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# Children in Chains: Indiscriminate Shackling of Juveniles

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## I. INTRODUCTION

The two boys appeared to be about thirteen or fourteen years old. They were arrested in school during their lunch period for fighting.[1] Neither boy had thrown a punch. Instead, they demonstrated their intent to fight verbally and by facing off in a revolving circle in the cafeteria. This verbal argument and near fight caused a large crowd of teenagers to leave their lunch tables to go watch the two boys argue. Teachers assigned to keep the lunch period orderly warned the growing group of teenagers to return to their seats. These admonishments went unheard and unheeded. School police officers were called and quickly arrested the two boys.[2] Both boys were transported by school police officers to juvenile court for arraignment. Their parents were called and told to meet their children in Boston Juvenile Court. As dictated by court security procedures, the boys were taken to the court detention facility. This facility houses both adults and children, albeit in separate cells and on

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1. To protect the identity of the minors, all identifying information has been omitted.

2. Boston, Massachusetts is a city located within Suffolk County. In Suffolk County, school police officers are Boston Police Officers assigned to police Boston Public Schools. They have arrest powers identical to that of all police officers. *See School Police Officers*, BOSTON PUBLIC SCHOOLS, http://www.bostonpublicschools.org/school-police-officers (last visited Jan. 1, 2012).

opposite ends of the facility—space providing.[3] The boys were brought into the courtroom from a detention cell located in the basement of the courthouse. Each boy's mother was already in the courtroom when her son was brought up from detention. The courtroom was crowded. Defense counsel, prosecutors, probation officers, police officers, victim advocates, and a group of law students were all in the courtroom.

Each boy was led into the courtroom with handcuffs and leg cuffs around his ankles. A chain connected the handcuffs together, and another chain connected the foot cuffs together. The boys were directed to stand for their arraignment, and both were assigned defense counsel. At no time during this court appearance were the restraints removed. The arraignment never occurred. A probation officer indicated that neither boy had any prior juvenile court involvement, neither boy had ever been arrested before that day, and that both boys attended school regularly without incident prior to that afternoon. The prosecutor offered a term of pre-trial probation. Through their counsel, both boys agreed to this offer. The judge inquired as to the nature of the fight and the reason for it. Upon hearing that no punches were thrown and that gossip had precipitated the near fight, the judge asked the boys to shake hands and put their differences to rest. The boys did so still wearing handcuffs on both wrists. After they willingly shook hands, the boys were allowed to sit down so that the handcuffs and leg cuffs could be removed. They were given another court date to return so that the court could monitor their compliance with the terms of their pre-adjudicatory probation.[4]

The two boys would not be the last juveniles brought up from detention in handcuffs and leg cuffs. Juvenile courts in Massachusetts

3. Boston Juvenile Court is one of several courts housed in the Edward Brooke Courthouse. Boston Municipal Court, which hears adult criminal matters, is also located in the Brooke Courthouse. *See* MASS.GOV, http://www.mass.gov/courts/courtsandjudges/courts/suffolkjuvenilemain.html and http://www.mass.gov/courts/courtsandjudges/courts/bmcmain.html (last visited Feb. 1, 2012).

4. Massachusetts law allows for the postponement of an arraignment for purposes of pre-adjudicatory probation. *See* MASS. GEN. LAWS ANN. ch. 276, § 87 (West Supp. 2011). The presiding justice, the Commonwealth, and the juvenile must agree to the terms, duration, and final disposition of pre-adjudicatory probation.

had long adhered to a blanket practice of indiscriminate shackling—restraining every juvenile arrested and transported to court without any determination of need for such restraints. This Article argues that indiscriminate shackling of juveniles is unconstitutional and should therefore be prohibited in the United States.

In 1967, when the U.S. Supreme Court decided the seminal case *In re Gault*, there was a juvenile or family court in every state in the nation, in the District of Columbia, and in Puerto Rico.[5] As noted in *Gault*, these courts were established to serve the needs of children in a setting separate from the criminal justice system that served adults and children prior to 1899.[6] In *Gault*, the Court noted the history and purpose of the juvenile court: "The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."[7] To date, the juvenile justice system continues to operate and serve children under the same mandate of treatment and rehabilitation.

Despite the ongoing protective and rehabilitative mandate of the juvenile justice system, juveniles are still forced to appear in restraints during court appearances in juvenile courts across the United States. In some jurisdictions, these minors include children as young as seven.[8] Typically, these are adolescents who have been arrested, detained, and transported to court. The restraints or shackles described in this Article often include handcuffs and leg cuffs, but may also include belly belts secured around the waist and a chain that connects handcuffed hands to leg cuffs.[9] In states that allow indiscriminate or blanket shackling, every juvenile who has been

5. *In re* Gault, 387 U.S. 1, 14 (1967) (citing NATIONAL COUNCIL OF JUVENILE COURT JUDGES, DIRECTORY AND MANUAL 1 (1964)).

6. *See id.* at 15–16. The first juvenile court was established in Illinois in 1899. *See id.* at 14. Prior to 1899, children were processed through the criminal justice system and were often incarcerated with adults for similar terms. *Id.* at 16.

7. *Id.* at 15–16.

8. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 119, § 52 (West 2008) (defining a "delinquent child" as "a child between seven and seventeen" who commits acts of alleged juvenile delinquency).

9. In some instances this "belly chain" has also connected the individual juvenile to another person, or to a piece of furniture, door, or other object inside the courtroom. *See* PATRICIA PURITZ & CATHRYN CRAWFORD, NATIONAL JUVENILE DEFENDER CENTER, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 57–58 (2006), *available at* http://www.njdc.info/pdf/Flordia%20Assessment.pdf.

detained at any point prior to or during court proceedings is even shackled during court appearances. In some instances, shackling may occur prior to charges being filed. In all situations described in this Article, indiscriminate shackling occurs regardless of the child's age, gender, history, charges, ability to obey court rules, or behavior in court. Issues such as mental illness, physical challenges or illnesses, past sexual or physical abuse, and ongoing effects of trauma are ignored.[10] No individualized determination of need is assessed.[11]

The U.S. Supreme Court has not yet addressed indiscriminate shackling of juveniles, but it has done so regarding adults. This Article begins by reviewing the Court's rulings on blanket shackling of adults in Part II. Part III reviews state appellate court decisions that have addressed the use of restraints on juveniles in court. Part IV makes the argument that indiscriminate shackling of children is unconstitutional because it violates the Fifth, Sixth, and Fourteenth Amendments (due process of law and right to counsel) to the U.S. Constitution.[12] Part IV also examines the special characteristics of adolescents that support this argument.

Part V of this Article surveys each States' current juvenile courtroom shackling practices and classifies those practices into four categories: (1) States that permit blanket shackling of juveniles; (2) States that do not permit blanket shackling via state legislation or regulation; (3) States that do not permit blanket shackling via written court policy; (4) States where appellate case law has prohibited indiscriminate shackling of juveniles; and (5) States that have pending legislation which will prohibit indiscriminate shackling.

