UNSHACKLED: THE POST-*SANCHEZ-GOMEZ* SCRUTINY AND SECURITY CONUNDRUM

*Christian P. Ogata**

TABLE OF CONTENTS

* Juris Doctor Candidate, May 2020, William S. Boyd School of Law, University of Nevada, Las Vegas. Thank you to my parents, sisters, and friends for their never-ending support throughout this journey—I would be lost without your unwavering support. Thank you to Judge Cam Ferenbach for allowing me to work in his chambers and introducing me to the area of law that inspired this Note topic. To Professor Ian Bartrum for his encouragement and guidance with this Note. And finally, thank you to Volume 20 of the Nevada Law Journal for all your amazing work and dedication. None of this would be possible without all of you and your countless hours spent making this publication all that it is.

INTRODUCTION

A cornerstone of American jurisprudence is the presumption that any person accused of a crime is innocent until proven guilty.[1] Throughout this nation's history, the presumption of innocence has developed in many aspects of the criminal justice system—including the right to be free from unjustifiable restraint.[2] This freedom is one with deep roots in English common law and American history, yet presents a modern debate over whether this protection extends beyond the presence of a jury.[3] In *Deck v. Missouri*, the Supreme Court first addressed the issue of whether an individual has the right to be free from unjustifiable restraint in the presence of a jury during sentencing and established three overarching principles that guide courts today.[4] First, visible shackling undercuts the presumption of innocence and unduly prejudices the jury because it indicates that the individual should be separated from the public.[5] Second, shackling diminishes an individual's right to effective assistance of counsel.[6] Third, shackling an individual disrupts the dignity and public perception of the court.[7]

Until recently, all circuits interpreting the issue of prejudicial restraint had held that the *Deck* presumptions applied only to proceedings where the jury was present.[8] That continuity between the circuits changed when the en banc Ninth Circuit Court of Appeals held in *United States v. Sanchez-Gomez* that the *Deck* presumptions compel courts to individually evaluate whether restraint is appropriate—regardless of the presence of a jury.[9] The United States Supreme Court granted certiorari, but because the defendants ultimately lacked standing to challenge the issue, the Supreme Court left the restraint question unanswered.[10]

---

[1] *See, e.g.*, Taylor v. Kentucky, 436 U.S. 478, 483 (1978) (citing Coffin v. United States, 156 U.S. 432, 453 (1895)).

[2] Deck v. Missouri, 544 U.S. 622, 630 (2005); Holbrook v. Flynn, 475 U.S. 560, 567–68 (1986).

[3] *Compare* United States v. Sanchez-Gomez, 859 F.3d 649, 662 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018), *with* United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015).

[4] *Deck*, 544 U.S. at 630.

[5] *Id.*

[6] *Id.* at 631.

[7] *Id.*

[8] *See, e.g.*, *LaFond*, 783 F.3d at 1225; United States v. Zuber, 118 F.3d 101, 104 (2d Cir. 1997).

[9] United States v. Sanchez-Gomez, 859 F.3d 649, 661 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

[10] United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1542 (2018). For a brief discussion regarding the justiciability issue, see *infra* Section III.E.

This Note contributes to the broader discussion of restraint in non-jury proceedings and the delicate balance between an individual's liberties and the need for safety and security in the courtroom. Part I of this Note will trace the historical lineage of the trend toward less shackling throughout the English common law courts and the early American approaches to restraint. Part II will explain modern developments and protections against restraint while balancing the serious security concerns that modern courts face. Part III of this Note will address the Ninth Circuit's split from its sister circuits and the Supreme Court's response. Finally, Part IV of this Note will analyze the judicial response to this split following *Sanchez-Gomez* and offer insight into the appropriate level of judicial scrutiny to apply in these situations, accounting for various factors and safety concerns. This Note considers the different approaches that circuits have adopted, and will recommend that courts apply a middle-ground approach that follows the core of *Sanchez-Gomez*, but places more significant weight upon the type of proceeding and location of the court in which the proceeding takes place. These considerations are necessary to provide protections for proceedings that take place in smaller or less-equipped courtrooms, where potential understaffing issues present security concerns.

I. HISTORICAL DEVELOPMENT

While the various methods and instruments of restraint have significantly changed since the Eighteenth Century in England, reluctance toward restraint has been a unifying theme throughout this development.[11] This hesitancy, however, has never been unlimited, and courts have generally recognized the need for security in court proceedings.[12] This Part of the Note will trace the history of restraint through the common law courts in England and early American courts that took a nearly identical approach to restraint.

A. The Common Law Background Against Unjustified Restraint

English common law courts established an early iteration of the presumption against restraint in arraignment proceedings, highlighting a deep-rooted right against unjustifiable restraint.[13] A serious concern historically rooted in

---

[11] *See Deck*, 544 U.S. at 638–39 (Thomas, J., dissenting) ("This concern was understandable, for the irons of that period were heavy and painful. In fact, leather strips often lined the irons to prevent them from rubbing away a defendant's skin.") (citing T. GROSS, MANACLES OF THE WORLD: A COLLECTOR'S GUIDE TO INTERNATIONAL HANDCUFFS, LEG IRONS AND OTHER MISCELLANEOUS SHACKLES AND RESTRAINTS 25 (1997)). *But see* Brief for Nat'l Ass'n of Fed. Defs. as Amicus Curiae Supporting Respondents at 8, United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018) (No. 17-312), 2018 WL 1156630 at *8 ("These testimonies, as well as extensive medical evidence, belie the notion that modern restraints may be categorically distinguished from the restraints of an earlier era with respect to the pain and injury they may cause.").

[12] *See infra* Section I.A.

[13] *See, e.g.*, 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 219 (Philadelphia, Robert H. Small 1847) ("The prisoner, tho under an indictment of the highest crime, must be brought to the bar without irons, and all manner of shackles or bonds."). *But see id.* ("But

the common law doctrine was that restraint inflicted unnecessary pain upon individuals brought before the court.[14] This pain—commenters noted—distracted individuals and affected their ability to properly and effectively defend themselves.[15] In addition to the difficulty that restraint posed on individuals to defend themselves, courts were also cognizant of protecting an individual's dignity.[16] These comments cautioned against any restraint that would cast a sense of shame upon the defendant.[17] Beyond the concern of an individual's dignity, English common law also focused on the "dignity and decorum of the judicial process."[18]

As courts and common law developed, so too did the limitation on unjustifiable restraint. It became increasingly clear that courts would not restrain a defendant at the time of his arraignment unless that defendant was likely to escape.[19] Matthew Hale detailed that even in cases where individuals were charged with the highest-level offense, they were to be brought in front of the court without restraint, unless it was clear there was a danger that the defendant would escape.[20] Hale noted that if a defendant was brought into the court in restraints, the court would remove the restraints until the defendant was ultimately convicted of the crime.[21] These comments indicate that there was a strong presumption toward limiting restraint unless it was ultimately necessary for security purposes.

While English common law distinguished between arraignments and trials, the presumption against restraint still applied regardless of the type of proceeding.[22] Often cited as an example of this distinction is the case and trial of Chris-

---

note, at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment.").

[14] 3 EDWARDO COKE, INSTITUTES OF THE LAWS OF ENGLAND 34 (London, W. Clarke & Sons 1809).

[15] *Id.* ("[S]o that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will.").

[16] 2 WILLIAM HAWKINS & JOHN CURWOOD, A TREATISE OF THE PLEAS OF THE CROWN 434 (London, S. Sweet, 8th ed. 1824).

[17] *Id.* (citations omitted) ("[E]very person . . . ought not to be brought to the bar in a contumelious manner; as with his [] hands tied together, or any other mark of ignominy and reproach; nor even with fetters on [] his feet . . .").

[18] David E. Westman, Note, *Handling the Problem Criminal Defendant in the Courtroom: The Use of Physical Restraints and Expulsion in the Modern Era*, 2 SAN DIEGO JUST. J. 507, 510 (1994).

[19] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (Oxford, Clarendon Press, 4th ed. 1770); *see also* COKE, *supra* note 14, at 34 ("If felons come in judgement 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.").

[20] HALE, *supra* note 13, at 219.

