Due Process Restrained: The Dual Dilemmas of Discriminate and Indiscriminate Shackling in Juvenile Deliquence Proceedings

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Abstract: In *Hidden in Plain Sight*, Barbara Bennett Woodhouse argues for the advancement of children’s rights through the development of a child-centric perspective. She identifies five principles to further that goal, including the principles of agency and dignity. These principles shed light on the problem of shackling juveniles during their delinquency proceedings. While a recent United States Supreme Court ruling barred indiscriminate shackling for all adult defendants, the status of juveniles remains unclear. Yet even in states that do not shackle juveniles without cause, significant problems remain. This Comment identifies and examines these problems, arguing for increased attention to shackled juveniles’ due process and fundamental dignity rights. The Comment concludes with proposals to improve the discriminate approach, with Woodhouse’s child-centric model in mind.

Introduction

[All juvenile proceedings must contain essentials of due process and fair treatment. In our view, 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 14.1]

Mike, a sixteen-year old African-American male, stands in the crowded and boisterous hallway of the Boston Juvenile Court.2 He has bravely agreed to discuss his experience with being shackled.3 The police detained Mike and brought him into court following a school fight,

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1 Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 375 (Ct. App. 2007).

2 Interview with Juvenile, in Boston, Mass. (Dec. 3, 2008). The juvenile’s name is changed to protect his identity.

3 *Id.*
but the charges were dismissed before arraignment. As his defense attorney put it, “the case never went anywhere.”

Even so, like hundreds of other boys and girls, he appeared before the judge in handcuffs and leg irons. Surely he posed some sort of danger? Not at all, Mike scoffed; he never missed a court appearance or attempted escape from custody. He never did or said anything threatening either in detention or in court. No one ever explained to Mike why he was shackled, though he seemed to understand and accept it as “standard procedure.”

When asked to describe what being shackled felt like, Mike did not hesitate. “I felt bad,” he said. “The cuffs are too tight. They hurt.” What about the leg irons? “Your legs are squished together. You can’t walk right.” Mike heard other juveniles tell court officers that their cuffs were too tight. Some officers loosened them; others refused. Mike never bothered to complain, he said with a tone of defeat. Did shackling make Mike feel anything else? “Yeah,” he replied. “It made me feel like a criminal.”

This young man’s experience directly contradicts the fundamental notion of due process within the juvenile justice system. As with America’s adult justice system, due process rights are deeply cherished and

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5 Id.
6 Interview with Juvenile, supra note 2.
7 Interview with Reardon, supra note 4.
8 Interview with Juvenile, supra note 2.
9 Id.
10 Id.
11 Id.
12 Id.
13 Interview with Juvenile, supra note 2.
14 See In re Gault, 387 U.S. 1, 12, 29 (1967) (explicitly granting due process rights to juveniles, including the right to notice of charges, to counsel, to confrontation and cross-examination of witnesses, and to the privilege against self-incrimination) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”); Kent v. United States, 383 U.S. 541, 554, 557 (1966) (granting juveniles in the waiver context the right to a hearing and to a statement of reasons for the judge’s decision) (“[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner.”). For decades, Kent and Gault have served as launch-pads for legal study on the intricate relationship between due process and juvenile delinquency matters. See, e.g., State ex rel. Juv. Dep’t of Multnomah County v. Millican, 906 P.2d 857, 860 (Or. Ct. App. 1995) (expanding upon Gault and expressly noting that “juveniles have the same right as adult defendants to appear free from physical restraints”).
embedded in the juvenile justice system. Such rights are meant to provide children appearing in court with essential safeguards against unjust deprivation of their liberty. In the past four decades, beginning with Kent v. United States and In re Gault, the Supreme Court has made admirable strides towards recognizing the importance of children’s rights by demonstrating an enhanced understanding of and sensitivity to those rights.

Nevertheless, scholars have questioned whether Gault’s promises to juveniles and their advocates have been fulfilled, particularly in juvenile delinquency cases. The propriety of shackling juveniles during delinquency proceedings is one area that has gained increasing prominence during the past three years. This question has posed a particularly difficult challenge for legal scholars because the factors on both sides—the child’s liberty versus the security of the courtroom and the safety of its occupants—are unusually compelling.

