 293 (1982).

[258] *See* Huang et al., *supra* note 253, at 96–97.

[259] *Id.* at 97 (citing JOSEPH LEDOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE 163–66 (Simon & Schuster ed.1996)).

[260] *Id.* at 96–97.

[261] *Id.* at 97.

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] *Id.*

involved sitting with hands placed under the thighs, dropped shoulders, and legs together.[266] 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.[267]

The decision-making task involved a simulated blackjack game that required participants to decide whether they wanted to take a card.[268] The abstraction task involved identifying pictures in a series of fragmented images.[269] In the blackjack game, participants seated in the expansive posture took a card more often than those in the constricted posture.[270] By contrast, neither role nor the interaction between role and posture had a statistically significant effect.[271] On the abstract thinking task, participants in the expansive posture correctly identified more pictures than participants in the constricted posture.[272] Again, neither the effect of role nor the interaction between role and posture was statistically significant.[273] Participants in the expansive posture also reported having a greater sense of power than those in the constrictive posture during both of these tasks.[274] 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.[275] The researchers concluded that the body has an intimate connection to important psychological processes and is the most direct correlate of power-related behavior, mattering more than actually having a powerful role.[276]

This study provides relevant 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—handcuffs, leg irons, and belly chains—constrain the human body much more than the

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[266] *Id.*
[267] *Id.* at 98.
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.* at 99.
[273] *Id.*
[274] *Id.*
[275] *Id.* at 100.
[276] *Id.*

constrictive posture in the experiment and therefore may have an even greater impact on cognition and behavior. In the immigration context, restraints may make the respondent 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 critical decisions, such as whether or not to admit the factual allegations, concede the charge of removability, 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 have a profound effect on a respondent's ability to present his or her case, especially if he or she is unrepresented. These cognitive and behavioral effects of restraints underscore that the respondent's interest in participating in the hearing is at stake, which is relevant to the first factor of the *Mathews* test. In addition, these studies highlight how the indiscriminate use of restraints contributes to the risk of error. If restraints impede the respondent's motivation or ability to fight the case, then there is an increased risk that the judge will issue a deportation order against someone who has a valid basis for remaining in the United States.

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;[277] students perceive teaching assistants who wear formal attire as more intelligent than those who dress casually;[278] and defendants dressed in black are perceived as more dangerous than those wearing light clothes.[279]

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[277] Sandra M. Forsythe, *Effect of Applicant's Clothing on Interviewer's Decision to Hire*, 20 J. APPLIED SOC. PSYCHOL. 1579, 1585, 1588 (1990).

[278] Tracy L. Morris et al., *Fashion in the Classroom: Effects of Attire on Student Perceptions of Instructors in College Classes*, 45 COMM. EDUC. 135, 143 (1996).

[279] Aldert Vrij, *Wearing Black Clothes: The Impact of Offenders' and Suspects' Clothing on Impression Formation*, 11 APPLIED COGNITIVE PSYCHOL. 47, 52 (1997).

These studies provide relevant background for understanding the effect that seeing a defendant in restraints may have on a jury or 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;[280] wearing a bikini makes women feel ashamed, eat less, and perform worse at math;[281] and professional sports teams that wear black uniforms are more aggressive than teams that wear other colors.[282] A recent study coined the term "enclothed cognition" to describe this phenomenon.[283] This study, which was profiled in *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.[284] Participants who believed that the coat belonged to a painter, on the other hand, showed no such improvement.[285] The authors theorized that wearing a piece of clothing influences psychological processes by triggering associated abstract concepts through the clothing's symbolic meaning.[286] 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.[287]

Restraints both create physical sensations and are imbued with symbolic meaning. Physically, respondents can see and feel the restraints around their

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[280] Phillip G. Zimbardo, *The Human Choice: Individuation, Reason, and Order versus Deindividuation, Impulse, and Chaos*, 17 NEB. SYMP. ON MOTIVATION 237, 264, 268 (1969); Robert D. Johnson & Leslie L. Downing, *Deindividuation and Valence of Cues: Effects on Prosocial and Antisocial Behavior*, 37 J. PERSONALITY & SOC. PSYCHOL. 1532, 1534, 1536 (1979).