[21] *Id.*

[22] *Id.* at 219 n.(b). As evidenced by the dissents in *United States v. Sanchez-Gomez*, and *Deck v. Missouri*, there is a dispute over this history. *See infra* Section I.A. Justice Thomas, in his dissent in *Deck*, stated that the rule these courts developed was limited to "ensure[] that a defendant was not so distracted by physical pain during his trial that he could not defend himself," not a "presumption of innocence, the right to counsel, concerns about deco-

topher Layer.[23] Layer was indicted for high-treason for "imagining the [d]eath of the King."[24] During arraignment, Layer pleaded for the court to remove his shackles, arguing that the restraint prevented him from effectively defending himself due to the great inconvenience and pain.[25] The Government argued that Layer not only previously attempted to escape, but actually succeeded in escaping, requiring shackles to reduce the risk that he would escape again.[26] The court ultimately found that restraint was justified because of Layer's escape risk.[27] This individualized assessment highlights that although Layer's objections were unsuccessful, it was uncommon to restrain an individual during an arraignment unless it was absolutely necessary to prevent that defendant from escaping.[28]

There is however a point of contention between jurists about whether the common law courts drew a distinction between arraignment and trial.[29] Notably, Justice Clarence Thomas interpreted Christopher Layer's case and concluded that the only reason the courts required a defendant to be brought to the bar for trial without shackles was because the pain of restraints was so significant that it distracted an individual from effectively defending himself.[30] Under Justice Thomas's reading of the case, the common law prohibited restraint at arraignment because the defendant "would play the main role in defending himself."[31] Judge Sandra Ikuta of the Ninth Circuit similarly read Layer's case, explaining, "the concern was not with escape, but with the practicalities of removing restraints for a hearing of limited purpose and duration."[32]

---

rum, or accuracy in decisionmaking." Deck v. Missouri, 544 U.S. 622, 638 (2005) (Thomas, J., dissenting); *see also* United States v. Sanchez-Gomez, 859 F.3d 649, 679 (9th Cir. 2017) (en banc) (Ikuta, J., dissenting) ("[T]he concern was not with escape, but with the practicalities of removing restraints for a hearing of limited purpose and duration."), *vacated*, 138 S. Ct. 1532 (2018).

[23] *See, e.g.*, *Deck*, 544 U.S. at 626; United States v. Henderson, 915 F.3d 1127, 1138 (7th Cir. 2019) (Hamilton, J., dissenting).

[24] *The Trial of Christopher Layer, Esq; at the King's-Bench for High-Treason, Nov. 21. 1722*, *in* 2 A COLLECTION OF THE MOST REMARKABLE TRIALS OF PERSONS FOR HIGH-TREASON, MURDER, RAPES, HERESY, BIGAMY, BURGLARY; AND OTHER CRIMES AND MISDEMEANORS 1 (London, T. Read 1735).

[25] *Id.* at 3 ("I hope I shall have these [c]hains taken off, that I may have the free [u]se of that [r]eason and [u]nderstanding which God hath given me . . . I hope these [c]hains shall be taken off in the first [p]lace, and then I hope I shall have a fair and a tender [t]rial.").

[26] *Id.* at 3–4.

[27] *Id.* at 5 ("I don't think a [m]an charged with [h]igh-[t]reason of this [n]ature, can be said justly to be too well guarded, especially if it be true that what hath been suggested, that he hath endeavored to make is [e]scape . . .").

[28] *See* United States v. Sanchez-Gomez, 859 F.3d 649, 664 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018). *But see infra* notes 29–32 and accompanying text.

[29] *See, e.g.*, Deck v. Missouri, 544 U.S. 622, 641 n.3 (2005) (Thomas, J., dissenting); *Sanchez-Gomez*, 859 F.3d at 679 (Ikuta, J., dissenting).

[30] *Deck*, 544 U.S. at 638 (Thomas, J., dissenting).

[31] *Id.* at 639–40 (Thomas, J., dissenting).

[32] *Sanchez-Gomez*, 859 F.3d at 679 (Ikuta, J., dissenting).

Although there is some dispute over exactly what type of proceedings this rule applied to, it is evident from the history of the common law jurisprudence that there has always been tension between, and a balancing of, competing security and due process interests.[33] These developments set the stage for early American courts, and ultimately modern courts, to require a court to justify its restraint of an individual to protect that individual's liberty.

B. Early American Jurisprudence and the Development of the Presumption Against Restraint

As with many other developments in the American legal system, early courts in the United States followed the English common law approach to restraint.[34] In the first reported American case on the issue of restraint during trial, the California Supreme Court held that a court may only use restraint where there is "evident necessity."[35] The court, closely following much of the English common law doctrine, held that absent a showing that it was absolutely necessary to restrain a defendant, any court action that imposed more restraint than necessary violated a defendant's constitutional rights.[36]

Several other courts in early American history also relied upon this rule and held that criminal defendants had a fundamental right to be free from unwarranted restraint in the courtroom during the guilt phase.[37] Courts continually emphasized that a court could only impose restraint upon an individual when it was "absolutely necessary."[38] Serious security concerns—such as a defendant who stated he intended to escape, threatened others, and was found with a weapon—did not inhibit a court from restraining individuals.[39] While some states afforded significantly higher deference to trial courts in determining the appropriate level of restraint, as courts in the United States developed, a majority of states adopted the common law approach away from shackling.[40]

---

[33] *See supra* Part I.

[34] 1 JOEL PRENTISS BISHOP, NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES 573, § 955 (Chicago, T. H. Flood & Co., 4th ed. 1895) ("Our American courts adhere pretty closely to this doctrine, yet deem that in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the manacles may be retained.").

[35] People v. Harrington, 42 Cal. 165, 168 (1871).

[36] *Id.*

[37] *See, e.g.*, Parker v. Territory, 52 P. 361, 363 (Ariz. 1898); State v. Kring, 64 Mo. 591, 592 (1877); State v. McKay, 165 P.2d 389, 405 (Nev. 1946).

[38] Westman, *supra* note 18, at 510.

[39] *Id.* (citing People v. Kimball, 55 P.2d 483, 484 (1936)).

[40] Tara J. Mondelli, Note, Deck v. Missouri*: Assessing the Shackling of Defendants During the Penalty Phase of Trials*, 15 WIDENER L.J. 785, 787 (2006). States like Alabama, New Mexico, and Mississippi all varied on how much deference they would afford the trial courts. *See* Deck v. Missouri, 544 U.S. 622, 643–44 (2005) (Thomas, J., dissenting). Upon review, New Mexico allowed a court to presume that there was a legitimate reason for shackling an individual in the trial court if the record was silent on the issue. Territory v. Kelly, 2 N.M. 292, 305 (1882). Alabama reflected the opposite end of the spectrum and even "went so far

II. MODERN DEVELOPMENT

As the law began to develop in the federal court system, English common law remained present in many judicial opinions.[41] And while several courts have upheld the presumption against restraint in the context of various jury proceedings, more recently, some have begun to move away from the presumption against unwarranted restraint in non-jury contexts. Methods of restraint have changed significantly, and as courts have evolved, so too have the security concerns that plague them.[42] This Part will identify the application and development of the presumption against unwarranted restraint in the sentencing phase of the trial and will explain the Second and Eleventh Circuits' hesitancy to apply this law beyond the presence of the jury.[43]

A. The Second Circuit

Before the Supreme Court decided the issue of restraint in jury proceedings, the Second Circuit in *United States v. Zuber* declined to apply the law that required "an independent, judicial evaluation of the need to restrain a party in court" to non-jury proceedings.[44] In *Zuber*, the defendant pled guilty to one count of cocaine distribution and was sentenced to a term of imprisonment of 151 months.[45] The defendant was brought before the court in restraints based on a recommendation from the U.S. Marshals Service.[46] During his sentencing hearing, the defendant requested that the court modify his restraints because his appearance before the judge in restraints was "not exactly a good way to present oneself to the sentencing [c]ourt."[47] The judge denied the defendant's request because the sentence determination occurred outside the presence of the jury.[48]

The defendant appealed his sentence based on the district court's deference to the U.S. Marshals' recommendation, arguing that Second Circuit precedent required the district court to make an individualized assessment, on the record, of why the court chose to restrain him.[49] The court rejected Zuber's argument

---

as to bar any appeal from the trial court's decision to restrain the defendant." *Deck*, 544 U.S. at 644 (Thomas, J., dissenting); *see also* Faire v. State, 58 Ala. 74, 81 (1877).

[41] *See, e.g.*, Holbrook v. Flynn, 475 U.S. 560, 568 (1986); Illinois v. Allen, 397 U.S. 337, 344 (1970).

[42] *See* Lee Sinclair & Timothy F. Fautsko, *Court Security on a Beer Budget*, A.B.A. (Nov. 1, 2014), https://www.americanbar.org/groups/judicial/publications/judges_journal/2014/fall/court_security_on_a_beer_budget/ [https://perma.cc/3RM5-7HKX].

[43] Although the Third Circuit recently addressed this split in *United States v. Ayala*, 917 F.3d 752 (3d Cir. 2019), this Part of the Note will only analyze the pre-*Sanchez-Gomez* approaches to restraint. The Third Circuit's opinion is discussed *infra* Part IV.