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15 See Gault, 387 U.S. at 29; Kent, 383 U.S. at 554.
16 See Tiffany A., 59 Cal. Rptr. 3d at 374 (concluding that the “unjustified use of physical restraints relate[s] directly to the constitutional values ... that the due process clause was intended to protect”). In addition, the court referred to the importance of an accused’s “right to present a defense” and the “presumption of innocence.” Id.
17 See Roper v. Simmons, 543 U.S. 551, 553 (2005) (noting three differences between juveniles and adults: their “susceptibility to immature and irresponsible behavior,” their “vulnerability and comparative lack of control over their immediate surroundings,” and their “struggle to define their identity”). The Court then concludes, “[o]nce juveniles’ diminished culpability is recognized, it is evident that neither of the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders—provides adequate justification for imposing that penalty on juveniles.” Id.
18 See Jay D. Blitzman, Gault’s Promise, 9 BARRY L. REV. 67, 68 (2007). In delinquency cases, district attorneys seek an adjudication from the court that a juvenile is a delinquent because he or she has committed an offense proscribed by law. See, e.g., MASS. GEN. LAWS ch. 119, § 52 (2008).
19 See In re Staley, 352 N.E.2d 3, 5–6 (Ill. App. Ct. 1976) (grappling with the issue of shackling juveniles during their adjudicatory hearings in Illinois juvenile courts). Among the court’s considerations were the juvenile’s ability to communicate with counsel and assist in his or her own defense. Id. at 5. Ultimately, the court held that shackling the juvenile Staley was an error warranting remand for another adjudicatory hearing. Id. at 6. Cases like Staley are helpful in that they hone in on the particular dilemma posed by shackling pre-adjudicated juveniles in court as opposed to on route to and from the courtroom. See id. at 5. But cf. State v. Lewis, 990 So. 2d 109, 118 (La. Ct. App. Aug. 13, 2008) (considering defendant’s argument for reversible error after a juror saw the defendant “being transported to the courtroom for trial [in shackles] and mentioned it to another juror”); State v. Tommy Y., Jr., 637 S.E.2d 628, 638 (W. Va. 2006) (“[No] court in the country ... prohibits transporting a prisoner to a courthouse wearing prison garb or shackles. Any rule to the contrary would be ludicrous.”). While shackling during transportation is an issue that merits attention, this Comment does not address it.
In 2005, in *Deck v. Missouri*, the Supreme Court held the indiscriminate shackling of a criminal defendant during the sentencing phase of a capital case unconstitutional under the Fifth and Fourteenth Amendments, absent a showing that restraints are “justified by an essential state interest.”21 This holding was consistent with a line of cases in which courtroom security alone was deemed an insufficient justification for shackling an accused.22 The decision also served as the capstone to over a century of legal thought, in which the shackling of any accused was generally and persistently disfavored.23 However, the *Deck* court did not comment on whether its ruling applied to juvenile delinquency cases, which, strictly speaking, are not criminal proceedings.24

Even in the wake of *Deck*, Massachusetts, like other states, has continued to shackie all juveniles indiscriminately during delinquency proceedings.25 Other states have adopted an approach more in line with *Deck*—in these states, the juvenile court conducts a case-specific evaluation before a juvenile is left shackled.26 However, even this discriminate

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22 See id. at 632; *Solomon v. Superior Court*, 177 Cal. Rptr. 1, 3–4 (Ct. App. 1981) (finding a failure to prove necessity because the trial judge did not send for more bailiffs before ordering the defendant shackled). This logic was then cited in *Tiffany A.*. See 59 Cal. Rptr. 3d at 372–73 (“We note that no California State court has 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.”).

23 See *People v. Allen*, 856 N.E.2d 349, 367 (Ill. 2006) (Freeman, J., dissenting) (“The United States Supreme Court has acknowledged the deep-rooted, historical aversion the judiciary has long had toward trying a criminal defendant in restraints.”).

24 See *Kent*, 383 U.S. at 554 (noting that delinquency proceedings are “designated as civil rather than criminal” and therefore strive “to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment”). Indeed, there is an important distinction between an adjudication of delinquency and a finding of guilt because a finding of guilt implicates the adult justice system and the protections therein. See id. at 556; Courtney P. Fain, *What’s in a Name? The Worrisome Interchange of Juvenile “Adjudications” with Criminal “Convictions”*, 49 B.C. L. Rev. 495, 498 (2008).