[281] Barbara L. Fredrickson et al., *That Swimsuit Becomes You: Sex Differences in Self-Objectification, Restrained Eating, and Math Performance*, 75 J. PERSONALITY & SOC. PSYCHOL. 269, 275, 279–80 (1998).

[282] Mark G. Frank & Thomas Gilovich, *The Dark Side of Self- and Social Perception: Black Uniforms and Aggression in Professional Sports*, 54 J. PERSONALITY & SOC. PSYCHOL. 74, 81 (1988).

[283] Adam & Galinsky, *supra* note 244, at 919.

[284] *Id.* at 922; Sandra Blakeslee, *Mind Games: Sometimes a White Coat Isn't Just a White Coat*, N.Y. TIMES, April 2, 2012, at D3.

[285] Adam & Galinsky, *supra* note 244, at 921.

[286] *Id.* at 919.

[287] *Id.*

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. Chains are also associated with slavery, which involved egregious forms of oppression and dehumanization.

Respondents in removal proceedings are certainly aware that chains represent powerlessness while physically seeing, feeling, and hearing the chains on their bodies. The study of enclothed cognition discussed above indicates that this combination may well influence a respondent's mental processes and generate feelings of helplessness and corresponding behaviors, especially when worn with an orange jumpsuit, which is another symbol of criminality. As noted above, in removal proceedings such 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.[288]

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.[289] 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.[290] 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,

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[288] *See, e.g.*, United States v. Zuber, 118 F.3d 101, 106 (Cardamone, J., concurring).

[289] Nicholas G. Castle, *Mental Health Outcomes and Physical Restraint Use in Nursing Homes*, 33 ADMIN. & POL'Y MENTAL HEALTH & MENTAL HEALTH SERVICES RES. 696, 696–97 (2006).

[290] Andrea M. Berzlanovich et al., *Deaths Due to Physical Restraint*, 109 DEUTSCHES ÄRZTEBLATT INT. 27, 27 (2012).

humiliation, fear, anger, agitation, anxiety, and resistance to care.[291] 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."[292]

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.[293] Professor Elyn Saks and others have advocated allowing psychiatric patients choice among various restraint measures because they "are most likely to know their own states of mind and how various measures will affect them."[294] Many detainees in removal proceedings have also experienced severe trauma, which is often the basis of applications for asylum and related forms of relief. For these individuals, restraints may have a particularly detrimental effect on their ability to participate fully in the proceedings.

Finally, studies of acute restraint stress—a widely used experimental model to study emotional and autonomic responses to stress in animals—shed even more light on the impact of restraints.[295] The procedure usually

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[291] *See* Castle, *supra* note 289, at 700–01; Eliana S. Chaves et al., *Review of the Use of Physical Restraints and Lap Belts With Wheelchair Users*, 19 ASSISTIVE TECH. 94, 99 (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'Y 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 PRAC. 95, 98 (2005).

[292] Raija Kontio et al., *Seclusion and Restraint in Psychiatry: Patients' Experiences and Practical Suggestions on How to Improve Practices and Use Alternatives*, 48 PERSP. PSYCHIATRIC CARE 16, 17 (2012) (citing T. Hoekstra et al., *Seclusion: The Inside Story*, 11 J. PSYCHIATRIC & MENTAL HEALTH NURSING 276, 277 (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).

[293] Ruth Gallop et al., *The Experience of Hospitalization and Restraint of Women Who Have a History of Childhood Sexual Abuse*, 20 HEALTH CARE FOR WOMEN INT'L 401, 407–08, 413 (1999).

[294] Elyn R. Saks, *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 S. CAL. REV. L. & SOC. JUST. 109, 124 (2011).