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

[45] *Id.* at 102–03.

[46] *Id.* at 103.

[47] *Id.*

[48] *See id.* at 103 n.1.

[49] *Id.* at 103.

holding that because judges are not likely to be prejudiced by seeing a defendant in restraints, courts should be able to defer to the U.S. Marshals Service.[50] Although juror bias is not the only reason behind restricting the use of restraints in jury proceedings, it is one of the most important concerns; thus, the court held that there was no need for the district court to engage in an individualized assessment on the record where a defendant would not be shackled in a jury's presence.[51] As the Ninth Circuit's majority noted in *Sanchez-Gomez*, this case did not rule out the possibility of an individual asserting a liberty interest in this scenario, but rather focused solely on whether shackling presents an "inherent prejudice."[52]

B. The United States Supreme Court

Although many cases identified that the presumption of innocence applied during the guilt phase, none applied this presumption outside of this context[53]—until *Deck v. Missouri*.[54] There, the United States Supreme Court further developed restraint jurisprudence and held that an individual had the right to be brought before the court unrestrained during the penalty phase of a capital trial, unless the government could provide a sufficient and individualized justification for restraint.[55] A Missouri jury convicted Carman Deck of murder and robbery and sentenced him to death.[56] Deck successfully appealed his sentence to the Missouri Supreme Court based on ineffective assistance of counsel and was granted a new penalty phase trial.[57] During his new sentencing hearing, Deck was brought into court in "leg irons, handcuffs, and a belly chain."[58] The trial judge overruled numerous objections to Deck's restraint because he had already been convicted of the crime and the only issue was his sentence.[59] "Deck was again sentenced to death."[60]

The United States Supreme Court overturned Deck's sentence in a seven to two decision,[61] holding that the lower court's use of shackles during the penalty phase violated clearly established principles central to the U.S. judicial sys-

---

[50] *Id.* at 104.
[51] *See id.*
[52] United States v. Sanchez-Gomez, 859 F.3d 649, 661 n.8 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).
[53] Brandon Dickerson, Case Note, *Bidding Farewell to the Ball and Chain: The United States Supreme Court Unconvincingly Prohibits Shackling in the Penalty Phase in* Deck v. Missouri, 39 CREIGHTON L. REV. 741, 741 (2006).
[54] Deck v. Missouri, 544 U.S. 622, 630 (2005); *see also* Dickerson, *supra* note 53, at 742.
[55] *Deck*, 544 U.S. at 624.
[56] *Id.* at 624–25.
[57] Deck v. State, 68 S.W.3d 418, 422 (Mo. 2002) (en banc).
[58] *Deck*, 544 U.S. at 625.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 623 (Breyer, J., wrote the opinion of the Court, joined by Rehnquist, C.J., Stevens, O'Connor, Kennedy, Souter, and Ginsburg, JJ. Thomas, J., authored a dissenting opinion that Scalia, J., joined).

tem.[62] The Court held that an individual's right to due process under the Fifth and Fourteenth Amendments extended to the right to be free from restraint in the presence of a jury.[63] To reach this conclusion, the Court first analyzed instructive cases from both American courts and English common law.[64] The Court held that although today's courts are less concerned with the pain that restraints impose, the case law made clear that three overarching principles demanded that a court show that the particular case necessitated restraint.[65]

The first principle the Court identified was the presumption of innocence—that any individual is innocent until proven guilty.[66] This presumption—as outlined above—is one with many historical underpinnings.[67] The Supreme Court held that visible shackling undercuts the presumption because it demonstrates to the jury that the defendant is an individual who must be separated from the public.[68] The Court held that the use of restraint had the ability to "permeate the jury's decision-making process."[69]

Second, the Court identified that the right to a meaningful defense is dependent upon the defendant's ability to freely communicate with his attorney.[70] The Supreme Court noted, for example, that a defendant would not be able to take the witness stand to defend himself if restrained.[71] The Court again relied on cases from the English common law courts to explain that restraint increases the burden on a defendant so much that it may "'confuse and embarrass' defendants' 'mental faculties,' and thereby tend 'materially to abridge and prejudicially affect his constitutional rights.'"[72]

Third, the Court held that restraint during the sentencing phase negatively implicated the public perception of the judicial system generally.[73] In this sense, the Court was concerned with how individuals perceived the purpose of courtrooms—that routine shackling has the potential to enforce a public opinion that the court is a place of punishment, and not of justice.[74]

This application of the presumption by the Court to the sentencing phase of a trial mirrored the trend throughout English and American courts. Only the least restrictive amount of restraint was permissible when a serious security

---

[62] *See id.* at 629.

[63] *Id.*

[64] *Id.* ("In light of this precedent, and of a lower court consensus disapproving routine shackling dating back to the 19th century, it is clear that this Court's prior statements gave voice to a principle deeply embedded in the law.").

[65] *See id.* at 630.

[66] *Id.*

[67] *See supra* Part I.

[68] *Deck*, 544 U.S. at 630.

[69] Mondelli, *supra* note 40, at 794.

[70] *Deck*, 544 U.S. at 631.

[71] *Id.*

[72] *Id.* (quoting People v. Harrington, 42 Cal. 165, 168 (1871)).

[73] *Id.*

[74] *See id.*

concern justified it.[75] Although the Court was highly sensitive to the effects of shackling, it identified that trial courts still maintained "latitude in making individualized security determinations."[76] This case balanced an individual's liberty interest with a court's need to ensure safety during the proceeding.

C. The Eleventh Circuit

Years later, the Eleventh Circuit addressed the issue of shackling in a nonjury setting in *United States v. LaFond* and refused to apply the *Deck* presumptions outside of a jury proceeding.[77] In *LaFond*, a defendant was brought before the court and remained in hand restraints during his sentencing hearing.[78] During the hearing, the defendant objected to his restraint, arguing that he had not exhibited any disruptive behavior in the courtroom to justify his continued restraint.[79] The defendant also argued that keeping him shackled "'offend[ed] the dignity of th[e] public courtroom.'"[80] The district court overruled his objections and stated that because there was no jury present, he was not entitled to be free from restraint.[81] The Eleventh Circuit affirmed the defendant's sentence and held that the "rule against shackling pertains only to a jury trial."[82]

In holding that the presumption applied solely to jury trials, the Eleventh Circuit's interpretation of *Deck* and the early English common law went further than the *Zuber* court in the Second Circuit.[83] This court's analysis narrowly interpreted the Supreme Court's holding in *Deck* and focused solely on whether the jury was present.[84] Although this court limited the presumption against unwarranted restraint without balancing a defendant's individual liberties, this decision is notable because it contributes to the dispute over whether jury presence is the only factor that makes restraint unjustifiable. It followed the Second Circuit and established continuity amongst the federal circuits that lasted until 2017.[85]

III. THE *SANCHEZ-GOMEZ* SPLIT

In 2017, the Ninth Circuit split from the Second and Eleventh circuits and held that the principles established in *Deck* applied to all court proceedings—

---

[75] *See id.* at 632.
[76] *Id.*
[77] United States v. LaFond, 783 F.3d 1216, 1225 (11th Cir. 2015).
[78] *Id.* at 1221.
[79] *Id.*
[80] *Id.* (alteration in original).
[81] *Id.*
[82] *Id.* at 1225.
[83] *See id.*; *see also* United States v. Sanchez-Gomez, 859 F.3d 649, 661 n.8 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).
[84] *LaFond*, 783 F.3d at 1225.
[85] *See id.* at 1225 (citing United States v. Zuber, 118 F.3d 101, 102 (2d Cir. 1997)); *see also infra* Part III (discussing the split following the Ninth Circuit's decision in *Sanchez-Gomez*).

regardless of jury presence.[86] Although the rule announced in *Sanchez-Gomez* expanded the restraint jurisprudence beyond the guilt and sentencing phases of trial, the principles largely followed the same underlying rationale—an individual could only be restrained to the level it was absolutely necessary to protect the safety and security of the courtroom.[87]

A. The District Court

Following a series of dangerous incidents while bringing prisoners to the court, including a prisoner stabbing another prisoner, prisoner-made weapons found in holding cells, and an assault, U.S. Marshal Steven Stafford wrote a letter to the Chief Judge of the United States District Court for the Southern District of California requesting that he approve a district-wide restraint policy.[88] Stafford also cited the overwhelming number of prisoners that U.S. Marshals in the district were required to manage with an understaffed workforce.[89] This district-wide policy was consistent with the U.S. Marshals Service Policy Directive that directed the Marshals to fully restrain all defendants in non-jury courtroom proceedings unless directed otherwise by the Magistrate or District Judge.[90] Ultimately, Chief Judge Moskowitz deferred to the Marshals' request, stating that the safety and security of the courtroom was outside the purview of the court's expertise.[91] Although his direction required the U.S. Marshals to adhere to any judicial decision to remove restraint upon objection by a party, this unfettered deference allowed the U.S. Marshals Service to create a district-wide policy that defaulted to fully restraining in-custody individuals for all non-jury proceedings.[92] In effect on October 11, 2013,[93] all but one judge in the district began to follow the policy and started fully restraining all in-custody defendants during non-jury pretrial proceedings.[94]

---

[86] *Sanchez-Gomez*, 859 F.3d at 661.