26 See *Tiffany A.*, 59 Cal. Rptr. 3d at 365; *In re Deshaun M.*, 56 Cal. Rptr. 3d 627, 629 (Ct. App. 2007); *In re R.W.S.*, 728 N.W.2d 326, 331 (N.D. 2007).
approach fails to protect juveniles’ full rights to procedural and substantive due process.\(^{27}\)

These failures become even more apparent in light of Barbara Bennett Woodhouse’s book, *Hidden in Plain Sight*.\(^{28}\) Woodhouse argues for an enhanced view of children’s rights and advocates for a child-centric perspective.\(^{29}\) She identifies five values or “principles” at the heart of this child-centric perspective—privacy, agency, equality, dignity, and protection.\(^{30}\) In particular, the practice of shackling runs afoul of Woodhouse’s agency and dignity principles.\(^{31}\) Under the agency principle, a child is entitled to “play an active role in shaping his or her own destiny.”\(^{32}\) An important component of the agency principle, according to Woodhouse, is the right to be heard in court.\(^{33}\) Under the “indispensable” dignity principle, every child deserves “inherent human dignity.”\(^{34}\) In order to realize that dignity, she continues, jurists should adopt a broad reading of the guarantee of “liberty” expressed in the Fourteenth Amendment.\(^{35}\) Woodhouse sees “freedom from bodily harm and restraint” as falling well within the bounds of the Fourteenth Amendment’s protections.\(^{36}\) With Woodhouse’s two principles in mind, one can better analyze and attempt to resolve the defects in the discriminate approach.\(^{37}\)

Part I of this Comment explores indiscriminate shackling. This Comment first uses Massachusetts as a case study and then touches upon other states, particularly Florida, through recent criticism of the practice. This Comment then explores criticism of indiscriminate shackling in light of the agency and dignity principles, with a special emphasis on physical and psychological harms. Part II describes the discriminate approach in detail. Part III explains how discriminate

\(^{27}\) See, e.g., *In re Kenneth T.*, No. J05–01577, 2008 WL 3856658, at *10 (Cal. Ct. App. Aug. 20, 2008). In failing to fully grasp the rights at stake for shackled juveniles, many courts have issued disappointing decisions on the issue of shackling in delinquency cases. See id.

\(^{28}\) See BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN’S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 29–34 (2008). Woodhouse is the David H. Levin Chair in Family Law and founding director of the Center on Children and Families at the University of Florida.

\(^{29}\) Id. at 30.

\(^{30}\) Id. at 34.

\(^{31}\) See id.

\(^{32}\) Id. at 37.

\(^{33}\) WOODHOUSE, supra note 28, at 38.

\(^{34}\) Id. at 40.

\(^{35}\) Id.

\(^{36}\) Id.

\(^{37}\) See id. at 34.
shackling is problematic because it deprives juveniles of due process and represents an affront to their fundamental rights. This Comment first argues that current practices violate juveniles’ agency right, at both the trial and appellate levels. It then argues that current practices violate juveniles’ dignity right by failing to consider excessive psychological harms. Part IV draws upon Woodhouse’s child-centric framework to suggest ways to remedy and improve the indiscriminate approach and argues for a legal analysis that better recognizes shackled juveniles’ fundamental rights.

I. INDIRECTIMATE SHACKLING IN ACTION

A. *The Curious Case of Massachusetts*

Many states, including Massachusetts, continue to employ the indiscriminate approach.\(^38\) In Massachusetts, all juveniles brought to court from detention are transported in shackles, remain shackled during their proceedings, and, if they are not released from custody, escorted back to detention in shackles.\(^39\) The rationale underlying this practice is simple—shackling is thought to be the best, if not the only, way to ensure safety in the courtroom.\(^40\) The justification for the practice arose from two courtroom disruptions—one in which a juvenile flipped a counsel table over, breaking the glass pane on top, and another in which a juvenile made rude comments to an Assistant District Attorney as he was escorted behind the Commonwealth’s table.\(^41\)

However, hindsight suggests that shackling would not have prevented either of these two incidents because a handcuffed juvenile could still muster enough leverage to flip a table, and shackles cannot prevent rude comments.\(^42\) In addition, the second juvenile would not have passed by the Commonwealth’s table at all if the placement of people and furniture in the courtroom had been less “ill-considered.”\(^43\) Escape attempts are especially unlikely in a courthouse like the Boston Juvenile Court, where the delinquency session has only one public