[295] *See* Cristiane Busnardo et al., *Paraventricular Nucleus Modulates Autonomic and Neuroendocrine Responses to Acute Restraint Stress in Rats*, 158 AUTONOMIC NEUROSCIENCE: BASIC & CLINICAL 51, 51, 55 (2010).

involves placing a mouse or rat in a container that restricts its movement.[296] This stress model leads to autonomic, behavioral, cognitive, and neurological changes.[297] The autonomic changes include hormonal changes, elevated blood pressure, elevated heart rate, and increased body temperature.[298] Behavioral changes include reduced exploration of the open arms of a maze,[299] reduced exploratory activity in an open field,[300] increased immobility in a forced swimming test,[301] and enhanced fear conditioning.[302] Cognitive and neurological changes include anxiety, depression, fear, impaired memory, and dendritic atrophy.[303] If humans experience the same types of biological changes when physically restrained, those changes would have a significant impact on the ability to fight a deportation case.

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[296] *See, e.g.*, *id.* at 52.

[297] *See, e.g.*, *id.* at 56.

[298] *See, e.g.*, *id.* at 51, 55 (discussing hormonal changes); Rodrigo F. Tavares & Fernando M. Corrêa, *Role of the Medial Prefrontal Cortex in Cardiovascular Responses to Acute Restraint in Rats*, 143 NEUROSCIENCE 231, 238 (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, 26 (2002) (describing changes in blood pressure); Daniel M. L. Vianna & Pascal Carrive, *Changes in Cutaneous and Body Temperature During and After Conditioned Fear to Context in the Rat*, 21 EUR. J NEUROSCIENCE 2505, 2510 (2005) (describing changes in body temperature).

[299] 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 & BEHAV. 325, 328 (2000); F.S. Guimarães et al., *Hippocampal 5-HT Receptors and Consolidation of Stressful Memories*, 58 BEHAV. BRAIN RES. 133, 136 (1993).

[300] Guy A. Kennett et al., *Enhancement of Some 5-HT-Dependent Behavioural Responses Following Repeated Immobilization in Rats*, 330 BRAIN RES. 253, 259 (1985); G.A. Kennett et al., *Antidepressant-Like Action of 5-HT$_{1A}$ Agonists and Conventional Antidepressants in an Animal Model of Depression*, 134 EUR. J. PHARMACOLOGY 265, 268 (1987); S. Mechiel Korte & Sietse F. De Boer, *A Robust Animal Model of State Anxiety: Fear-Potentiated Behaviour in the Elevated Plus-Maze*, 463 EUR. J. PHARMACOLOGY 163, 163 (2003).

[301] *See* S. Sevgi et al., *L-NAME Prevents Anxiety-Like and Depression-Like Behavior in Rats Exposed to Restraint Stress*, 28 METHODS & FINDINGS EXPERIMENTAL & CLINICAL PHARMACOLOGY 95, 97 (2006).

[302] Cheryl D. Conrad et al., *Repeated Restraint Stress Facilitates Fear Conditioning Independently of Causing Hippocampal CA3 Dendritic Atrophy*, 113 BEHAV. NEUROSCIENCE 902, 906 (1999).

[303] *See id.* at 902–03; *see also* Guimarães et al., *supra* note 299, at 134; Sevgi et al., *supra* note 301, at 97.

4. Conclusions Regarding the Impact of Restraints on Litigants

While the impact of restraints in a courtroom will obviously depend on the type of restraints used and their 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. Such changes would diminish a detainee's sense of dignity in removal proceedings and prevent full participation in the proceedings, which, as discussed above, are important liberty interests under the first factor of the *Mathews* test. In addition, the psychological and behavioral changes triggered by restraints increase the risk of error by enervating one side in the adversarial process and making it difficult for that party to provide critical information in analyzing deportability and eligibility for relief from removal.

B. Impact on Judges

While courts have readily accepted the idea that restraints prejudice the jury, they tend to assume that judges are immune to such bias, often without explaining why.[304] This assumption could be based on various factors. First, judges are legally trained and have professional experience in making decisions, which distinguishes them from laypeople.[305] Judges may even be more intelligent, on average, than laypeople.[306] 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.[307] Furthermore, judges, unlike jurors, usually need to state the rationale for their decisions, which requires deliberative thinking.[308] Lastly, judges are held individually accountable for their decisions, whereas jurors are not.[309]

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[304] *See, e.g.*, United States v. Zuber, 118 F.3d 101, 103–04 (2d Cir. 1997); United States v. Howard, 480 F.3d 1005, 1012 (9th Cir. 2007).