10. *See, e.g.*, *In re* Rebecca C., District Court Division, Guilford County, North Carolina, Mot. to Prohibit Shackling of Minor Child in Ct. and Other Public Areas Absent a Judicial Finding of Need. The file number has been omitted to protect the identity of Rebecca C. (copy on file with author). In this matter, Rebecca, age fourteen, was being treated for bipolar disorder, post-traumatic stress disorder, disruptive behavior disorder, and attention-deficit hyperactivity disorder. Rebecca was first sexually abused when she was eight years old and was abused for three years. At times, her attacker used handcuffs to restrain her. After her arrest and detention, Rebecca was forced to appear in juvenile court in handcuffs. When she appeared in 2007, North Carolina had a policy of indiscriminate shackling, which did not allow for individualized consideration of Rebecca's tragic history and diagnoses.

11. *See id.*

12. The following recent U.S. Supreme Court decisions are reviewed in Part IV in support of this argument: *Roper v. Simmons*, 543 U.S. 551 (2003); *Graham v. Florida*, 130 S. Ct. 2011 (2010); and *J.D.B. v. North Carolina*, 131 U.S. 2394 (2011).

Florida has enacted legislation and Massachusetts has instituted a court policy, both of which address the issue of indiscriminate shackling of juveniles in court. Part VI analyzes and compares Massachusetts' court policy to Florida legislation.

## II. INDISCRIMINATE SHACKLING OF ADULTS

The U.S. Supreme Court has addressed the indiscriminate shackling of adults both directly[13] and in dicta.[14] In *Deck v. Missouri*, the Court addressed the novel issue of whether the use of restraints visible to a jury is unconstitutional during the penalty phase as opposed to the guilt phase.[15] In *Deck*, the Court examined the history of the long-held ban on indiscriminate shackling during the guilt phase in the presence of a jury.[16] The Court cited common law authority[17] and state court authority[18] in recognizing this well-settled

13. *See* Deck v. Missouri, 544 U.S. 622, 626 (2005) ("We first consider whether, as a general matter, the Constitution permits a State to use visible shackles routinely in the guilt phase of a criminal trial. The answer is clear: The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need.").

14. *See, e.g.*, Illinois v. Allen, 397 U.S. 337, 344 (1970) ("Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But 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."); Holbrook v. Flynn, 475 U.S. 560, 568–69 (1986) ("The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial.").

15. 544 U.S. at 630.

16. *Id.* at 626–29.

17. *Id.* at 626. "[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.'" *Id.* (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)); *see also id.* (noting defendants shall come before the court "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") (quoting 3 EDWARDO COKE, INSTITUTES OF THE LAWS OF ENGLAND, 34).

18. *Id.* at 626–27 (citing Parker v. Territory, 52 P. 361, 363 (Ariz. 1898)); People v. Harrington, 42 Cal. 165, 167 (1871); Eaddy v. People, 174 P. 2d 717, 718 (Colo. 1946) (en banc); Hauser v. People, 71 N.E. 416, 421 (Ill. 1904); Blair v. Commonwealth, 188 S.W 390, 393 (Ky. App. Ct. 1916); State v. Kring, 64 Mo. 591, 592 (1877); State v. McKay, 165 P. 2d 389, 405–06 (Nev. 1946); State v. Roberts, 206 A.D. 2d 200, 203 (N.J. Super. Ct. App. Div. 1965); French v. State, 377 P. 2d 501, 502–04 (Okla. Crim. App. 1962); State v. Smith, 8 P.

rule against the use of restraints during the guilt stage of court proceedings while in front of a jury.

In dicta, the Court has considered the use of restraints on adults during court proceedings before a jury. In *Illinois v. Allen*, the Court opined that "no person should be tried while shackled and gagged except as a last resort."[19] In 1986, the Court determined that the presence of uniformed state troopers sitting in full view of the jury during a jury trial was not a violation of the constitutional right to a fair trial.[20] In his decision for the majority, Justice Thurgood Marshall wrote, however, that shackling a defendant during court proceedings is an inherently prejudicial practice that may violate a defendant's constitutional right to a fair trial.[21]

In 2005 in *Deck*, the defendant was restrained in leg irons, a belly belt, and handcuffs as the jury considered the death penalty.[22] The Court reiterated the long-held rule that the right to appear before a jury unshackled is a "basic element of the 'due process of law' protected by the Federal Constitution."[23] The Court identified "three fundamental legal principles" which are violated by indiscriminate shackling in the presence of a jury:[24] the presumption of innocence;[25] the right to counsel;[26] and the need of judges "to maintain a judicial process that is a dignified process."[27] *Deck* held that indiscriminate shackling of adults in the presence of a jury during the penalty phase violates the due process clauses of the Fifth and Fourteenth Amendments. The Court also held that indiscriminate shackling of

343 (Or. 1883); Poe v. State, 78 Tenn. 673, 674–78 (1882); Rainey v. State, 20 Tex. App. 455, 472–73 (1886); State v. Williams, 50 P. 580, 581 (Wash. 1897)).

19. *Allen*, 397 U.S. at 344.

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

21. *See id*. at 568–69.

22. *Deck*, 544 U.S. at 625.

23. *Id.* at 629.

24. *Id.* at 630–32.

25. *Id.* at 630 ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.").

26. *Id.* at 631 ("[Shackles] can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand in his own behalf.").

27. *Id.* at 631 ("The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.").

the defendant during the penalty phase violated his Sixth Amendment right to counsel.[28] The Court in *Deck* held that indiscriminate shackling of adults in view of the jury during the penalty phase violates each of these rights in the same manner as during the guilt phase.[29]

Because the jury in *Deck* had already determined the defendant's guilt, the Court held that the presumption of innocence was not per se violated by the use of shackles during the penalty phase, but that the issue of life or death was no less critical.[30] Additionally, the Court held that the use of shackles during the penalty phase was a violation of the rights to counsel and to due process of law.[31] Specifically, the Court held that shackles interfere with the ability of a defendant to assist and communicate with his counsel, and absent any showing of need, courtroom restraints abrogate the dignity of court proceedings. Notably, the Court further rejected Missouri's argument that the defendant in *Deck* had not demonstrated any showing of actual prejudice. Instead, the Court reiterated its dicta in *Holbrook v. Flynn* that "shackling is 'inherently prejudicial,'"[32] and therefore no showing of actual prejudice is required to demonstrate a due process violation.[33]

Many state courts have rendered similar decisions regarding shackling of adults in court. In *Deck*, the Court noted some of these decisions.[34] Because these cases are not binding upon outside jurisdictions, involve only adults, and do not elaborate beyond the ruling in *Deck*, this Article does not focus on those decisions beyond noting that it is very well settled law in most states.