[87] *See id.* at 662–666.

[88] *See* Joint Appendix at 76–77, United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018) (No. 17-312).

[89] *See id.* at 77 (detailing "the fact that the Marshals produced in-custody prisoners for 44,426 court appearances in FY 2012 (an average of 178 per day), and the fact that the Marshals are understaffed.").

[90] *See id.* at 77; *see also* U.S. MARSHALS SERV., UNITED STATES MARSHALS SERVICE POLICY DIRECTIVES: PRISONER OPERATIONS 9.18(E)(3)(b) (2011) [hereinafter USMS POLICY DIRECTIVES].

[91] Joint Appendix, *supra* note 88, at 79.

[92] *Sanchez-Gomez*, 859 F.3d at 653.

[93] United States v. Morales, Nos. 13mj3858 BLM (LAB), 13mj3882 JMA (LAB), 13mj3928 BLM (LAB), 2013 WL 6145601, at *1 (S.D. Cal. Nov. 21, 2013), *vacated sub nom*. United States v. Sanchez-Gomez, 798 F.3d 1204 (9th Cir. 2015), on *reh'g en banc* 859 F.3d 649 (9th Cir. 2017), *vacated*, 138 S. Ct. 1532 (2018).

[94] *Sanchez-Gomez*, 859 F.3d at 653 ("Only one district judge, Judge Marilyn Huff, opted out of the policy altogether. For the rest of the Southern District's judges, the Marshals shackled all in-custody defendants at pretrial proceedings.").

As defendants began objecting to the policy, a clear pattern of deference began to emerge.[95] All defendants were fully restrained in accordance with the policy—regardless of their crime, or any physical incapacities.[96] This meant that each defendant was presented in leg irons and handcuffs that were connected to a chain around the individual's waist.[97] The policy directive also recommended the addition of security boxes and padlocks.[98] One individual appeared in front of the court in full restraints notwithstanding his fractured wrist.[99] Another individual was brought in full restraints, even though she was in a wheelchair for her "dire and deteriorating health."[100] And although judges gave defendants the opportunity to object to their restraint, most objections were denied.[101] Judges noted objections but clarified that they valued prompt resolution of the issue.[102]

In three separate but related cases, four defendants objected to use of full restraints, but were each overruled by the magistrate judges.[103] Jasmine Morales, Moises Patricio-Guzman, and Rene Sanchez-Gomez—all represented by the Federal Defenders of San Diego—consolidated their objections to their restraints and filed an emergency motion opposing the policy, but the district judge denied the motion.[104] Applying a rational basis review of the defendants' objections, Judge Larry Alan Burns stated that the restraint policy was not unconstitutional because the policy did not mandate full restraint, but rather, deferred to the judgment of the U.S. Marshals and still required the Marshals to remove arm and hand restraints during sentencing hearings and guilty pleas.[105]

A fourth defendant, Mark Ring, was brought before the magistrate judge in full restraint even though he appeared in federal court twice before with no restraint and was crying largely due to the pain.[106] Ring objected to his restraint but was similarly overruled by the magistrate judge.[107] District Judge Michael Anello denied both Ring's appeal to remove his restraint and his objections to

---

[95] *See id.* at 654.

[96] *Id.*

[97] *See* USMS POLICY DIRECTIVES, *supra* note 90, at 9.18(D)(2).

[98] *See id.*

[99] *Sanchez-Gomez*, 859 F.3d at 654.

[100] *Id.* (internal quotation marks omitted).

[101] *See id.*

[102] *See id.* ("For the record, . . . every defendant that has come out is in th[e] exact same shackling; so [counsel doesn't] have to repeat that every time. . . . The court noted her objection to the shackles and appreciate[d] [counsel] not taking anymore time with it." (alteration in original) (internal quotation marks omitted)).

[103] *Id.*

[104] United States v. Morales, Nos. 13mj3858 BLM (LAB), 13mj3882 JMA (LAB), 13mj3928 BLM (LAB), 2013 WL 6145601, at *1 (S.D. Cal. Nov. 21, 2013), *vacated sub nom*. United States v. Sanchez-Gomez, 798 F.3d 1204 (9th Cir. 2015), on *reh'g en banc* 859 F.3d 649 (9th Cir. 2017), *vacated*, 138 S. Ct. 1532 (2018).

[105] *See id.*

[106] Brief for Respondents at 5, United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018) (No. 17-312); *see also* Joint Appendix, *supra* note 88, at 743.

[107] Brief for Respondent, *supra* note 106, at 5.

the district-wide policy.[108] These objections and subsequent denials were examples of a seemingly larger pattern.[109] Defendants would appear in full restraint, their public defenders would object, and the judges would summarily deny the requests.[110]

B. Ninth Circuit Court of Appeals—Three-Judge Panel

Failing to find relief in the district court, the four defendants appealed to the Ninth Circuit Court of Appeals, which initially vacated the district court's ruling.[111] On appeal, the defendants argued that the Southern District's policy violated the Due Process Clause and the Ninth Circuit's only other case on pretrial restraint.[112] A three-judge panel agreed and vacated the district courts' opinions.[113] Judge Mary Schroeder, writing for the panel, disagreed with the government's reading of *United States v. Howard*.[114] There, the Ninth Circuit upheld a general restraint policy, that unlike the Southern District of California, was limited to only leg restraints.[115] Beyond this distinction, the *Howard* policy was also limited to initial appearances before magistrate judges and required the government to show a more sufficient justification than *Sanchez-Gomez*.[116] Given this distinction and the court's interpretation of *Deck*, the *Sanchez-Gomez* court held that the government had to justify its restraint policy based on a showing of necessity.[117] Unlike the *Howard* policy, which was necessary because the infrastructure of the courtroom was "ill-suited to accommodate modern security concerns,"[118] the Southern District's policy had no similar requirement.[119]

C. Ninth Circuit Court of Appeals—En Banc Rehearing

Shortly thereafter, the Ninth Circuit reheard the case en banc.[120] Five judges joined the majority[121] and a sixth concurred in the judgment.[122] The majority

---

[108] Joint Appendix, *supra* note 88, at 751.

[109] *See* United States v. Sanchez-Gomez, 859 F.3d 649, 654 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

[110] *Id.* ("The judges routinely denied the requests, relying on the Marshals Service's general security concerns as well as concerns particular to the Southern District.").

[111] United States v. Sanchez-Gomez, 798 F.3d 1204, 1209 (9th Cir. 2015), on *reh'g en banc*, 859 F.3d 649, *vacated*, 138 S. Ct. 1532 (2018).

[112] Appellant's Joint Opening Brief at 27, 31, United States v. Sanchez-Gomez, 859 F.3d 649 (9th Cir. 2017) (Nos. 13-50561, 13-50562, 13-50566, 13-50571) (citing United States v. Howard, 480 F.3d 1005, 1008 (9th Cir. 2007)).

[113] *Sanchez-Gomez*, 798 F.3d at 1209.

[114] *Id.* at 1207.

[115] *Howard*, 480 F.3d at 1008; *see also Sanchez-Gomez*, 798 F.3d at 1208.

[116] *Sanchez-Gom*ez, 798 F.3d at 1208 (citing *Howard*, 480 F.3d at 1013).

[117] *Id.* at 1207 (citing *Howard*, 480 F.3d at 1008).

[118] *Id.* at 1208.