[305] *See Blinking on the Bench*, *supra* note 157, at 13.

[306] *See id.*

[307] *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).

[308] *Blinking on the Bench*, *supra* note 157, at 36–38.

[309] Beecher-Monas, *supra* note 307, at 1002.

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.[310] 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 procedural 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, as discussed above.

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.[311] Professor Theodore Eisenberg, for example, found that bankruptcy judges were overconfident about how fairly they treat the attorneys who appear before them.[312] Jeffrey Rachlinski, Chris Guthrie, and Andrew Wistrich also found evidence of overconfidence among the judiciary. One of their studies showed that federal magistrate

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[310] Stephenson v. Wilson, 619 F.3d 664, 673 (7th Cir. 2010) ("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.") (citations omitted). The opinion cites the following empirical studies of jury behavior: Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUMAN BEHAV. 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 LEGAL 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, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); *see also* Gacy v. Welborn, 994 F.2d 305, 313 (7th Cir. 1993) ("Social science has challenged many premises of the jury system.").

[311] Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 813 (2001) [hereinafter *Judicial Mind*].

[312] Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L. REV. 979, 985 (1994).

judges exhibited strong egocentric bias regarding the likelihood of being overturned on appeal.[313] 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.[314] 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.[315]

Assuming that the sight of restraints does not prejudice a judge risks not only ignoring existing biases but also exacerbating them. Believing oneself to be objective makes one more susceptible to act on implicit biases.[316] 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.[317] Doubting one's own objectivity therefore represents the first step towards breaking the link between implicit bias and behavior.[318] Doubt also increases motivation to be fair.[319] 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.[320] After going through such trainings, judges are more likely to report that implicit biases can affect their behavior.[321]

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[313] *Judicial Mind*, *supra* note 311, at 814.

[314] *See* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009) [hereinafter *Unconscious Racial Bias*]; *see also* Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

[315] *Unconscious Racial Bias*, *supra* note 314, at 1226.

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

[317] *Id.*

[318] *See Bias in the Courtroom*, supra note 157, at 1172–73.

[319] *Id.* at 1174–75.

[320] *See id.* at 1172–75.

[321] *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, 22 tbl.11 (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.[322] This leads people to place too much weight on whether the evidence matches their mental picture of a particular category.[323] In other words, people tend to "reason by anecdote and stereotype rather than through the use of group-based knowledge."[324] Legal scholars have long recognized that the representativeness heuristic may lead judges and juries to convict certain defendants and acquit others.[325] For example, Russell Korobkin and Thomas Ulen 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."[326] Conversely, Gregory

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[322] *See* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 82 (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").

[323] 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 § 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").

[324] Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 403 (1999).

[325] *See, e.g.*, Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 528–29 (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 RTS. L. REP. 79, 93–95 (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); Slobogin, *supra* note 324, at 403–04 (arguing that the representativeness heuristic makes it difficult for finders of fact to "maintain allegiance to high-minded constitutional values" during criminal trials).

[326] Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumptions from Law and Economics*, 88 CALIF. L. REV. 1051, 1087 (2000); *see also* James S. Liebman et al., *The Evidence of Things Not Seen: Non-Matches as Evidence of*

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."[327]

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.[328] 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.[329] Since restraints are representative of danger and criminality, the sight of a restrained litigant may well lead to inferences of guilt. The question then becomes whether judges, like laypersons, are vulnerable to the representativeness heuristic.

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.[330] Only 40% of the judges in the study chose the correct answer on a

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Innocence, 98 IOWA L. REV. 577, 665–66 (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").

[327] Gregory Mitchell, *Mapping Evidence Law*, 2003 MICH. ST. L. REV. 1065, 1069–71 (2003).

[328] *See* Gold, *supra* note 325, at 528–29; Kessler, *supra* note 325, at 94; *Judicial Mind*, *supra* note 311, at 805 (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).