## III. INDISCRIMINATE SHACKLING OF JUVENILES

Many state courts have addressed indiscriminate shackling of juveniles. To date, California, Florida, Illinois, North Dakota,

28. *Id* at 632.
29. *Id.* at 632–33.
30. *Id.* at 632.
31. *Id.* at 632–33.
32. *Id.* at 635 (quoting Holbrook v. Flynn, 475 U.S. 560, 568 (1986)).
33. Deck v. Missouri, 544 U.S. 622, 626 (2005).
34. *See supra* text accompanying note 17.

Oregon, and Washington state appellate courts have ruled on this issue.[35] These cases, while not binding nationally, are illustrative because they pertain to juveniles and can be used to strengthen the argument that indiscriminate shackling of juveniles is unconstitutional. Two state cases set the tone for the argument against the blanket use of restraints on minors in court. Each addresses common arguments made in support of indiscriminate shackling of minors.[36]

The Supreme Court of Illinois was the first to address blanket shackling of juveniles in 1977.[37] In *In re Staley*, the minor remained handcuffed throughout his bench trial despite oral objections made by his attorney.[38] The trial court cited "poor security" in the courtroom as the basis for rejecting the motion to remove the restraints.[39] On appeal, the State argued that the long-held prohibition against indiscriminate shackling of adults in the presence of a jury did not apply to proceedings involving a juvenile that were heard outside the presence of a jury.[40] The *Staley* court rejected both arguments. The court dismissed the argument regarding a lack of courtroom security by indicating that the record did not sufficiently support a finding that the minor was a threat to escape or that courtroom security was lacking.[41] Implicit in this ruling is the notion that some individualized determination of need must be made before restraints are utilized.

The *Staley* court also rejected the second argument put forth by the State. The court held that "[t]he possibility of prejudicing a jury . . . is not the only reason why courts should not allow the shackling of an accused in the absence of a strong necessity for doing so."[42] The court cited the presumption of innocence as being "central to our

35. *See, e.g.*, Tiffany A. v. Superior Court of L.A. Cnty., 59 Cal. Rptr. 3d 363 (Cal. Ct. App. 2007); *In re* Deshaun M., 56 Cal. Rptr. 3d 627 (Cal. Ct. App. 2007); S.Y. v. McMillan, 563 So.2d 807 (Fla. Dist. Ct. App. 1990); *In re* Staley, 364 N.E.2d 72 (Ill. 1977); *In re* R.W.S., 728 N.W.2d 326 (N.D. 2007); State *ex rel.* Juvenile Dep't of Multnomah Cnty. v. Millican, 906 P.2d 857 (Or. Ct. App. 1995); State v. E.J.Y., 55 P.3d 673 (Wash. Ct. App. 2002).

36. *See Staley*, 364 N.E.2d at 72–74; *Tiffany A.*, 59 Cal. Rptr. 3d at 369–73.

37. *Staley*, 364 N.E.2d at 72.

38. *Id.*

39. *Id.*

40. *Id.* at 73.

41. *Id.* at 74.

42. *Id.* at 73.

administration of criminal justice,"[43] whether or not the accused was an adult or a minor. The court stated that the use of restraints during trial infringed upon the right of any defendant to communicate with his counsel whether or not a jury was present.[44] *Staley* was also the first U.S. case to rule that indiscriminate shackling in this instance constituted reversible error, and thus was not harmless error.

*Tiffany A. v. Superior Court of Los Angeles County*[45] expanded upon *Staley* and more fully fleshed out the constitutional argument against the use of indiscriminate restraints on juveniles. The blanket policy utilized in Los Angeles County is similar to those utilized by many states today. Specifically, all detained minors in L.A. County were restrained with leg or foot cuffs while appearing in court. This policy was rooted in courtroom security.[46]

On appeal, the County of Los Angeles argued that the policy of shackling all detained minors was permissible for several reasons. First, where juvenile court proceedings do not involve any witnesses and are held before a judge, outside the presence of a jury, and are "brief and/or uncontested," no individualized determination of the necessity for shackling is required.[47] Second, Los Angeles County argued that, "safety concerns arising from the design of the courthouse facility as well as the lack of sufficient numbers of security personnel" justify a blanket policy to restrain all detained juveniles without a particularized determination of need.[48] Finally, the County argued that all case law limiting the use of courtroom restraints involved adults and did not apply to juveniles.[49]

After reviewing relevant California law and U.S. Supreme Court decisions regarding the use of restraints on adults, the court in *Tiffany A.* rejected the arguments made by the County and concluded that the indiscriminate use of restraints on juveniles is similarly

43. *Id.*
44. *Id.*
45. 59 Cal. Rptr. 3d 363 (Cal. Ct. App. 2007).
46. *See id.* The County of Los Angeles specifically alleged that the juvenile courtroom had a number of unsecured doors leading from the courtroom, unsecured hallways, and a lack of adequate courtroom security personnel. *Id.*
47. *Id.* at 365, 367.
48. *Id.* at 365–67.
49. *Id.*

unconstitutional and prohibited.[50] The court held that even where no jury or witnesses are present, some showing of need must be demonstrated before a juvenile may be restrained in court.[51] *Tiffany A.* further held that "the type of proceeding determines the amount of 'need' that the court must find to justify the use of restraints."[52] Thus, a hearing held in the presence of a jury or witnesses will require more of a showing of need for restraints than any hearing when neither jury nor witnesses are present.[53] An individualized determination of the need for shackling is therefore required in every instance and a "court must not . . . have a *general policy* of shackling *all defendants*."[54]

Los Angeles County also argued that the use of restraints due to lack of adequate security and/or inadequate courtroom facilities was sufficient to determine that blanket restraints were necessary.[55] The court rejected this argument, noting that no California court had ever "endorsed the use of physical restraints based solely on . . . the lack of courtroom security personnel, or the inadequacy of the court facilities."[56] This holds true in other states as well. Each state court that has reviewed challenges to blanket shackling policies has held that individualized determinations of need must be made, and that this determination may not be based solely upon security issues within the courtroom.[57]

*Tiffany A.* also rejected the argument that case law involving the restraint of adults does not apply to similar restraints of juveniles. The court held that the underlying rehabilitative purpose of juvenile court was contrary to the more punitive use of shackles in court.[58] The court noted that the use of shackles without any individual determination of need introduces "the very tone of criminality

50. *Id.* at 370–73.
51. *Id.* at 373.
52. *Id.* at 372.
53. *Id.* at 371 ("If the proceeding is before a jury, 'manifest necessity' is clearly required. However, where the proceedings do not require a jury a 'lesser showing' of need is apparently sufficient.").
54. *Id.* (quoting *In re* Deshaun M., 56 Cal. Rptr. 3d 627, 629 (Cal. Ct. App. 2007)).
55. *Id.* at 365.
56. *Id*. at 372.
57. *See* Deck w. Missouri, 544 U.S. 622, 635 (2005).
58. *See Tiffany A.*, 59 Cal. Rptr. 3d at 375.