[119] *Id.*

[120] United States v. Sanchez-Gomez, 859 F.3d 649, 649, 653 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

took the broadest application yet on this issue and announced that uniform shackling policies violated an individual's due process rights.[123] This opinion broadly held that district courts were not permitted to defer to the U.S. Marshals and had to make an individual determination about each defendant's conditions justifying restraint.[124] The majority clarified that this decision applied to all proceedings, "regardless of a jury's presence or whether it's a pretrial, trial or sentencing proceeding."[125] It emphasized *Deck*'s fundamental holding that "[c]riminal defendants, like any other party appearing in court, are entitled to enter the courtroom with their heads held high."[126]

The majority announced that for a court to restrain a defendant at any proceeding, that court had to justify the restraint with an explanation of the security concerns with that defendant, then balance that security concern with the individual's liberties, affording no deference to security personnel.[127] Tracing much of the historical lineage that the *Deck* Court followed, the majority applied the longstanding principles against restraint and held that the right to be free from unwarranted restraint was fundamental and "'has deep roots in common law.'"[128] The court thus went beyond the Ninth Circuit panel's decision and announced a new fundamental right.[129] In holding that the Due Process Clause required courts to engage in an individualized assessment for each restraint decision, the en banc majority overruled *United States v. Howard*'s central holding that a court could implement a routine shacking policy in an effort to defer to the U.S. Marshals.[130] As discussed below, the en banc majority gave few factors for a trial court to use to determine when and what level of restraint is appropriate.[131]

Judge Ikuta filed a dissenting opinion stating that "[t]he majority's analysis is wrong at every turn."[132] In her view, *Deck*'s principles and core holding applied only to proceedings where the jury was present.[133] She vehemently disagreed with the majority's reading of the language of *Deck* as dicta.[134] In the

---

[121] *Id.* at 653 (Kozinski, J., wrote the majority opinion and was joined by Thomas, C.J., and Reinhardt, Paez, Berzon, JJ.).

[122] *Id.* at 666 (Schroeder, J., concurring) (fully joining the majority but writing separately to "offer a brief comment about Judge Ikuta's lengthy, well written dissent.").

[123] *See id.* at 661.

[124] *Id.* at 666 (Ikuta, J., dissenting).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.* at 662 (citation omitted).

[129] Recent Case, United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017) (en banc), cert. granted in part, 138 S. Ct. 543 (2017)*, 131 HARV. L. REV. 1163, 1169 (2018) ("[A] more restrained approach would have allowed for the same result.").

[130] *Sanchez-Gomez*, 859 F.3d at 661 n.10 (overruling United States v. Howard, 480 F.3d 1005 (9th Cir. 2007)).

[131] *See infra* Section III.D.

[132] *Sanchez-Gomez*, 859 F.3d at 684 (Ikuta, J., dissenting).

[133] *Id.* at 677–78 (Ikuta, J., dissenting).

[134] *Id.* at 678 (Ikuta, J., dissenting) ("These rationalizations do not hold water.").

dissent, Judge Ikuta stated that the applicable vehicle for analysis on this issue was *Bell v. Wolfish*.[135] There, the Supreme Court addressed the issue of the presumption of innocence and held that it did not protect "a pretrial detainee during confinement before his trial has even begun."[136] For Judge Ikuta, this meant that the government could limit an individual's liberties in an effort to ensure efficiency and security of the court.[137] Thus, under the rational basis standard of judicial review, the Southern District's restraint policy was reasonably related to the government's legitimate security interests and ultimately constitutional.[138]

D. What Now? The Judicial Response

Following the en banc decision, district courts in the Ninth Circuit were left to interpret the ruling to the best of their abilities.[139] Some resorted to less restrictive restraints using only leg restraints and focused on the nature of the proceeding and what information was available to the court at the time of the proceeding.[140] These courts instructed judges to exercise discretion and consider the "totality of the circumstances" in each case.[141] This approach required judges to balance the defendant's liberty interest and other due process concerns with the safety and security of the court.[142] Similarly, other courts closely followed the language of *Sanchez-Gomez* and performed an individualized assessment for each defendant but found a defendant's criminal history a compelling reason to justify the individual's restraint.[143] Others went further and instructed judges to ensure that their decision to restrain an individual comported with the three principles outlined in *Deck*.[144] One judge even found that alt-

---

[135] *Id.* at 681 (Ikuta, J., dissenting).

[136] Bell v. Wolfish, 441 U.S. 520, 533 (1979).

[137] *Sanchez-Gomez*, 859 F.3d at 682 (Ikuta, J., dissenting).

[138] *Id.* at 683 (Ikuta, J., dissenting).

[139] *See In re* Zermeno-Gomez, 868 F.3d 1048, 1053 (9th Cir. 2017); *see also infra* Section IV.A.; *In re* Zermeno-Gomez, 868 F.3d at 1052 ("Under our 'law of the circuit doctrine,' a published decision of this court constitutes binding authority 'which must be followed unless and until overruled by a body competent to do so.' " (citations omitted) (internal quotation marks omitted)).

[140] *See, e.g.*, Martin-Perez v. Major, No. 3:18-CV-00996-H-JLB, 2018 WL 2761734, at *6 (S.D. Cal. June 8, 2018).

[141] *See id.*

[142] *Id.* at *5.

[143] *See, e.g.*, United States v. Borque, No. 2:17-cr-00131-KJD-VCF, 2018 WL 1092338, at *2 (D. Nev. Feb. 27, 2018) ("Further, . . . this Court made its own individualized determination regarding the use of shackles prior to Defendant's Change of Plea Hearing, stating . . . '[T]he Court has reviewed the Defendant's criminal history and finds that a compelling government purpose would be served and that leg shackles are the least restrictive means for maintaining security and order in the courtroom.' "); *see also* Memorandum from the Honorable Raner C. Collins, Chief Judge, U.S. Dist. Court, Dist. of Ariz., to All Court Personnel et al. (Aug. 4, 2017), *In re* Zermeno-Gomez, 868 F.3d 1048 (9th Cir. 2017) (No. 17-71867), ECF No. 17-2.

[144] *See, e.g.*, *Martin-Perez*, 2018 WL 2761734, at *6.

hough a defendant was charged with murder, no compelling reason existed to restrain that defendant for a preliminary hearing.[145]

While the Ninth Circuit offered protection for the right to be free from unwarranted restraint, many courts found that the enforcement lacked specificity.[146] This holding—although admittedly clear to some[147]—left many questions unanswered. The Ninth Circuit alluded to a set of factors in other shackling cases such as "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."[148] And while these factors could help a district court with its shackling decision, the language ultimately failed to provide a clear and effective framework that a court could base its decision on.

E. Foul Ball: The Supreme Court's Intervention

Looming over this entire dispute was the issue of justiciability.[149] It is important to note that before the issue ever reached the Ninth Circuit Court of Appeals, not one of the four defendants who challenged the policy was still detained.[150] Three of the defendants pled guilty to their respective offenses, while the other defendant's charges were dismissed.[151] The en banc majority ultimately determined it was capable of reaching the merits of the shackling issue because the appeal challenged not only the defendants' injuries, but the policy itself.[152] The court held that this challenge was a "functional class action[]" that gave the court jurisdiction to analyze the policy even though not one defendant was still implicated.[153] This issue was the ultimate end of the road for the de-

---

[145] *See* Tiffany DeMasters, *Arizona Appeals Cuff-less Ruling*, WEST HAW. TODAY (Oct. 1, 2017, 8:53 AM), https://www.westhawaiitoday.com/2017/10/01/hawaii-news/arizona-appeals-cuff-less-ruling/[https://perma.cc/5DC5-KF4Y].

[146] Maxine Bernstein, *Judges Now Deciding Daily if Inmates Should Wear Shackles in Court*, OREGONIAN (Oct. 8, 2017), https://www.oregonlive.com/portland/index.ssf/2017/10/judges_now_deciding_daily_if_i.html [https://perma.cc/X488-ZF5F].

[147] *See, e.g.*, United States v. Bradley, No. 2:04-CR-0100-KJD-VCF, 2018 WL 493005, at *2 (D. Nev. Jan. 19, 2018) ("Defendant's tunnel vision on these examples mischaracterizes what *Sanchez-Gomez* requires. The Ninth Circuit states it plainly . . .").

[148] United States v. Sanchez-Gomez, 859 F.3d 649, 660 (9th Cir. 2017) (en banc) (citation omitted) (internal quotation marks omitted), *vacated*, 138 S. Ct. 1532 (2018).

[149] *See id.* at 657. This Note does not offer an analysis of the justiciability and mootness issues presented and argued in the course of litigation but focuses solely on the merits of the Ninth Circuit's due process decision.

[150] United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1536 (2018) ("Morales, Sanchez-Gomez, and Patricio-Guzman each pled guilty to the offense for which they were charged. . . . The charges against Ring . . . were dismissed pursuant to a deferred-prosecution agreement.").

[151] Morales pled guilty to felony importation of a controlled substance, Sanchez-Gomez pled guilty to felony misuse of a passport, and Patricio-Guzman pled guilty to misdemeanor illegal entry into the United States. *Id.*

[152] *Sanchez-Gomez*, 859 F.3d at 655.