[329] *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 Richard R. Izzet & Walter Leginski, *Group Discussion and the Influence of Defendant Characteristics in a Simulated Jury Setting*, 93 J. SOC. PSYCHOL. 271, 276–77 (1974)); Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 714 (1996).

[330] *Judicial Mind*, *supra* note 311, at 793–94, 797–98, 803–04, 810 (finding evidence of anchoring, framing, representativeness, and hindsight bias among the judges); *see also* Jeffrey J. Rachlinski et al., *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).

task designed to test for representativeness bias, and the vast majority of those who got it wrong picked the answer that would be reached by relying on intuitive thinking.[331] However, despite the large number of errors made by the judges, they still performed much better at the task than other types of experts.[332] For example, a similar experiment conducted with doctors found that only 18% of the doctors selected the correct answer.[333] 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.[334] 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).[335] The CRT involves just three questions designed to distinguish intuitive from deliberative processing.[336] While the test measures some component of intelligence, it more specifically measures "the capability and willingness to deliberate to solve a problem when [relying on] intuition would lead one astray."[337] 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."[338] The results showed that the judges used a predominantly intuitive approach.[339] Their average score on

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[331] *Judicial Mind*, *supra* note 311, at 810.

[332] *Id.* at 818.

[333] *Id.* (citing Ward Casscells et al., *Interpretation 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)).

[334] *See* Darrin R. Lehman et al., *The Effects of Graduate Training on Reasoning: Formal Discipline and Thinking About Everyday-Life Events*, 43 AM. PSYCHOLOGIST 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).

[335] *Blinking on the Bench*, *supra* note 157, at 10, 13, 17.

[336] *Id.* at 10.

[337] *Id.* at 12.

[338] *Id.* at 13.

[339] *Id.* at 19.

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.[340] 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 correctly, and only one-seventh answered all three correctly.[341] The incorrect answers that the judges selected tended to be the intuitive ones.[342] 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

Although restraints normally have no legal relevance to the case, their presence may unconsciously affect a judge's decision, just as implicit racial bias has been shown to influence legal outcomes. In one study of implicit racial bias, trial court judges who had taken the Implicit Association Test (IAT) were given two different vignettes and asked their views about the defendant's likelihood of recidivism and the recommended verdict.[343] The 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.[344] In general, however, without taking into account how the judges scored on the IAT, the primes did not prompt harsher responses from judges.[345] 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.[346] 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

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[340] *Id.* at 14.

[341] *Id.* at 14–15.

[342] *Id.* at 16.

[343] *Unconscious Racial Bias*, *supra* note 314, at 1214–15.

[344] *Id.*

[345] *Id.* at 1216.

[346] *Id.*; Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 LAW & HUM. BEHAV. 483, 493–94, 496 (2004).

sentences.[347] These studies once again indicate that implicit biases do affect judicial behavior, but not 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, such as bail determinations and sentencing. 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.[348] Similarly, race, gender, income, and education all appear to influence sentencing decisions.[349] 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 receive larger downward departures than noncitizens."[350] These studies undercut the notion that judges are immune from considering legally irrelevant facts.

5. Implicit Consideration of Inadmissible Evidence

Studies examining whether judges can ignore inadmissible evidence are similarly relevant to the question of whether they are prejudiced by the sight of a litigant in restraints. Unfortunately, there are few such studies. A 1994 study 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.[351] The study further found that the judges' response to the inadmissible evidence was similar to that of

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[347] Graham & Lowery, *supra* note 346, at 489, 493, 496.

[348] *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 207 tbl.7.3, 231 tbl.7.6 (1979); *see also* Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, *in* PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 233, 236–37 (Ian Ayres ed., 2001) (discussing the influence of race on bail determinations).

[349] *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 (2001) (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).

[350] Mustard, *supra* note 349.