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38 Telephone Interview with King, *supra* note 25.
39 Id. Judge King notes that this practice applies to most proceedings, but not to some fact-finding proceedings, such as trials, competency hearings, or hearings on motions to suppress. E-mail from Ken King, Middlesex Juvenile Court, to author (Mar. 17, 2009, 14:18:00 EST) (on file with author).
40 Telephone Interview with King, *supra* note 25.
41 Id.; E-mail from Ken King, *supra* note 39.
42 E-mail from Ken King, *supra* note 39.
43 Telephone Interview with King, *supra* note 25.
doorway with heavy swinging doors, officers are stationed in the courtroom and in the hallway, and at least two floors separate the courtroom from the main exit.\textsuperscript{44} Successful escape, therefore, is “virtually impossible.”\textsuperscript{45}

Moreover, the mandate for the indiscriminate approach in Massachusetts does not come not from the bench; rather, it seems to derive from the unwritten policies of courtroom security personnel.\textsuperscript{46} There is not a single statute, precedent, or court rule that authorizes the indiscriminate shackling of juveniles.\textsuperscript{47} However, the Massachusetts Rules of Criminal Procedure, which generally apply to delinquency proceedings, require discriminate shackling for adult defendants.\textsuperscript{48} It is unclear why this particular Rule does not extend to delinquency matters—or if it does, why it is so openly disregarded.\textsuperscript{49}

\textbf{B. Academic Criticism of Indiscriminate Shackling}

Following Deck, juveniles have legally challenged indiscriminate shackling policies in a few states, though no such challenges have been brought in Massachusetts.\textsuperscript{50} Opponents of the practice launched an especially prominent anti-shackling movement in Florida in late 2006.\textsuperscript{51}

\begin{itemize}
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. (commenting that there is “no articulated, principled reason” for the indiscriminate shackling policy).
\item \textsuperscript{48} See Mass R. Crim. P. 45(a).
\item \textsuperscript{49} Telephone Interview with King, supra note 25.
\item \textsuperscript{50} See id.; Anita Nabha, Note, Shuffling to Justice: Why Children Should Not Be Shackled in Court, 73 BROOK. L. REV. 1549, 1550 (2008) (noting pending litigation in Florida and New York); Press Release, Legal Aid of N.C., Legal Aid Requests Court Cease Shackling of Minor Child (Feb. 5, 2007), available at http://www.lsc.gov/press/updates_2007_detail_T158_R4.php (introducing litigation in North Carolina). Procedurally, the shackling issue usually arises in the form of a post-adjudication appeal from a denied motion to unshackle, where the relief sought is vacating the adjudication or, at the very least, reversal and remand for a new trial. See, e.g., In re Deshaun M., 56 Cal. Rptr. 3d 627, 628–29 (Ct. App. 2007).
\end{itemize}
As a result, scholars have begun to take notice of the problems with indiscriminately shackling all juveniles. One scholar extensively critiqued Florida’s indiscriminate shackling policy, exploring the way that it violates the due process rights of juveniles. He noted that indiscriminate shackling fails to consider children’s constitutionally guaranteed liberty interest. The scholar then compared juveniles’ due process rights to those of adult defendants, placing a special emphasis on the impact of *Gault* and the rights it guarantees to juveniles. He noted that the *Gault* court “would find routine indiscriminate shackling a thoroughly reprehensible practice.” The scholar concludes that indiscriminately shackling juveniles is an undesirable policy that should be terminated.

Another scholar argued that *Deck*’s bar on indiscriminate shackling should apply to delinquency proceedings. Moving away from indiscriminate shackling, she concludes, is more in line with the juvenile justice system’s goal of rehabilitation. Moreover, eliminating indiscriminate shackling would provide a sense of fairness to juveniles appearing in court.

Finally, a study conducted by the Center on Children and Families challenged the practice of shackling as a courtroom security measure. The study first noted that only 4.5 percent of juvenile offense cases nationwide in 2006 involved a violent crime, whereas property crimes represented eighteen percent and non-violent status offenders comprised twenty-nine percent. The study also reported on its observations of juveniles during their proceedings in Alachua County, Florida in 2007. Overall, ninety-three percent of juveniles there were rated as

Not all of Florida’s Juvenile Court judges have fallen into line, but some have “curtailed or abolished” the policy of blanket shackling in their courtrooms. For instance, efforts to change shackling in Dade County were successful, but similar efforts in Palm Beach County were not. See Emily Banks et al., Ctr. on Children & Families, *The Shackling of Juvenile Offenders: The Debate in Juvenile Justice Policy* 5 (2008).