[153] *Id.* at 658.

fendants at the United States Supreme Court, which did not reach the merits of the restraint policy and only granted certiorari on the jurisdictional question presented for review.[154]

In a unanimous opinion authored by Chief Justice Roberts, the Court held that the Ninth Circuit did not have jurisdiction to hear the appeal because the issue was moot.[155] Unlike the original panel of Ninth Circuit judges and the en banc majority who heard the case notwithstanding the defendants' detention status, the Supreme Court held that reliance upon class action precedent was inappropriate and vacated the en banc majority decision.[156] The Supreme Court's decision to vacate the Ninth Circuit's judgment had a consequence beyond simply reversing the holding. Because the Supreme Court vacated the judgment, the Court effectually stripped the Ninth Circuit's decision of any precedential value, even though it only explicitly disagreed with the Ninth Circuit's treatment of the jurisdiction issue.[157]

IV. GOLDILOCKS AND THE THREE TIERS OF SCRUTINY—THE NINTH CIRCUIT'S IMPRACTICABLE APPROACH TO RESTRAINT

The United States Supreme Court's decision in *Sanchez-Gomez* left the federal judicial system in limbo. The Seventh Circuit declined to decide the issue,[158] while the Third Circuit recently emphasized the importance of judicial discretion in security decisions and declined to apply a "bright-line rule" to individualized shackling determinations.[159] Although the Supreme Court identified ways that the restraint issue could come again before the Court,[160] the

---

[154] *See* United States v. Sanchez-Gomez, 138 S. Ct. 543, 543 (2017), *cert. granted*.

[155] *Sanchez-Gomez*, 138 S. Ct. at 1542.

[156] *Id.* This Note will not attempt to predict the outcome of this issue should it come before the Supreme Court again. It is notable however that only three justices from the *Deck* Court are still present on the United States Supreme Court—Justices Breyer and Ginsburg from the majority, and Justice Thomas from the dissent.

[157] *See* O'Connor v. Donaldson, 422 U.S. 563, 577 n.12 (1975) ("[O]ur decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case."). Although courts in the Ninth Circuit are no longer required to follow the *Sanchez-Gomez* approach, without a decision on the issue from the Supreme Court, these courts are also not prohibited from following the court's guidance. Thus, this Note analyzes the Ninth Circuit's approach in contrast to the Second, Third, and Eleventh Circuits' approaches.

[158] *See* United States v. Henderson, 915 F.3d 1127, 1132 (7th Cir. 2019).

[159] United States v. Ayala, 917 F.3d 752, 763 (3d Cir. 2019). In *Ayala*, the defendant objected to her restraints at her sentencing hearing. *Id.* at 762. The Third Circuit distinguished the case from *Sanchez-Gomez*, *Deck*, and another Third Circuit case because the defendant was not subject to a uniform restraint policy, her sentence was not capital, and no jury was present. *Id.* at 762–63.

[160] The Court discussed that a defendant could use a civil suit to challenge. *See* Transcript of Oral Argument at 12–18, United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018); *see also Sanchez-Gomez*, 138 S. Ct. at 1542 ("None of this is to say that those who wish to challenge the use of full physical restraints in the Southern District lack any avenue for relief. In the course of this litigation the parties have touched upon several possible options."). Recently,

Court's silence on the shackling issue makes it unclear whether the presumption applies to and protects individuals in non-jury proceedings.[161] It is similarly unclear what level of restraint would be appropriate without judicial review. What is clear however, is that a uniform federal rule is necessary for courts to know what conduct is permissible as it relates to restraint, and for individuals to know what rights the Constitution affords them in non-jury proceedings. It is undoubtedly impermissible then for a court to adopt a uniform restraint policy in violation of the individual assessment requirement, but what then is a judge's discretion to restrain an individual who has limited history with the justice system?

The Ninth Circuit's framework that applies the strictest level of judicial review to pretrial shackling decisions, without a clear set of factors for courts to apply, could significantly limit a future court's ability to restrain a potentially dangerous individual. While some argue that this holding was largely symbolic,[162] its effect could have consequences that could—as Judge Ikuta noted—"reach into courthouses of every size and capacity."[163] In addition, an unclear standard by which judges can measure their conduct could lead to different and potentially inequitable applications of the law. For example, two defendants that are charged with the exact same crime and that have a very similar criminal history—but are in front of different judges in the same court—could have very different restraints imposed on them. *Sanchez-Gomez* thus established a framework that could afford significantly different protections to individuals depending on which courtroom they end up in that week.

Therefore, the Supreme Court should apply *Deck*'s core holding to afford individuals a right to be free from unwarranted restraint and require judges to make individualized assessments of defendants, but should widen the Ninth Circuit's scope of factors to consider when making restraint decisions.[164] This Part of the Note first addresses the aftermath of the *Sanchez-Gomez* holding and different judicial approaches to the issue. Next, it offers an analysis of the levels of judicial scrutiny and explains the inadequacy of the current due process frameworks for this issue. Finally, it argues that while the *Sanchez-Gomez* holding is consistent with the development against restraint throughout American history, given the nature of certain proceedings, courts should be able to apply a lower level of judicial scrutiny to this decision in pretrial proceedings. In analyzing various scenarios under each level of scrutiny, this Part argues that a lower level of scrutiny offers the best balance between security and an individual's liberties.

---

the Seventh Circuit also declined to address the issue of restraint in the non-jury proceedings as an issue of justiciability. *See Henderson*, 915 F.3d at 1129.

[161] *See* Martin-Perez v. Major, No. 3:18-CV-00996-H-JLB, 2018 WL 2761734, at *4 (S.D. Cal. June 8, 2018).

[162] Recent Case, *supra* note 129, at 1167–68.

[163] United States v. Sanchez-Gomez, 859 F.3d 649, 684 (9th Cir. 2017) (en banc) (Ikuta, J., dissenting), *vacated*, 138 S. Ct. 1532 (2018).

[164] *See* discussion *infra* Sections IV.A.3., IV.B.

A. Reconsidering the Appropriate Level of Judicial Scrutiny

As explained *supra*, the Ninth Circuit's decision to announce the right to be free from unwarranted restraint as a fundamental right, so rooted in the history of the United States that it warrants the highest level of judicial scrutiny, inequitably tips the scale away from courtroom security. The decisions following *Sanchez-Gomez* exemplify that a lack of clear direction by the Ninth Circuit's decision left courts to interpret these situations to the best of their abilities.[165] While trial courts ultimately retain the discretion to make security decisions in their courtrooms,[166] the compelling interest requirement heightened the standard by which a trial court could justify restraint and took away any deference toward court security. If adopted, these factors have the potential to leave the trial courts with no basis for their decisions to justify restraint. Under the *Sanchez-Gomez* framework, courts have little discretion to restrain an individual with no history of disruptive courtroom behavior or any pattern of defiance toward court personnel—even if that individual is on trial for a violent offense. While the right to be free from unwarranted restraint has developed in many aspects of the judicial system, this history is also focused on the safety and security of the court.

Although *Sanchez-Gomez* no longer binds courts, the en banc court's decision highlights the distinct approaches and levels of scrutiny that courts apply in restraint decisions. Courts have historically applied three levels of review in analyzing the Constitutional implications of laws.[167] This Part of the Note will analyze the traditional tiers of judicial review and scrutiny for such due process concerns. It then offers that a new tier of scrutiny for this area of the law is necessary to stabilize the balance upset by *Sanchez-Gomez*.

1. Strict Scrutiny

The compelling interest standard announced by the Ninth Circuit in *Sanchez-Gomez* is nothing new to the American judicial system. Finding its roots in Equal Protection jurisprudence,[168] this level of judicial scrutiny affords the highest level of protection toward an individual's liberties and affords the

---

[165] *See supra* Section III.D.

[166] *See, e.g.*, Dietz v. Bouldin, 136 S. Ct. 1885, 1892 (2016); Wilson v. McCarthy, 770 F.2d 1482, 1484 (9th Cir. 1985).

[167] Emma Freeman, Note, *Giving* Casey *its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 282 (2013) (discussing tiers of scrutiny in equal protection and due process challenges).

[168] *See* Washington v. Glucksberg, 521 U.S. 702, 762 (1997) (Souter, J., concurring) ("The first was not even in a due process case but one about equal protection, *Skinner* v. *Oklahoma*, where the Court emphasized the 'fundamental' nature of individual choice about procreation and so foreshadowed not only the later prominence of procreation as a subject of liberty protection, but the corresponding standard of 'strict scrutiny,' in this Court's Fourteenth Amendment law." (citations omitted)).

lowest amount of deference to the government's implementation of that law.[169] Some have even colloquially referred to this standard as "strict in theory and fatal in fact."[170] Courts apply this standard in all cases involving fundamental rights or suspect classifications.[171] The Ninth Circuit's ruling that a court must show a "compelling interest" before using the least restrictive means of restraint because of this right's fundamental nature mirrors the language of the traditional strict scrutiny test.