[351] 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, 120–22 (1994).

jury-eligible adults.[352] A more recent study involving 265 judges concluded that judges often cannot ignore information they know, but they are better able to do so in some situations than others.[353] The researchers gave the judges seven scenarios that were designed to test the ability to disregard certain types of inadmissible evidence.[354] 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.[355] 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.[356] Thus, in immigration proceedings, where appeals are rare, judges may be particularly susceptible to unconsciously considering inadmissible evidence.[357]

In addition, two studies conducted with non-judges found that the effect of inadmissible evidence is moderated by race.[358] One study tested the impact of incriminating wiretap evidence on conviction rates of Black and White defendants in a simulated criminal trial.[359] 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.[360] 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.[361] These results indicate that when

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[352] *Id.* at 125.

[353] Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1251–52, 1279 (2005).

[354] *Id.* at 1282–83.

[355] 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 1291, 1297, 1303, 1307, 1311. 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 1317, 1321.

[356] *Id.* at 1323–24.

[357] *See supra* Part IV.B.1.c. (discussing the special susceptibility of immigration judges).

[358] *See* James D. Johnson et al., *Justice Is Still Not Colorblind: Differential Racial Effects of Exposure to Inadmissible Evidence*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 893, 893, 896 (1995).

[359] *Id.* at 896.

[360] *Id.*

[361] *Id.*

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.[362] The study also found that participants reported being less affected by the inadmissible evidence when the defendant was Black.[363] This finding is consistent with research showing that people believe they are less influenced by information consistent with previously held expectations.[364] 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.[365]

A British study similarly found that the effects of DNA evidence varied based on the race of the defendant.[366] 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.[367] Afterwards, the participants were asked to provide ratings about guilt, sentencing recommendations, the likelihood that the defendant would reoffend, and the likelihood of rehabilitation.[368] 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.[369] Furthermore, the participants tended to judge Black defendants more harshly when the incriminating evidence was inadmissible than when it was admissible.[370] 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

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[362] *Id.* at 897.

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] Gordon Hodson et al., *Adverse Racism in Britain: The Use of Inadmissible Evidence in Legal Decisions*, 35 EUR. J. SOC. PSYCHOL. 437, 440, 444 (2005).

[367] *Id.* at 440–41.

[368] *Id.* at 441.

[369] *Id.* at 443.

[370] *Id.* at 445.

about Blacks exhibit a "rebound effect" that makes them more likely to rely on those stereotypes.[371]

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.[372] 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. Conclusions Regarding the Impact of Restraints on Judges

The impact of restraints on judges, like their impact on litigants, is relevant to the first and third factors of the *Mathews* test, as well as to the analysis of prejudice. The litigant has a liberty interest in an unbiased adjudicator, and if the use of restraints leads to implicit bias, it contributes to the risk of error. In addition, judicial bias is relevant to the analysis of prejudice, as it may affect the outcome of the case. Thus, empirical studies of implicit bias, which traditionally have not been utilized in the procedural due process analysis, are actually highly relevant in the context of restraints. Future research that specifically examines whether—or to what extent—judges are susceptible to prejudice by the sight of restraints would be extremely helpful. This research could explore not only judges' unconscious responses to restrained litigants, but also the influence of race, gender, and legal status on judges' decisions to require restraints.[373] In

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[371] *Id.* (citing Gordon Hodson & John F. Dovidio, *Racial Prejudice as a Moderator of Stereotype Rebound: A Conceptual Replication*, 25 REPRESENTATIVE RES. IN SOC. PSYCHOL. 1, 6 (2001); C. Neil Macrae et al., *Out of Mind but Back in Sight: Stereotypes on the Rebound*, 67 J. PERSONALITY & SOC. PSYCHOL. 808, 815 (1994); and Margo Monteith et al., *Consequences of Stereotype Suppression: Stereotypes on AND Not on the Rebound*, 34 J. EXPERIMENTAL SOC. PSYCHOL. 355, 375 (1998)).

[372] *U.S. Deportation Proceedings in Immigration Courts by Nationality, Geographic Location, Year and Type of Charge*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php (last visited Jan. 21, 2015) (showing that in FY 2013, 199,586 individuals were in removal proceedings, of whom 75,309 were Mexican, 24,400 were Guatemalan, 24,380 were Salvadoran, and 22,410 were Honduran).