52 See Perlmutter, *supra* note 51, at 25.
53 See *id.* at 4.
54 See *id.* at 47.
55 *Id.* at 35–37.
56 *Id.* at 36.
57 See Perlmutter, *supra* note 51, at 58.
58 Nabha, *supra* note 50, at 1575.
59 *Id.* at 1551.
60 *Id.* at 1587.
61 See Banks et al., *supra* note 51, at 3, 9.
62 *Id.* at 3.
63 *Id.* at 8.
“compliant,” four percent “withdrawn,” and a mere one percent “defiant.” Given these data, the efficacy of shackling as a courtroom security measures comes under great scrutiny.

C. The Harms of Indiscriminate Shackling

Indiscriminate shackling is problematic because it fails to acknowledge juveniles’ agency and dignity rights. First, the agency right is violated because juveniles are given no opportunity to participate in the decision-making process—in fact, there is no decision-making process at all. The practice of deferring to security personnel runs counter to a great deal of modern case law. For example, the Supreme Court of North Dakota found error when a judge below deferred to law enforcement’s decision to shackles. Similarly, an Oregon court emphasized the duty of the trial judge: “[A] conclusory statement alone by a prosecutor or law enforcement officer is not sufficient to permit the independent analysis necessary for the exercise of [the court’s] discretion.” Moreover, the emphasis on courtroom security to the total exclusion of all other factors such as agency stands against the heft of case law. For instance, as a California court recently commented, “no California [s]tate court has 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.”

Second, juveniles’ dignity rights are violated because shackling often results in physical and psychological harm. The effects of shackling, particularly the physical effects, have been documented for over a century. Moreover, juveniles are more susceptible to suffering

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64 Id. at 9.
65 See id. at 3, 9.
66 See Woodhouse, supra note 28, at 34–35.
67 See id. at 37.
69 R.W.S., 728 N.W.2d at 331.
72 Id.
73 See Woodhouse, supra note 28, at 40; Telephone Interview with King, supra note 25 (describing indiscriminate shackling as “destructive and unnecessary”).
74 See Tiffany A., 59 Cal. Rptr. 3d at 370 (“As early as 1871 the California Supreme Court recognized placing the criminal defendant in shackles ‘imposes physical burdens,
psychological harms after being shackled than are their adult counterparts.\textsuperscript{75} Shackled juveniles suffer embarrassment and humiliation, particularly when surrounded by strangers in the court gallery.\textsuperscript{76} They develop a lowered self-image, feel like captive animals, and are forced to surrender their psychological supremacy.\textsuperscript{77} Some juveniles have been shackled for hours at a time while awaiting their turn in court.\textsuperscript{78} Exceptionally young juveniles have been shackled, and often experience intense confusion at the experience.\textsuperscript{79} Shackling is particularly painful for juveniles who already have a background of abuse, usually from an authority figure like a parent.\textsuperscript{80} Some African-American juveniles and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense.'\textsuperscript{75}) (citing People v. Harrington, 42 Cal. 165, 168 (1871)).

\textsuperscript{75} See Millican, 906 P.2d at 861 (DeMuniz, J., dissenting); Perlmutter, \textit{supra} note 51, at 19–20 (citing Bennett H. Brummer et al., Pub. Defender Eleventh Jud. Cir. Ct. of Fla., Motion for Child to Appear Free from Degrading and Unlawful Restraints, \textit{available at} http://www.pdmiami.com/unchainthechildren/Unshackle_Calendar_Motion2.pdf); Telephone Interview with King, \textit{supra} note 25 (noting a “labeling, branding, and shaming effect” to shackling juveniles).

\textsuperscript{76} See People v. Allen, 856 N.E.2d 349, 372 (Ill. 2006) (Freeman, J., dissenting); Perlmutter, \textit{supra} note 51, at 19–20 (“[B]eing shackled in public is humiliating for young people, whose sense of identity is vulnerable.” (citing Brummer et al., \textit{supra} note 75 at 8)).

\textsuperscript{77} See Allen, 856 N.E.2d at 372 (Freeman, J., dissenting); Perlmutter, \textit{supra} note 51, at 19–20, 37 (“The young person who feels like he/she is being treated like a dangerous animal will think less of him/herself. . . . [B]eing chained like a ‘dangerous animal’ may cause the child to feel like one. . . . Being shackled conveys that others see the child as ‘a contained beast,’ an image that ‘becomes integrated in his own identity formation, possibly influencing his behavior and responses in the future.’") (citing Brummer et al., \textit{supra} note 75, at 20, 27, 34).