juvenile proceedings were intended to avoid."[59] The *Tiffany A.* court also held that "all juvenile proceedings must contain essentials of due process and fair treatment,"[60] and that "the constitutional presumption of innocence, the right to present and participate in the defense, the interest in maintaining human dignity and the respect for the entire judicial system, are among these essentials whether the accused is 41 or 14."[61]

## IV. INDISCRIMINATE SHACKLING OF JUVENILES IS AN UNCONSTITUTIONAL VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

The constitutional argument against policies that indiscriminately shackle juveniles begins with *In re Gault*.[62] In *Gault*, the U.S. Supreme Court held that as "[d]ue process of law is the primary and indispensable foundation of individual freedom," its protections must be extended to minors appearing in juvenile courts.[63] *Gault* began by taking note of the many differences between minors involved in the juvenile court system and adults in the criminal court system.[64] Despite these differences, the Court famously held that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court,"[65] and that the "failure to observe the fundamental requirements of due process" in any court was likely to result in "unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy."[66]

The Fourteenth Amendment to the U.S. Constitution protects individuals from state encroachment upon any right protected by the Bill of Rights if said right is of "fundamental nature."[67] Although

59. *Id.*
60. *Id.* Although the court in *Tiffany A.* does not cite *In re Gault*, the U.S. Supreme Court in *Gault* held that the protections of the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution apply with equal force to juveniles. *In re* Gault, 387 U.S. 1, 27–29 (1967).
61. *Tiffany A.*, 59 Cal. Rptr. 3d at 375.
62. 387 U.S. at 20.
63. *Id.*
64. *Id.* at 14–17.
65. *Id.* at 28.
66. *Id.* at 19–20.
67. Gideon v. Wainwright, 372 U.S. 335, 341 (1963).

most juveniles are not tried before a jury, the Court's rulings in *Deck*, and other cases dealing with shackling in the presence of a jury, are equally applicable to juveniles, regardless of whether these matters are heard before a judge alone or before a jury.

As the *Deck* Court identified, indiscriminate shackling violates three such fundamental rights.[68] First, blanket shackling policies completely abrogate the presumption of innocence regardless of whether the person restrained is an adult or a child. The Court in *Estelle v. Williams*, held that "[t]he right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment."[69] "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[70] *Gault* specifically conferred protection of the Bill of Rights and the Fourteenth Amendment upon juveniles while appearing in juvenile court if the right in question is of a fundamental nature. It stands to reason therefore, that juveniles are entitled to a fair trial and to the hallmark of a fair trial—the presumption of innocence, both of which are fundamental rights.

Even when a jury is not present, indiscriminate shackling violates the Sixth Amendment right to counsel. A shackled, teenaged defendant is more likely than an adult to respond to his/her state of restraint and to disengage from effective communication with his/her attorney. *Deck* noted that courtroom restraints might interfere with an adult defendant's right to counsel. The Court reasoned that a shackled adult may have difficulty communicating with his attorney and may not be able to fully participate in the defense, thereby implicating the Sixth Amendment right to counsel.[71] *Deck* also noted that shackling may "confuse and embarrass" adult defendants, thereby affecting their ability to participate in their defense and diminishing their Sixth Amendment right to counsel.[72] This effect is only heightened when the shackled defendant is an adolescent.[73]

68. *Deck*, 544 U.S. 622, 630–32 (2005).
69. 425 U.S. 501, 503 (1976) (citing Drope v. Missouri, 420 U.S. 162, 172 (1975)).
70. *Id.*
71. *Deck*, 544 U.S. at 631.
72. *Id.* (quoting People v. Harrington, 42 Cal. 165, 168 (1871)).
73. *See infra* Part IV for a discussion of the effects of indiscriminate shackling upon adolescents.

The third fundamental legal principle identified in *Deck* is the duty of the judge to maintain the dignity of the court process.[74] The Court explained this requirement as ensuring that all defendants receive a fair trial and that the court process is conducted with "formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, . . . and the gravity with which Americans consider any deprivation of an individual's liberty."[75]

Juvenile courts must be conducted in a similar manner, as the liberty interests of juvenile defendants are similar. *Gault* compared the loss of liberty of adults in criminal court to that of juveniles in juvenile court. The Court noted that this loss was virtually identical, if not more severe; therefore, juveniles are entitled to the same constitutional protections as adults.[76] In every state, juveniles face a potential loss of liberty as a result of delinquency adjudication. The gravity of these proceedings is similar to that of adult criminal proceedings. Therefore, as the Court held in *Gault*, constitutional protections of fundamental rights afforded to adults within the criminal justice system must be extended to juveniles appearing within the juvenile justice system.

Policies that allow for the restraint of all detained juveniles in court are contrary to the goals and objectives of juvenile court.[77] In *Kent v. United States*,[78] the U.S. Supreme Court noted that juvenile court proceedings were civil in nature and that its objectives were "to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."[79] Shackling juveniles without any individualized determination of need is contrary to the notions of rehabilitation and guidance described in *Kent*.[80] As noted in *Tiffany A.*, indiscriminate

74. *Deck*, 544 U.S. at 631–32.
75. *Id.* at 631.
76. *In re* Gault, 387 U.S. 1, 27–30 (1967).
77. *See* Tiffany A. v. Superior Court of L.A. Cnty., 59 Cal. Rptr. 3d 363, 375–76 (Cal. Ct. App. 2007).
78. 383 U.S. 541 (1966).
79. *Id.* at 554.
80. *See Tiffany A.*, 59 Cal. Rptr. 3d at 375–76.

shackling "creates the very tone of criminality juvenile proceedings were intended to avoid."[81]

Finally, indiscriminate shackling of juveniles is contrary to Supreme Court decisions regarding juveniles. The Court has a lengthy history of recognizing the inherent differences in adolescents and adults. It has long held that in some situations the developmental and sociological capabilities of juveniles requires disparate treatment than that accorded to adults in similar situations. In *Eddings v. Oklahoma*, the Court poignantly recognized that "youth is more than a chronological fact."[82] In *Johnson v. Texas*, the Court held that age must be considered as a mitigating factor against the death penalty.[83] In *Haley v. Ohio*, the Court ruled that age was a factor in determining the voluntariness of a confession.[84] The *Haley* Court noted "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens."[85] That the law is not being equally applied to children is not a new observation.[86] Each State imposes age-based limits on when children may drive, drink alcohol, vote, marry, work, and drop out of school.[87] All these decisions and laws implicitly and explicitly recognize that children and adolescents are not developmentally on par with adults. Given these developmental differences, children and adolescents require disparate treatment.