While this standard fits well in most shackling contexts, its application in non-jury proceedings, where the court and security provider have limited information about the individual's risk to the court, produces a potentially dangerous result.[172] The factors that the Ninth Circuit identified as compelling—history of disruptive behavior and pattern of escape—cannot account for a judge's concerns about things like the size of her courtroom or the amount of security staffed at the present time. While the requisite individualized assessment for each defendant allows judges to make determinations based on the information provided to them, the information reviewed in light of the factors provided by *Sanchez-Gomez* does not allow judges to restrain an individual based on valid security concerns.[173] If freedom from unwarranted restraint in all proceedings remains a fundamental right, judges must be allowed to include other valid security concerns as compelling interests justifying restraint. This standard, however, is impracticable in the trial court with increasing cases, filings, and security concerns,[174] and a less stringent standard should be applied.

---

[169] *See* Fisher v. Univ. of Tex., 570 U.S. 297, 316 (2013) (Thomas, J., concurring) ("This most exacting standard has proven automatically fatal in almost every case." (citation omitted) (internal quotation marks omitted)).

[170] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (citation omitted) (internal quotation marks omitted). *Contra Fisher*, 570 U.S. at 314 ("Strict scrutiny must not be strict in theory, but fatal in fact." (citations omitted) (internal quotation marks omitted)).

[171] Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting); Freeman, *supra* note 167, at 284 (discussing tiers of scrutiny in equal protection and due process challenges) ("Strict scrutiny applies to claims involving fundamental rights, such as the right to vote and the right to access the court system, and suspect classifications, such as race, national origin, and religion." (citations omitted)).

[172] *See* United States v. Sanchez-Gomez, 859 F.3d 649, 684 (9th Cir. 2017) (en banc) (Ikuta, J., dissenting), *vacated*, 138 S. Ct. 1532 (2018).

[173] *See Sanchez-Gomez*, 859 F.3d at 684 (Ikuta, J., dissenting) ("[T]he Marshals Service can either do the impossible (predict risks based on a dearth of predictive information) or sit idly by and suffer an identifiable, compelling harm (violence in the courtroom)."); *see also infra* Section IV.A.3.

[174] The safety concern, based on the sheer number of cases that federal courts take on, was as significant of a concern in 2013 as it is today. Over the last year, the number of criminal filings for criminal defendants in the federal courts went up by eight percent. ADMIN. OFFICE U.S. COURTS., FED. JUD. CASELOAD STATS. (2018), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/8S5L-EUL3]. In the Ninth Circuit, however, the number of cases went up by sixteen percent. ADMIN. OFFICE U.S. COURTS, FED. JUD. CASELOAD STATS., Table D (2018), https://www.uscourts.gov/federal-judicial-caseload-statistics-2018-tables [https://perma.cc/N65H-7PEA].

2. Rational Basis Review

Rational basis review is the baseline standard that all laws and governmental actions that do not implicate a fundamental right must meet.[175] Courts will uphold a governmental action challenged under this standard if it is reasonably related to serving a legitimate governmental interest.[176] Given that this standard is so low, it is highly deferential to the government, and nearly all laws pass this constitutional muster.[177] In the context of restraint, this means that a court's decision to fully restrain an individual because of the U.S. Marshals' recommendation would be a sufficient justification.[178] If afforded this level of protection, courts could implement district-wide policies to fully restrain any and all individuals—regardless of any factors signaling that they present no threat to security. The standard for determining the appropriate level of restraint under this review would be "whether [the restraint] appear[s] excessive in relation to" the "legitimate nonpunitive governmental purpose."[179] Like strict scrutiny, this standard of review is inadequate to resolve concerns about unwarranted restraint but swings the balance in the opposite direction toward far too much deference to the U.S. Marshals.

3. Intermediate Scrutiny

Traditionally, courts apply a third tier of scrutiny—intermediate scrutiny—to gender-based equal protection classifications.[180] Generally, courts are apprehensive to apply this third tier of scrutiny to substantive due process issues "[i]n an effort to avoid endorsing the untrammeled exercise of judicial power."[181] There are many contexts, however, that warrant a middle-ground approach to judicial review, that finds itself somewhere in between strict and rational basis scrutiny. For example, in laws restricting abortion, the Supreme Court applies the undue burden test to determine whether a law that restricts

---

[175] *See* Freeman, *supra* note 167, at 283 ("Rational basis applies to equal protection claims that do not implicate gender, suspect classifications, or fundamental rights." (citation omitted)). There is a heightened version of this review known as "rational basis with bite," which the Supreme Court has applied to laws based on pure animus toward a particular group, is less deferential, and presents a bigger challenge for the government to prove its purpose was legitimate. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 626, 632 (1996); Freeman, *supra* note 167, at 279. This Note does not analyze this heightened rational basis review and instead offers that intermediate scrutiny is more appropriate because of the rights at stake. *See infra* Section IV.A.3.

[176] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 954 (5th ed. 2017).

[177] *See* District of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) ("[A]lmost all laws[] would pass rational-basis scrutiny." (citation omitted)).

[178] *See* Brief *ex rel.* Cal. State Sheriffs' Ass'n as Amicus Curiae Supporting Petitioner at 4–5, 19–20, United States v. Sanchez-Gomez, 138 S. Ct. 1532 (2018) (No. 17-312), 2017 WL 4404964, at *4–5, *19–20.

[179] Bell v. Wolfish, 441 U.S. 520, 561 (1979).

[180] *See* 16B AM. JUR. 2d *Constitutional Law* § 861 (2019).

[181] Leading Cases, *The Supreme Court, 1991 Term–Substantive Due Process—Intermediate Level Scrutiny*, 106 HARV. L. REV. 163, 211 (1992).

access to an abortion presents "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[182] In the First Amendment context, the Supreme Court has applied an intermediate level of scrutiny to speech restrictions that are content-neutral.[183] While each area of the law presents different iterations of this approach, at its core, this level of review requires that a law be substantially related to an important government purpose.[184] Unlike strict scrutiny, a court does not need to find that the government interest is compelling but "must characterize the objective as 'important.' "[185]

Although courts have not traditionally applied this level of scrutiny to fundamental rights, this Note argues that the language of this test appropriately balances court security concerns, affording some level of deference to the Marshals, but still affording protection to an individual's right to be free from unwarranted restraint.[186] In applying this level of review, the Court would likely need to uphold the right to be free from unwarranted restraint as a fundamental right, but hold that in non-jury contexts, there are exceptions justifying restraint. This level of review would permit a court to follow the factors identified as "compelling" by *Sanchez-Gomez*, but would also allow the court to evaluate the nature of the proceeding and size of the courtroom as "important" government interests.[187]

This level of review would still protect an individual's rights under *Deck*. Under the intermediate standard of review, "[t]he means used need not be necessary, but must have a 'substantial relationship' to the end being sought."[188] The substantial relationship element of this review would help to resolve any issues with the presumption of innocence and ability to communicate with counsel. First, it would still require the court to only restrain an individual with the least restrictive means to further the security interest. The substantial relationship requirement would prohibit uniform restraint policies like the policy in *Sanchez-Gomez* because even if security is an important interest, a uniform policy would not have a substantial relationship to every single defendant and eve-

---

[182] Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992).

[183] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994).

[184] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

[185] CHEMERINSKY, *supra* note 176, at 727.

[186] *See* Hutchins v. District of Columbia, 188 F.3d 531, 563 n.24 (D.C. Cir. 1999) (en banc) (Rogers, J., concurring) ("Intermediate scrutiny emerged from equal protection and First Amendment jurisprudence, but is also appropriate in due process cases."); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 969 (1987) ("In substantive due process cases as well, the Court has fashioned a third test, falling between 'strict scrutiny' and 'mere rationality.' This midlevel standard is the product of a regime of judicial review that seeks both to protect non-textual 'fundamental rights' and to avoid criticism that the Court is operating beyond the bounds of the Constitution."); Leading Cases, *supra* note 181, at 211 ("To guide lower courts adjudicating and litigants advancing substantive due process claims, the Court should introduce a middle tier of scrutiny into its formal two-tiered substantive due process framework.").

[187] *Cf.* Sell v. United States, 539 U.S. 166, 180 (2003) (original emphasis omitted) (finding security as an important interest in the context of involuntary medication).

[188] CHEMERINSKY, *supra* note 176, at 727–28.

ry proceeding. If a defendant disagrees with the judge's decision, he may still object on the record to his restraint for the judge to reconsider her initial determination. This standard strikes the appropriate balance because unlike the *Sanchez-Gomez* compelling interest framework, it gives judges the discretion they need to make more effective individualized assessments of each defendant.