[373] Racial disparities are known to exist in the use of physical restraints in other contexts, such as nursing homes. *See* Kimberly M. Cassie & William Cassie, *Racial Disparities in the Use of*

addition, it would be helpful to examine whether the practice of shackling immigration detainees reinforces stereotypes of immigrants as threatening.[374] If so, then challenging the indiscriminate use of restraints could help subvert the very stereotypes that contribute to the formation of implicit biases.

VI. RECOMMENDATIONS

A. Require Individualized Judicial Determinations of Necessity for Bond and Merits Hearings

In light of the due process analysis 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 safety threat or 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, consistent with other civil cases. 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

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Physical Restraints in U.S. Nursing Homes, 39 HEALTH & SOC. WORK 207, 209–10 (2014) (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); Ocen, *supra* note 208, at 1243–44 (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, 547–48 (2013) (discussing the intersection of race and gender in stereotypes of Latinos and Latinas).

[374] DOUGLAS S. MASSEY & MAGALY SÁNCHEZ R., BROKERED BOUNDARIES: CREATING IMMIGRANT IDENTITY IN ANTI-IMMIGRANT TIMES 68 (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, 650, 677–78 (2014); Chacón, *supra* note 106, at 1838; David B. 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).

cases where there is evidence that a particular detainee presents a safety or flight risk.

B. Require a Lesser Showing of Necessity for Master Calendar Hearings

Bond hearings and merits hearings require a high level of participation by immigration detainees, as they usually involve substantial testimony. Since restraints affect cognition 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 calendar hearings, which are brief status hearings, do not raise these same concerns.

However, important decisions are still made at master calendar hearings. At the initial master hearing, the respondent normally admits or denies the factual allegations and concedes or denies the charge of removability. Sometimes, denying the charge 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.[375] 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.

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[375] *See* People v. Fierro, 821 P.2d 1302, 1322 (Cal. 1991).

C. Take Steps to Minimize Judicial Bias

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 biases. Keeping restraints out of sight might help but is likely not enough, since the judge would still know that the respondent is restrained. More systemic changes are therefore necessary to reduce the influence of implicit bias.[376] To begin with, immigration judges should be educated about implicit bias and the research on judicial susceptibility to such bias.[377] 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 personally. Taking this test may motivate them to combat implicit bias, which has been shown to reduce the impact of implicit bias on behavior.[378] Developing an IAT that specifically examines implicit biases associated with restraints would be extremely helpful in furthering our understanding of their prejudicial impact.

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.[379] 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.[380] Auditing would also help identify specific judges who would benefit the most from de-biasing interventions, since studies indicate huge variations in the behavior of immigration judges.[381]

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[376] *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.

[377] *See Unconscious Racial Bias*, *supra* note 314, at 1228; John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 7–8 (2010).

[378] Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 486–87, 500 (2010).

[379] *See Unconscious Racial Bias*, *supra* note 314, at 1230.

[380] *Id.* at 1230–31.

[381] *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 313–14 (2007) (showing widespread variation in immigration judges' grant rates for asylum).

Third, changes should be made in courtroom practice.[382] Currently, some immigration courts are located inside detention facilities and only hear detained cases.[383] Others have separate detained and non-detained dockets, which are typically assigned to different judges, so that some judges only hear detained cases.[384] 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.[385]

Finally, the conditions of decision-making could be vastly improved to give immigration 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. These changes should help reduce the impact of implicit bias on decision making.

D. Increase Funding for Immigration Courts to Improve Security

Immigration courts currently have minimal security.[386] There is no bailiff and no law enforcement presence besides the few ICE officers who bring the detainees to court.[387] Typically, everyone entering the courthouse must walk through a metal detector, and some courts also have X-ray

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[382] *See Unconscious Racial Bias*, *supra* note 314, at 1231.

[383] *See, e.g.*, *Immigration Court Eloy, Arizona*, U.S. Dep't of Just. (Dec. 16, 2014), http://www.justice.gov/eoir/sibpages/elo/elomain.htm (last visited February 17, 2015).