\textsuperscript{78} See Perlmutter, \textit{supra} note 51, at 6–7 (describing the physical effects of extended shackling on juveniles in Miami-Dade, Florida). Perlmutter points to juveniles whose “chains stay on for hours at a time, sometimes as long as a full day, and are not removed even when the children need to use the bathroom.” \textit{Id.} Such juveniles suffer “cuts, bruises and abrasions from the tight cuffs,” which cause “bleeding and other serious physical harms and discomforts.” \textit{Id.} at 7.

\textsuperscript{79} See \textit{id.} at 6–7; Bob Herbert, Op-Ed., 6-Year Olds Under Arrest, \textit{N.Y. Times}, Apr. 9, 2007 at A17. Herbert’s article recounts the arrest and shackling of six-year old Desre’e Watson of Avon Park, Florida. After misbehaving in her kindergarten class, the child was charged with felony battery on a school official for flailing and kicking at teachers who tried to control her during a tantrum, as well as a misdemeanor for disrupting a school function for yelling in class. Herbert, \textit{supra}. She was also charged with resisting a law enforcement officer because when she saw officers approaching, she crawled under a table. \textit{Id.} The officers finally pulled Desre’e out from under the table and placed handcuffs on her. \textit{Id.} They had to place them on her biceps because her wrists were too tiny. \textit{Id.}

\textsuperscript{80} See Perlmutter, \textit{supra} note 51, at 19–20 (noting that shackling poses special psychological dangers to children “who have been previously traumatized by physical and sexual abuse, loss, neglect, and abandonment”). Such children “suffer from depression, attention and conduct disorders, and substance abuse.” \textit{Id.} Shackling also “exacerbates trauma, re-
niles who have been shackled report feeling like their chained and enslaved ancestors.\textsuperscript{81}

Courts’ failure to consider shackled juveniles’ agency and dignity is especially disconcerting because of the rehabilitative aims at the heart of the juvenile justice system.\textsuperscript{82} Troubled juveniles who perceive a court system as totally dismissive of their rights have no incentive to reform their behavior or to avoid later returning to court as adult defendants.\textsuperscript{83} Shackling also fails to serve as a deterrent for future delinquent behavior.\textsuperscript{84} As one former defense attorney describes the reasoning of juveniles, “people already think I’m bad, so I may as well be bad.”\textsuperscript{85}

The notion of shackling as antithetical to the goals of rehabilitation is reflected in the context of secured treatment facilities.\textsuperscript{86} In Massachusetts, for instance, a juvenile committed to the custody of the Department of Youth Services and housed in a secured facility cannot be shackled without cause, and then only as a last resort.\textsuperscript{87} Such policies recognize that shackling is often contrary to a juvenile’s rehabilitation, and therefore take into account a juvenile’s physical and psychological characteristics before making the decision to shackle.\textsuperscript{88} Thus, common sense dictates that judges proceed with caution when the individual to be shackled is a juvenile.\textsuperscript{89}

\footnotesize{viving feelings of powerlessness, betrayal, and self-blame.” Id. Finally, when restraint was part of prior abuse, in-court shackling can “trigger flashbacks and reinforce early feelings of powerlessness.” Id.}
\footnotesize{\textsuperscript{81} See id.}
\footnotesize{\textsuperscript{82} See Millican, 906 P.2d at 862 (DeMuniz, J., dissenting); Julian W. Mack, The Juvenile Court, 23 Harv. L. Rev. 104 (1909), as reprinted in Barry C. Feld, Cases and Materials on Juvenile Justice Administration 7 (2d ed. 2000); Perlmutter, supra note 51, at 375.}
\footnotesize{\textsuperscript{83} See Nabha, supra note 50, at 1582 (“Children may understand that their out-of-control behavior in a facility has a consequence and may result in the use of restraints. However, in court, if without acting inappropriately they are still restrained, children will not understand why they are being punished.”).}
\footnotesize{\textsuperscript{84} See id. at 1574 (“Juvenile defenders and scholars note that there is no evidence to suggest that shackling juveniles is an effective deterrent to juvenile crime.”).}
\footnotesize{\textsuperscript{85} Telephone Interview with King, supra note 25.}
\footnotesize{\textsuperscript{86} See Mass. Dep’t of Youth Servs. Policy 03.02.08(d), available at http://www.mass.gov/Eeohhs2/docs/dys/policies/030208d_restraint_use_force.doc.}
\footnotesize{\textsuperscript{87} See id.}
\footnotesize{\textsuperscript{88} See id.}
\footnotesize{\textsuperscript{89} See Perlmutter, supra note 51, at 19–20.}
II. THE DISCRIMINATE APPROACH IN ACTION