B. Finding an Appropriate Middle Ground: Intermediate Scrutiny Applied

The final Part of this Note presents two hypothetical scenarios and analyzes them under each standard of judicial review. It concludes that under these facts, intermediate scrutiny provides the best balance for an individual's rights and courtroom safety and security.

1. Defendant A

An individual—Defendant A—is arrested for possession of marijuana with intent to distribute under 21 U.S.C. § 841[189] and has one prior conviction for battery. In his time in the judicial system, he has no history of disruptive courtroom behavior. At his initial appearance, court security presents him in a small courtroom in District Z, in front of a U.S. Magistrate Judge. On the day of his initial appearance, the U.S. Marshals inform the judge that they are understaffed and recommend that because of the understaffing and Defendant A's history of violent offenses, he be presented to the court in full restraints. District Z has a district-wide policy of presenting each defendant in leg restraints.

Noted in Figure 1, Defendant A would receive different levels of restraint under each level of scrutiny.[190] Under both the *Sanchez-Gomez* strict scrutiny approach and the approach offered by this Note, District Z's policy of restraint would be unconstitutional, while under the rational basis review, it is likely permissible. Defendant A would likely not be able to object under rational basis review because so much deference is afforded to the government as the best decision maker for these security concerns.

---

[189] 21 U.S.C. § 841 (2012).

[190] *Infra* Figure 1.

FIGURE 1

	Strict Scrutiny	Intermediate Scrutiny	Rational Basis
District-Wide Policy's Constitutionality	Unconstitutional	Unconstitutional	Constitutional
Restraint of Defendant A	Unconstitutional	Likely Constitutional	Constitutional
Appropriate Level of Restraint	None	Leg Restraints Only	Full Restraints[191]

In a *Sanchez-Gomez* scenario, the magistrate judge would be unable to restrain Defendant A. Although the Marshals identified a serious security concern given the number of staff members and the defendant's criminal history, this defendant does not have a "pattern" of evading law enforcement nor does he have any history of violent or disruptive courtroom behavior. This scenario highlights the ineffectiveness of this approach and that the individualized assessments provided for by *Sanchez-Gomez* are inadequate. This scenario leaves the court vulnerable if the magistrate judge makes a pretrial bond decision the defendant does not like, or if some commotion breaks out inside of the courtroom.

Under the intermediate scrutiny approach, the magistrate judge likely could restrain this defendant with leg restraints. These restraints would offer the optimal amount of security while still balancing Defendant A's liberties. The magistrate judge could find that the Marshals' request for full restraint is not substantially related to the security concern because there is a less restrictive manner to secure that interest. The magistrate judge has the discretion under this scenario to reject handcuffs alone as another less restrictive option because it would insufficiently prevent Defendant A's escape.[192] The court could require that the restraint be concealed from the public and that the defendant be brought into the courtroom before the magistrate judge enters to prevent visible restraint from clouding his judgment.[193]

Finally, under the rational basis review standard, Figure 1 demonstrates that Defendant A would likely be brought into court in full restraints. Although full restraints are not required under this level of scrutiny, because rational basis permits the most deference to court security, the U.S. Marshals could fully restrain Defendant A because of the understaffing issues. At the very minimum, because the district-wide policy is leg restraints, Defendant A would be brought in for his initial appearance in leg restraints. The magistrate judge would still retain discretion under this scenario to reduce the amount of restraint against

---

[191] USMS POLICY DIRECTIVES, *supra* note 90, at 9.18(D)(2) ("To fully restrain a prisoner on all movements, the required equipment will consist of handcuffs, waist chains, and leg irons.").

[192] *See* Sinclair & Fautsko, *supra* note 42.

[193] This practice is necessary to avoid any judicial bias from seeing the defendant in restraint. *See* People v. Best, 979 N.E.2d 1187, 1189 (N.Y. 2012) ("[J]udges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder.").

the Marshals' recommendation, but only if he is so inclined. This scenario highlights just how little an individual's rights are protected under this level of review.

2. Defendant B

Under this scenario, Defendant B is also arrested for possession of marijuana with intent to distribute under 21 U.S.C. § 841.[194] Defendant B, however, does not have a violent criminal history and only has one prior conviction for a similar drug-related offense. In her time in the judicial system, she has never been disruptive in the courtroom. However, she evaded police once several years before. At her initial appearance, she is presented in the same small courtroom, on the same day, and in District Z in front of a U.S. Magistrate Judge.

FIGURE 2[195]

	Strict Scrutiny	Intermediate Scrutiny	Rational Basis
Restraint of Defendant B	Unconstitutional	Constitutional	Constitutional
Appropriate Level of Restraint	None	Leg Restraint	Full Restraints

In this hypothetical, Defendant B likely could not be restrained under the *Sanchez-Gomez* strict scrutiny framework. Because Defendant B only evaded police once before, she does not have a clear pattern of disruptive or evasive behavior. Under the *Sanchez-Gomez* factors, Defendant B's conduct outside of the courtroom, coupled with the lack of security for the court, are still insufficient reasons to justify restraining her. While one can never fully predict an individual's actions, not restraining Defendant B presents a serious security risk in case Defendant B attempts to escape or evade the U.S. Marshals. This scenario, like the scenario with Defendant A, showcases the inadequacy and inflexibility of this framework.

Under the lesser framework offered by this Note however, the magistrate judge has more discretion and ability to evaluate Defendant B's history and the nature of security available to the court. Like with Defendant A, the magistrate judge could focus on the size of the courtroom and understaffing to choose to constitutionally restrain her. Although this defendant has no violent history, the potential security concern highlighted by the Marshals should be sufficient for the judge to justify a limited amount of restraint. Because of her limited criminal history, however, Figure 2 notes that the magistrate judge likely could only place Defendant B in leg restraints as a method that is substantially related to the court's security concerns because they restrain her without affecting her

[194] 21 U.S.C. § 841 (2012).

[195] Figure 2 omits the district-wide policy from the table because it is the same under both hypothetical scenarios.

ability to communicate with counsel[196] and maintain the integrity of the court. To protect the defendant's presumption of innocence, just as in Defendant A's scenario, the Marshals would need to bring her into the courtroom before the judge.

Just like Defendant A's scenario, under the rational basis review of this decision, the magistrate judge would likely order the Marshals to bring Defendant B into the court in full restraints at the Marshals' request. Under this scenario, it is possible that the magistrate judge could order less restraint because Defendant B does not have a violent criminal history. Under this review, however, Defendant B likely would not have a successful constitutional challenge to this decision.

This Part of the Note indicates that although the intermediate or relaxed strict scrutiny approach is not without flaws, it offers the most balanced approach to the right against unwarranted restraint. This approach, however, should not follow the same method as the *Sanchez-Gomez* framework. Without clear markers for judges to determine what circumstances are important enough to justify restraint, courts applying an intermediate standard of review could potentially produce a similar result as *Sanchez-Gomez*. Announcing clear factors that a court can consider under this level of review is necessary to prevent courts from arbitrarily enforcing this law and implementing unofficial restraint policies.

CONCLUSION

This Note contributes to the broader discussion about judicial decision-making in pretrial and non-jury proceedings. Although this issue presents a contentious debate over the interpretation of precedent—both old and new—and the extension of certain liberties to different areas of the law, it is clear that the current framework is untenable. While the Ninth Circuit correctly applied the presumptions established in *Deck* to all proceedings regardless of jury presence, it left many questions unanswered. This Note analyzed the history of this issue and identified a unifying theme throughout—shackling should be as limited as possible to prevent the diminution of an individual's liberties unless it is clear that failure to restrain the defendant will pose a serious security concern for the court. Next, it explained the current state of the law following the Ninth Circuit's split from its brethren in *Sanchez-Gomez*, and the unworkable framework and factors it established for courts in its circuit. Finally, this Note offered a framework for approaching the issue of unwarranted restraint in the non-jury context and predicted the outcomes of various scenarios under each tier of judicial scrutiny.

While no individual's interaction with the American judicial system is ever the exact same, courts should not allow that differential treatment to be because of an unclear rule. As the Ninth Circuit wrote: "while the phrase may be well-

---

[196] *See* United States v. Jackson, 419 F. App'x 666, 670–71 (7th Cir. 2011) (finding that leg restraints did not prevent a defendant from defending himself).

worn, it must also be worn well: We must guard against any gradual erosion of the principle it represents, whether in practice or appearance."[197]

[197] United States v. Sanchez-Gomez, 859 F.3d 649, 659 (9th Cir. 2017) (en banc), *vacated*, 138 S. Ct. 1532 (2018).

[THIS PAGE INTENTIONALLY LEFT BLANK]