The Court has continued and, some believe expanded the demarcation between adults and minors in three recent cases. *Roper v. Simmons*,[88] *Graham v. Florida*,[89] and *J.D.B. v. North Carolina*,[90] uphold the notion that children are not "miniature adults," and therefore require unique protections.[91]

81. *Id.* at 375.
82. 455 U.S. 104, 115 (1982).
83. 509 U.S. 350 (1993).
84. 332 U.S. 596, 599–601 (1948).
85. *Id.* at 599.
86. *See, e.g.*, Yarborough v. Alvarado, 541 U.S. 652 (2004) (addressing custody for *Miranda* purposes); Belotti v. Baird, 443 U.S. 622 (1979) (addressing parental consent requirement for abortion).
87. *See* J.D.B. v. North Carolina, 131 S. Ct. 2394, 2403–04 n.6 (2011).
88. 543 U.S. 551 (2005).
89. 130 S. Ct. 2011 (2010).
90. 131 S. Ct. 2394 (2011).
91. *Id.* at 2404.

*Roper* and *Graham* held that the inherent differences between children and adults required that children be categorically excused from certain sentences.[92] In *J.D.B.*, the Court held that age is a significant factor when deciding the objective question of custody in the context of confessions.[93]

### *A. Special Characteristics of Adolescents*

In *Roper*, *Graham*, and *J.D.B.*, the Court relied upon scientific and sociological studies regarding adolescent development. Specifically, the *Graham* Court concurred with petitioner's amici that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds" that last through late adolescence, and that recent data does not "provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles."[94]

These differences are also the principles upon which juvenile court was created. In *Kent* and *Gault*, the Court described the underlying theory of juvenile court as being parens patriae due to the fundamental differences between adults and children.[95] "The objectives [of juvenile courts] are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment."[96] Explicit in the establishment of the juvenile justice system as a system distinct from the criminal justice system is the notion that the needs of adolescents

92. *See Roper*, 543 U.S. at 578 (holding sentence of death for a crime committed while below eighteen years of age is a violation of the Eighth Amendment prohibition against cruel and unusual punishment); *Graham*, 130 S. Ct. at 2034 (holding sentence of life without the possibility of parole for a crime that is not a homicide offense is a violation of the Eighth Amendment ban on cruel and unusual punishment if imposed upon a person under eighteen years old).

93. *J.D.B.*, 131 S. Ct. at 2406.

94. *Graham*, 130 S. Ct. at 2026.

95. *In re* Gault, 387 U.S. 1, 15–17 (1967); Kent v. United States, 383 U.S. 541, 554–55 (1966).The Latin phrase parens patriae means "parent of the country." The Court in *Gault* described its application to juvenile justice as a situation where "parents default effectively in performing their custodial functions—that is, the child is 'delinquent'—the state may intervene." *Gault*, 378 U.S. at 16

96. *Kent*, 383 U.S. at 554.

and children cannot be met by the criminal justice system that serves adults.

The Court's ruling in *Deck* takes on new significance when the defendant subjected to indiscriminate shackling is an adolescent. Several psychological, medical, and social work experts have noted the significant social, biological, and developmental differences between adults and adolescents. When an adolescent is shackled with no individualized finding of need, three fundamental rights; the presumption of innocence, the right to counsel, and maintenance of a dignified judicial process; are much more likely to be impugned due to the inherent developmental, sociological, and biological differences between adolescents and adults.

First, shackling without reason abrogates the presumption of innocence that "lies at the foundation of the administration of our criminal law."[97] Indiscriminate shackling has a more potent effect when the accused is an adolescent who is not likely to have a secure sense of identity and is more likely to be susceptible to external perceptions.[98] The Court in *Roper* recognized this influence: "juveniles are more vulnerable . . . to negative influences and outside pressures."[99] "Being shackled in public is humiliating for young people, whose sense of identity is vulnerable. The young person who feels he/she is being treated like a dangerous animal will think less of him/herself."[100] Where an adult may be able to conclude that shackles do not define their identity, an adolescent is not able to draw the same conclusion.[101]

Additionally, it has been widely noted that juveniles also have a more intensive sense of morality than most adults.[102] When they feel that they have been treated unfairly or have been unjustly wronged,

97. Deck v. Missouri, 544 U.S. 622, 630 (2005) (citing Coffin v. United States, 156 U.S. 432, 453 (1895)).

98. *See* Aff. of Dr. Marty Beyer 3–4, *available at* http://www.pdmiami.com/unchainthe children/AppendixDBeyer.pdf.

99. Roper v. Simmons, 543 U.S. 551, 569 (2005).

100. Aff. of Dr. Marty Beyer, *supra* note 85.

101. *Id.* at 5 ("Knowing they are capable of remaining calm in the courtroom without handcuffs or shackles, young people conclude it must be something bad about them that justifies the chains.").

102. *See id.*

they tend to focus on this unfairness and perceived wrongdoing.[103] An adolescent who has been shackled without reason may find it very difficult to participate in the entire court process.[104] This may affect communication with his/her attorney and willingness to testify and/or participate in his/her defense, all of which negatively impact the Sixth Amendment right to counsel. An adolescent with a still developing identity may be more likely to respond negatively to, and be harmed by, the blanket use of shackles.[105] *Deck* noted that the indiscriminate use of restraints in court "suggests to the jury that the justice system itself sees a "'need to separate a defendant from the community at large.'"[106] An adolescent who has been shackled without reason is likely to feel removed from the juvenile justice system that was created to serve him/her.

Second, *Deck* noted that shackles "'ten[d] to confuse and embarrass' defendants' 'mental faculties,' and thereby tend 'materially to abridge and prejudicially affect his constitutional rights,'" including his Sixth Amendment right to counsel.[107] If the defendant is an adolescent, experts agree that blanket shackling will "prejudicially affect" that juvenile defendant's Sixth Amendment right to counsel.[108] Even without the distraction of shackling, adolescents have difficulty with "judgment, decision-making, and ability to develop the trust, confidence and open communication necessary for an effective attorney-client relationship."[109] A shackled

103. *See id.*

104. *See id.* ("For most young people who believe that, even though they were arrested, they will not harm others and will not misbehave in the courtroom, it seems unfair to be shackled. Adolescents do not have the adult cognitive abilities to say, 'This is not unfairness directed at me personally, all juveniles who go into court are shackled.' Because of where they are developmentally, their reaction to the unfairness of being shackled may preoccupy them, interfering with their paying attention to what the judge says in the courtroom.").

105. *See id.* ("Children and adolescents are more vulnerable to lasting harm from feeling humiliation and shame than adults. In the midst of their identity and moral development, demeaning treatment by adults may solidify adolescents' alienation, send mixed messages about the purpose of the justice system, and confirm their belief that they are bad.").

106. Deck v. Missouri, 544 U.S. 622, 630 (2005) (quoting Holbrook v. Flynn, 475 U.S. 560, 569 (1986)).

107. *Id.* at 631 (quoting People v. Harrington, 42 Cal. 165, 168 (1871)).

108. *Cf.* Aff. of Dr. Marty Beyer, *supra* note 98, at 5 (finding that shackling of minors diverts attention from courtroom proceedings).