A. The Requirement of Necessity

In states that have abandoned indiscriminate shackling, the practice is presumed unwarranted unless and until evidence is presented to demonstrate otherwise. This policy reflects the notion found at the heart of American jurisprudence that all defendants are innocent until proven guilty. While each state using this discriminate approach uses slightly different language to define its standard, each definition includes the requirement of need. In California, for instance, the court asks whether there is a “manifest need” to shackle a pre-adjudicated juvenile. In Illinois, children appearing in juvenile court cannot be shackled unless there is a “good reason” to do so. The state bears the initial burden of satisfying these standards, and can only succeed upon presenting sufficient evidence that a juvenile “has been unruly, has announced an intention to escape, or when the evidence shows that the juvenile would likely disrupt the judicial process if left unrestrained.” More specifically, a court will weigh such considerations as the likelihood that the juvenile will attempt escape or disrupt the pro-

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90 Cf. People v. Duran, 545 P.2d 1322, 1326 (Cal. 1976) (stating that a trial court must allow a defendant to appear “without physical restraints unless there was ‘evident necessity’ for the restraint”). This Comment does not argue that there is no case in which in-court shackling is unwarranted. See State v. Lehman, 749 N.W.2d 76, 79 (Minn. Ct. App. 2008). For instance, in Lehman, a defendant was shackled after he attacked his attorney in court, grabbing the attorney by the neck and “punching him repeatedly in the face.” Id. The defendant drew blood, and the attorney “suffered a cut lip and a black eye.” Id. The Court of Appeals of Minnesota held that the “district court did not abuse its discretion by ordering appellant [defendant] restrained for the remainder of the trial.” See id. at 84. Additionally, in People v. Kimball, the Court correctly found sufficient justification to place handcuffs on the defendant. See 55 P.2d 483, 484 (Cal. 1936). There, the government produced “evidence tending to show that defendant had expressed an intent to escape; that he had threatened to injure or kill three or four witnesses in the courtroom by striking them over the heads with a chair; [and] that on the first day of the trial a piece of lead pipe, fourteen inches in length, was found concealed in the top of one of his boots and under the leg of his overalls.” Id.


92 See, e.g., CAL. PENAL CODE § 688 (West 2008) (“No person charged with a public offense may be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.”).

93 See In re Deshaun M., 56 Cal. Rptr. 3d 627, 629 (Ct. App. 2007) (citing People v. Fierro, 3 Cal. Rptr. 2d 426, 445 (1991)).


ceedings, and the juvenile’s “past criminal record, his reputation, and his character.”

Courts have further held that there is no need to shackle a juvenile in court when less drastic alternatives are available and are reasonably sufficient. For example, a judge who orders a juvenile to be shackled solely because there are no or few guards in the courtroom should first attempt to procure additional guards. A judge’s failure to employ these less drastic alternatives when it is reasonable to do so constitutes an abuse of that judge’s discretion. Unsurprisingly, then, shackling an accused during court proceedings is often considered a “last resort.”

B. Jury Prejudice and Effect on the Defense

The analysis under the discriminate approach does not end with necessity, however, because necessity must be balanced against other important factors. Foremost among those factors is prejudice in the eyes of the jury. In fact, jury prejudice is such an important consideration that, in some jurisdictions, a juvenile’s or defendant’s failure to show actual or potential jury prejudice essentially concludes the analysis in the state’s favor, with no other factors coming into play at all. Focusing on jury prejudice puts juveniles at a disadvantage because juveniles do not have a constitutional right to a jury trial, and only a few states allow juries in delinquency cases.