[384] *See Improving Docket Efficiency through Better Communication and Coordination: Roles of USCIS, ICE, and FOIR*, U.S. Dep't of Homeland Sec. http://www.dhs.gov/improving-docket-efficiency-through-better-communication-and-coordination-roles-uscis-ice-and-eoir (last published June 29, 2012).

[385] *See Unconscious Racial Bias*, *supra* note 314, at 1226–27; Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 411–13 (2007); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 438 (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 & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action"*, 94 CALIF. L. REV. 1063, 1105 (2006).

[386] *See* Kevin Diaz, *Overburdened and Underfunded, Immigration Judges Decry 'Cinderella' Court System*, HOUS. CHRON., Aug. 27, 2014, http://www.houstonchronicle.com/news/article/Overburdened-and-underfunded-immigration-judges-5717090.php.

[387] *Id.*

machines that scan bags and briefcases for weapons.[388] Improving these security measures would help alleviate security concerns without infringing on any due process rights. 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.[389] Having a plan in place to handle violent incidents and holding practice "drills" are also important.[390] Risk-assessments can help understand the specific security risks and vulnerabilities of each courthouse.[391]

Funding these types of security measures is not only important to ensure the safety of court personnel, litigants, and witnesses, but also to protect the rights of detainees. While funding for immigration enforcement efforts has soared over the past decade, resulting in the deportation of nearly 450,000 people per year, funding for immigration courts has remained stagnant.[392] In 2014, the resources dedicated to immigration enforcement reached almost $18 billion, which is higher than for all other federal law enforcement combined, but the funding for immigration courts and the BIA was just 1.7 percent of that amount at $312 million.[393] Similarly, while the number of enforcement personnel doubled during the past decade, the number of immigration judges increased by just ten percent.[394] Allocating more resources to immigration courts so that they can keep up with enforcement efforts (or, alternatively, scaling back on enforcement) would help address the root causes of security concerns. When resources are invested to support safety measures like bailiffs in the courtrooms, judges will be less likely to reassure themselves by restraining the respondents who appear before them.

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[388] *See* Nat'l Ctr. for State Courts, *Courthouse Violence in 2010–2012: Lessons Learned* 10 (2013), *available at* http://www.sheriffs.org/sites/default/files/uploads/documents/SJI%20-Courthouse%20Violence%20in%202010-2012%20-%20Lessons%20Learned.pdf.

[389] *Id.* at 5.

[390] *Id.* at 6–7.

[391] *Id.* at 13.

[392] Marshall Fitz & Philip E. Wolgin, Center for American Progress, *Enforcement Overdrive Has Overloaded the Immigration Courts* (Nov. 18, 2014), https://www.americanprogress.org/issues/immigration/news/2014/11/18/101098/enforcement-overdrive-has-overloaded-the-immigration-courts/.

[393] *Id.*

[394] *Id.*; Devlin Barrett, *U.S. Delays Thousands of Immigration Hearings by Nearly 5 Years*, WALL ST. J. (Jan. 28, 2015), http://www.wsj.com/articles/justice-department-delays-some-immigration-hearings-by-5-years-1422461407.

VII. CONCLUSION

The prohibition against the indiscriminate use of restraints has been recognized for hundreds of years as fundamental to the integrity of a jury trial, yet courts have been slow to examine the applicability of this due process right to other types of proceedings. A close examination of the rationales underlying this prohibition indicate that its reach should be broader than many courts have recognized, since dignity, the ability to participate fully in a proceeding, and fairness in the fact-finding process are essential to many types of hearings, including removal proceedings. The analysis set forth above indicates that procedural due process demands an individualized judicial determination of the need for restraints in removal proceedings to protect these important legal principles. This analysis also highlights the need for courts to reexamine the ways that restraints may impair a litigant's mental faculties even if they do not inflict physical suffering and to question outdated theories about the objectivity of judges given recent empirical studies. Both lines of inquiry inform the procedural due process analysis by casting new light on the private interests at stake and the risk of erroneous deprivation. They also suggest that due process errors involving the use of restraints should be deemed inherently prejudicial since restraints have profound and pervasive effects that evade measurement and remain difficult to prove in any particular case.