109. *See* Brief for the NAACP Legal Defense & Educational Fund, Inc., Charles Hamilton Houston Institute for Race & Justice, and National Association of Criminal Defense Lawyers as

adolescent is clearly much less able to navigate the attorney client relationship than the shackled adult described by the Court in *Deck*.[110]

Third, *Deck* also held that blanket shackling undermines the maintenance of dignity within the judicial process. The language of the Court in describing this requirement mirrors the *Gault* Court's description of due process of the law. *Deck* stated that all defendants must receive a fair trial, and that the court process must be conducted with "formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, . . . and the gravity with which Americans consider any deprivation of an individual's liberty."[111] Similarly, in *Gault*, the Court stated that "[d]ue process of law is the primary and indispensible foundation of individual freedom."[112] *Gault* went on to famously note that since the juvenile defendant faced a "restrain[t] of liberty for years" he was entitled to full constitutional protections, and that "the condition of being a boy does not justify a kangaroo court."[113]

As juvenile courts in the United States have increasingly served children of color, the effect of indiscriminate shackling on adolescents of African-American and Latino descent in particular must be addressed. Disproportionate minority representation continues to plague juvenile courts throughout the United States. Black youth are consistently overrepresented in juvenile courts, particularly as compared to their white counterparts.[114]

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Amici Curiae in Support of Petitioners at 6, Graham v. Florida, 130 S. Ct. 2011 (2010) (Nos. 08-7412 & 08-7261) (citing Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLIN. PSYCH. 459, 468–71 (2009); Patricia Puritz & Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating a Paradigm for Specialized Juvenile Defense Practice*, 45 FAM. CT. REV. 466, 474 (2007)).

110. *Deck*, 544 U.S. at 631.

111. *Id.*

112. *In re* Gault, 387 U.S. 1, 20 (1967).

113. *Id.* at 27–28.

114. In 2008, black youth between ages thirteen and fifteen accounted for approximately 16.7 percent of the overall juvenile population in the United States. White youth (in the same age range) made up approximately 77.3 percent of the juvenile population. *See* CHARLES PUZZANCHERA, ANTHONY SLADKY & WEI KANG, EASY ACCESS TO JUVENILE POPULATION STATISTICS: 1990–2010 (2011), OJJDP.GOV, *available at* http://www.ojjdp.gov/ojstatbb/ezapop/asp/profile_display.asp These percentages do not hold up in juvenile courts. In 2008, the percentage of black youth who had cases handled by juvenile courts in the United States more than doubled that of the black juvenile population within the United States. Thirty-six percent

Common mechanisms of restraint are handcuffs and foot cuffs.[115] As previously noted, some jurisdictions also utilize belly belts and chains that connect these devices to other restrained juveniles and to furniture and other objects within the courtroom.[116] These restraints are of the same type used to restrain slaves and have significant negative connotations for black children. Many psychological experts widely believe that "the critical psychosocial task of adolescence" is "the search for and development of one's identity."[117] This process can be much more treacherous for adolescents of color who do not belong to more highly valued, majority groups. "Individuals who belong to highly valued groups do not need to modify or enhance their social identity; however, when faced with a context that devalues one's group, the person may have to engage in a process to negotiate the meaning of his or her identity."[118] When any adolescent is indiscriminately shackled and forced to appear in court before friends, family, court personnel, and the public, feelings of confusion, humiliation, vulnerability, and embarrassment are likely to negatively affect that individual's search for an identity. If that adolescent is of color, then this process of defining one's identity includes development of an ethnic identity. When the court system restrains adolescents of color without reason in a manner similar to restraints used on slaves, and when this is done in full view of family, friends, court personnel, and the public, their ethnic and social identities will be impacted.

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of all juveniles who had cases handled in juvenile court were black juveniles between the ages of thirteen and fifteen. In contrast, the percentage of white juveniles aged thirteen to fifteen who had case handled by juvenile courts in the United States decreased relative to the overall population percentages. Sixty percent of juveniles, aged thirteen to fifteen who had their cases handled in juvenile court in 2008 were white. *See* CHARLES PUZZANCHERA & WEI KANG, EASY ACCESS TO JUVENILE COURT STATISTICS 1985–2008 (2011), OJJDP.GOV, *available at* http://www.ojjdp.gov/ojstatbb/ezajcs/asp/demo.asp.

115. Foot cuffs are also known as leg irons.

116. *See* PURITZ & CRAWFORD, *supra* note 9.

117. Sabine French et al., *The Development of Ethnic Identity During Adolescence*, 42 DEVELOPMENTAL PSYCHOL. 1, 1 (2006).

118. *Id.* at 1–2.

## V. CURRENT STATE SURVEY ON INDISCRIMINATE SHACKLING

Despite the many constitutional and ethical arguments against the blanket use of shackles on juveniles without any showing of need, most states continue to do so a daily basis.[119] A handful of states have prohibited this practice via legislation,[120] written court procedures or policy,[121] or appellate case law.[122] In addition, three states have pending legislation that calls for an individualized determination of need.[123] In this section, this Article will review and compare two efforts to prohibit indiscriminate shackling: the recently enacted court policy in Massachusetts and Florida legislation.

The Massachusetts policy became effective in juvenile courts on March 1, 2010.[124] The stated purpose of this policy is to "provide procedures and guidelines and promote uniformity in practice when using restraints on juveniles" when minors appear in court.[125] The policy not only covers all juveniles under seventeen years of age in delinquency and children in need of services (CHINS) matters,[126] but

119. Alabama, Arizona, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont (but see VT. STAT. ANN. tit. 33, § 5123 (2009), which prohibits indiscriminate shackling of juveniles during transport to court), Virginia, West Virginia, Wisconsin, Wyoming, and Washington, D.C. are all believed to allow indiscriminate shackling of juveniles. Practices may differ widely within various courthouses within the same state. For the purposes of this Article, a state is classified as allowing indiscriminate shackling of juveniles if no judicial decision, written procedural rule, written court policy, or legislation specifically prohibits the practice in court.

120. FLA. R. JUV. P. 8.100(b) (2011); N.C. GEN. STAT. § 7B-2402.1 (2010); N.Y. COMP. CODES R. & REGS. tit. 9, § 168.3(a) (2011); 237 PA. CODE § 139 (2011).

121. *See* TRIAL COURT OF THE COMMONWEALTH COURT OFFICER POLICY & PROCEDURES MANUAL ch. 4, § 6 (2010); *In re* Use of Physical Restraints on Respondent Children, No. CS-2007-01, (N.M. Sept. 19, 2007), *available at* http://nmsupremecourt.nmcourts.gov/rules/pdfs/comments/Comments%20on%20Proposed520Amendments%20toForm%2010-427.pdf.

122. *See*, *e.g.*, Tiffany A. v. Superior Court of L.A. Cnty., 59 Cal. Rptr. 3d 363 (Cal. Ct. App. 2007); *In re* Staley, 364 N.E.2d 72 (Ill. 1977); *In re* R.W.S., 728 N.W.2d 326 (N.D. 2007); State *ex rel*. Juvenile Dep't of Multnomah Cnty. v. Millican, 906 P.2d 857 (Or. Ct. App. 1995); State v. E.J.Y., 55 P.3d 673 (Wash. Ct. App. 2002).

123. Alaska, Connecticut, and South Carolina have pending legislation that calls for a ban on indiscriminate shackling of minors in court.

124. *See* TRIAL COURT OF THE COMMONWEALTH COURT OFFICER POLICY & PROCEDURES MANUAL, *supra* note 121.

125. *Id.*

126. A child in need of services ("CHINS") is defined by MASS. GEN. LAWS ANN. ch. 119, § 21 (West 2008). This type of civil matter is included in the statutory code in many states.

also those under eighteen years of age in care and protection matters[127] and those under twenty-one years of age in youthful offender matters.[128]

The Massachusetts policy has a "presumption against use of restraints" during all court appearances unless the presiding justice determines that restraints are necessary.[129] Such an order must be based upon specific findings and must be entered on the record. The judge must find that restraints are necessary because the minor "may try to escape, or that a juvenile may pose a threat to his or her own safety, or to the safety of other people in the courtroom, or restraints are reasonably necessary to maintain order in the courtroom."[130] The policy lists nine factors that the judge must consider when making this determination. A finding that just one of these factors exists may result in the use of restraints during court appearances. The nine enumerated factors are:

> (a) the seriousness of the present charge (supporting a concern that the juvenile had an incentive to attempt to escape); (b) the criminal history of the juvenile; (c) any past disruptive courtroom behavior by the juvenile; (d) any past behavior that the juvenile presented a threat to his or her own safety, or the safety of other people; (e) any present behavior that the juvenile represents a current threat to his or her own safety, or the safety of other people in the courtroom; (f) any past escapes, or attempted escapes; (g) risk of flight from the courtroom; (h) any threats of harm to others, or threats to cause a disturbance, [sic] and (i) the security situation in the

127. Care and protection matters in Massachusetts are also known as child protective matters in other jurisdictions. *See* MASS. GEN. LAWS ANN. ch. 119, § 21, ch. 209A, § 1 (West 2008) (containing definitions of these petitions).

128. *See* TRIAL COURT OF THE COMMONWEALTH COURT OFFICER POLICY & PROCEDURES MANUAL, *supra* note 121 (defining juvenile for purposes of policy application). A youthful offender is a juvenile subject to penalties of the criminal and/or juvenile justice systems due to age and crime charged. *See* MASS. GEN. LAWS ANN. ch. 119, § 58 (West 2008).

129. *See* TRIAL COURT OF THE COMMONWEALTH COURT OFFICER POLICY & PROCEDURES MANUAL, *supra* note 121.

130. *Id.*

> courtroom and courthouse, including risk of gang violence, or attempted revenge by others.[131]

The presiding judge may receive information from court officers, probation officers, or any other source that they deem credible. Finally, the policy mandates that no court "shall impose a blanket policy to maintain restraints on all juveniles, or a specific category of juveniles, who appear before the court," and may "not cede responsibility for determining the use of restraints" to the court officer.[132]

A few states have enacted legislation or regulations specifically prohibiting indiscriminate shackling of minors in court. Florida Rule 8.100[133] is fairly representative of these legislative efforts. Rule 8.100 applies to all court hearings and prohibits the use of any type of restraint on a child in court unless the court finds that restraints are necessary due to one of three enumerated factors: (1) risk of "physical harm to the child or another person"; (2) a "history of disruptive courtroom behavior" by the child that created "potentially harmful situations or presents a substantial risk of inflicting physical harm" on the child or others; or (3) "a founded belief that the child presents a substantial risk of flight from the courtroom."[134] The presiding judge must further find that a less restrictive alternative, which is likely to prevent escape or physical harm to anyone in the courtroom, does not exist.[135] Rule 8.100 recognizes that "the presence of court personnel, law enforcement officers, or bailiffs" may be potentially less restrictive alternatives to the use of any type of restraint.[136]

The Massachusetts policy and Florida's Rule 8.100 require that an individualized determination of need be found before a juvenile may be shackled in court. Thus, they share some commonalities: both prohibit indiscriminate shackling, both allow for the use of restraints in certain limited and identified situations, and both mandate that the

131. *Id.*
132. *Id.*
133. FLA. R. JUV. P. 8.100 (2011).
134. *Id.* § 8.100(b).
135. *Id.* § 8.100(b)(2).
136. *Id.*

presiding judge make a record if restraints are to be utilized. In addition, both cite the prevention of physical harm to the minor and to any other person in the courtroom as a potential basis for allowing the use of restraints.[137] And neither allows a judge or court to enforce a blanket policy of shackling juveniles. Finally, both mandate that the sole decision regarding whether to shackle or not rests with the presiding judge.[138] The similarities end there.

The Massachusetts policy contains elements that are not supported by decisional law. The policy allows for the use of restraints based upon the juvenile's criminal history and the seriousness of the crime charged. Several cases indicate that neither of these factors should be considered. In *Deck*, the defendant was convicted of two counts of murder and was facing the death penalty.[139] Despite the seriousness of the crimes and the severity of the penalty faced, neither was a determinative factor considered by the Supreme Court.[140] Even where prior criminal acts include serious allegations of escape, courts have held that the presiding judge must make a determination regarding whether a less restrictive alternative to shackles is available.[141]

The ruling by the Ninth Circuit in *Spain v. Rushen*[142] made clear that the seriousness of the crime charged and a defendant's criminal history should not be considered when determining the need for restraints during court proceedings. Instead, *Spain* mandated that all other less restrictive alternatives be explored before shackling is utilized.[143] Johnny Spain, the named defendant in *Spain*, was charged with participating in a violent uprising and escape attempt from San Quentin Prison in 1971.[144] Spain was charged with five counts of murder in the first degree, conspiracy, and assault. During an attempted escape from the courthouse by Spain's accomplice, three

137. FLA. R. JUV. P. § 8.100 (2011); *see supra* note 120. The Florida Rule and the Massachusetts policy both seem to mirror the holdings in *Deck* and in *Tiffany A.* in this regard.

138. *See supra* note 120.

139. Deck v. Missouri, 544 U.S. 622, 624–25 (2005).

140. *See id.* at 630–32.

141. *See id.*

142. Spain v. Rushen, 883 F.2d 712, 720 (9th Cir. 1989) (discussing Illinois v. Allen, 397 U.S. 337 (1970)).

143. *Id* at 728.

144. *Id.* at 713–14.

people, including the presiding judge, were killed.[145] Spain was repeatedly disruptive during court proceedings and was removed several times to a holding cell where he continued to be disruptive. Despite his history of escape attempts and violence, the Ninth Circuit held that "[d]ue process requires that shackles be imposed only as a last resort."[146]

The Massachusetts policy also contains determinative factors that may have little or nothing to do with the individual defendant's conduct. The presiding judge in Massachusetts may consider "the security situation in the courtroom and courthouse, including risk of gang violence, or attempted revenge by others" as the sole determinative factor."[147] This is contrary to the ruling in *Tiffany A.* There, the California Appellate Court noted that California courts that had "considered the use of physical restraints in the courtroom, irrespective of the type of proceeding, [had] looked to the conduct of the individual defendant to determine the need for restraints," and that no California court had ever "endorsed the use of physical restraints based solely on the defendants' status in custody, the lack of courtroom security personnel, or the inadequacy of the court facilities."[148]

In contrast, one federal court has ruled that courtroom security issues may be the sole determinative factor for a blanket policy of restraining adults during preliminary hearings before a judge. In *United States v. Howard*, the Ninth Circuit held that courtroom security issues could properly be the sole determinative factor regarding the use of shackles.[149] The court in *Tiffany A.* distinguished the facts in *Howard* from those involving most shackled juveniles.[150] First, the *Howard* court indicated that an individualized assessment of the need for restraints for each defendant prior to their arraignments

145. *Id.* at 719.

146. *Id.* at 728.

147. TRIAL COURT OF THE COMMONWEALTH COURT OFFICER POLICY & PROCEDURES MANUAL, *supra* note 121.

148. Tiffany A. v. Superior Court of L.A. Cnty., 59 Cal. Rptr. 3d 363, 372 (Cal. Ct. App. 2007).

149. 463 F.3d 999, 1006–07 (9th Cir. 2006). The court ruled that courtroom security was an adequate reason to allow a blanket policy of courtroom restraints on defendants appearing for arraignment. *Id.*

150. *Tiffany A.*, 59 Cal. Rptr. 3d at 373–75.

may not have been possible.[151] This is not the case in most juvenile arraignments, and no evidence to the contrary was demonstrated in *Tiffany A.*[152] In *Howard*, the court only allowed restraints to be used during the first appearance.[153] In *Tiffany A.*, the policy extended to all appearances for all detained juveniles.[154] In *Howard*, multiple defendants routinely appeared before the judge for an initial appearance. The facts of *Tiffany A.* involved only one defendant, and the court in *Tiffany A.* declined to determine if the arraignment of multiple juvenile defendants could necessitate a diminished showing of need.[155] The court in *Tiffany A.* made a final, important distinction from the facts in *Howard*. *Tiffany A.* involved a juvenile in juvenile court and not an adult in criminal court. The very purpose of juvenile court, rehabilitation, is undermined by the criminal implications that indiscriminate shackling implies.

In contrast to the Massachusetts policy, the legislative effort in Florida[156] hews much more closely to available case law. It does not allow for consideration of factors such as gang activity, past criminal behavior, seriousness of the crimes charged, or courtroom security issues.[157] Rule 8.100 does allow for consideration of a defendant's history of disruptive courtroom behavior when determining the need for restraints in court.[158] Rule 8.100 states that this behavior must constitute behavior that "has placed others in potentially harmful situations."[159] On its face, consideration of this factor seems contrary to the ruling in *Spain*. However, as *Spain* noted, the use of restraints is not a per se constitutional violation.[160] The trial court in *Spain* did not consider any less restrictive alternative to shackles and therefore

151. *See id.* at 374.

152. *See id.* at 369. Many juvenile courts have school reports, probation reports, information regarding prior juvenile arrests, and reports from police and courtroom security available prior to arraignment. This plethora of information comports to the stated rehabilitative purpose of juvenile court.

153. *See id.* at 374.

154. *See id.* ("Here, however, this matter concerns the use of restraints at nearly *every* appearance in the Lancaster juvenile delinquency court.").

155. *Id.*

156. FLA. R. JUV. P. 8.100(b) (2011).

157. *See id.*

158. *Id.* § 8.100(b)(1)(B).

159. *Id.*

160. Spain v. Rushen, 883 F.2d 712, 716 (9th Cir. 1989).

erred.[161] In contrast, Rule 8.100 requires that the presiding judge specifically find that no less restrictive alternative to shackling exists.[162]

A "substantial risk of flight from the courtroom" is another determinative factor under Rule 8.100.[163] The presiding justice must have a "founded belief" that such a risk exists.[164] In contrast, the Massachusetts policy permits the presiding judge to order restraints if she finds that the juvenile "may try to escape" and no level of proof or belief is indicated.[165] Thus, Florida seems to appropriately balance the need of the state to maintain custody with the juvenile's right to due process of the law and to counsel.

## VI. CONCLUSION

Indiscriminate shackling of adults and juveniles without an individualized determination of need violates the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution. The U.S. Supreme Court has repeatedly held that appearing in court in "shackles 'impos[es] physical burdens, pains, and restraints . . ., . . . ten[ds] to confuse and embarrass' [adult] defendants' 'mental faculties' and thereby tend 'materially to abridge and prejudicially affect [their] constitutional rights.'"[166] Where the defendant is not an adult, but instead is an adolescent, these constitutional rights are much more likely to be negatively impacted. The inherent developmental and sociological differences between adults and adolescents have been widely recognized by psychologists and by the U.S. Supreme Court. The Court has long recognized these differences, and recently in *Roper*, *Graham*, and *J.D.B.*, the Court has carved out categorical exceptions for adolescents and has held that age must be considered when determining the subjective question of custody. The practice of

161. *See id.* at 728.

162. FLA. R. JUV. P. 8.100(b)(2) (2011) (listing increased courtroom security personnel as an example of a less restrictive alternative to shackling).

163. *Id.* § 8.100(b)(1)(C).

164. *Id.*

165. TRIAL COURT OF THE COMMONWEALTH COURT OFFICER POLICY & PROCEDURES MANUAL, *supra* note 121.

166. Deck v. Missouri, 544 U.S. 622, 631 (2005) (quoting People v. Harrington, 42 Cal. 165, 168 (1871)).

indiscriminate shackling is unconstitutional as applied to adults and is even more so when applied to children.

Despite this, thirty-six states and the District of Columbia still allow indiscriminate shackling. Only eleven states have banned indiscriminate shackling of juveniles via legislation, regulation, appellate case law, or court policy. Three states have pending legislation that would prohibit this practice. Juveniles subjected to indiscriminate shackling often encounter this practice pre-adjudication. No determination of guilt or wrongdoing has been assessed, and in some situations, no juvenile delinquency petition has been filed.

Where indiscriminate shackling is allowed, the ability to control oneself in court is irrelevant and dismissed. Indiscriminate shackling sends the clear message that the juvenile justice system views adolescents as criminals, as people from whom society must be protected, as people not to be trusted to behave in court, and as individuals presumed guilty at the very first appearance.

This message and practice is not only harmful, but also unconstitutional.