96 See Deshaun, 56 Cal. Rptr. 3d at 629; Staley, 352 N.E.2d at 6.
98 See In re Staley, 364 N.E.2d 72, 74 (Ill. 1977).
99 See Boose, 337 N.E.2d at 341; Randall E. Tuskowski, Spain v. Rushen: Shackles or Showtime? A Defendant’s Right to See and Be Seen, 20 Golden Gate U. L. Rev. 175, 175 (1990).
101 See, e.g., Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 375 (Ct. App. 2007).
102 See State v. E.J.Y., 55 P.3d 673, 679 (Wash. Ct. App. 2002) (“This was a proceeding without a jury, which greatly reduces the likelihood of prejudice.”).
103 See United States v. Lu, 174 F. App’x 390, 396 (9th Cir. 2006); People v. Horn, 755 N.W.2d 212, 218 (Mich. Ct. App. 2008) (“[Michigan’s] caselaw holds that a defendant is not prejudiced if the jury was unable to see the shackles on the defendant.”).
Nevertheless, even if a juvenile has not suffered jury prejudice, he or she can still demonstrate that being shackled was improper.\textsuperscript{105} Beyond jury prejudice, many courts also consider the impact of shackling on courtroom decorum, the juvenile’s ability to confer with counsel, and the juvenile’s decision about whether to testify on his or her own behalf.\textsuperscript{106} In evaluating the impact of shackling on courtroom decorum, the court is concerned with infringing upon the defendant’s right to be presumed innocent, for to unfairly shackle an accused is deeply offensive to our system of justice.\textsuperscript{107}

Further, a juvenile’s ability to confer with counsel and to freely decide whether to take the stand is an essential part of the adjudication process.\textsuperscript{108} If a juvenile is ordered to wear handcuffs, the court must consider whether the cuffs would unfairly infringe on that juvenile’s ability to write notes to his attorney.\textsuperscript{109} Similarly, courts must consider whether shackling would cause the juvenile such anxiety that he would not be able to concentrate on communicating with counsel or on delivering testimony from the witness stand.\textsuperscript{110} Overall, the juvenile court judge’s mandate is to analyze and weigh all of these factors together, thereby engaging in an individualized risk assessment of each case and

\begin{itemize}
\item \textsuperscript{105} See Tiffany A., 59 Cal. Rptr. 3d at 371; cf. People v. Robinson, 872 N.E.2d 1061, 1071 (Ill. App. Ct. 2007).
\item \textsuperscript{107} See Eaddy v. People, 174 P.2d 717, 718–19 (Colo. 1946); Staley, 364 N.E.2d at 73.
\item \textsuperscript{108} Cf. Allen, 397 U.S. at 344 (“[O]ne of the defendant’s primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.”); Gonzalez v. Plier, 341 F.3d 897, 900 (9th Cir. 2003).
\item \textsuperscript{109} See Deshaun M., 56 Cal. Rptr. 3d at 630 (holding that any error in shackling juvenile was harmless because juvenile’s “right hand was freed from restraints so that he could write and communicate with counsel”).
\item \textsuperscript{110} See State ex rel. Juv. Dep’t of Multnomah County v. Millican, 906 P.2d 857, 860–61 (Or. Ct. App. 1995); cf. People v. Allen, 856 N.E.2d 349, 372 (Ill. 2006). The issue of the distracted defendant-witness takes on greater importance when stun belts are used. See United States v. Durham, 287 F.3d 1297, 1306 (11th Cir. 2002). The court explained that
\end{itemize}

[w]earing a stun belt is a considerable impediment to a defendant’s ability to follow the proceedings and take an active interest in the presentation of his case. It is reasonable to assume that much of a defendant’s focus and attention when wearing one of these devices is occupied by anxiety over the possible triggering of the belt. A defendant is likely to concentrate on doing everything he can to prevent the belt from being activated, and is thus less likely to participate fully in his defense at trial.

\textit{Id.}; see People v. Mar, 52 P.3d 95, 106 (Cal. 2002).
making a reasoned decision on shackling accordingly.111 This analysis makes clear that unwarranted shackling interferes with the right to a fair trial and constitutes a due process violation.112

III. THE PROBLEMS WITH DISCRIMINATE APPROACH

A. No Requirement of a Hearing

While the discriminate approach is certainly superior to the indiscriminate approach described in Part I, it is flawed in that it fails to fully protect pre-adjudicated juveniles’ right to due process.113 One defect in the discriminate approach is that juvenile court judges are not required to hold formal hearings on the propriety of shackling pre-adjudicated juveniles.114 However, it is a positive step forward that, in most states, courts must make a record as to the necessity of shackling pre-adjudicated juveniles.115 The record must go beyond mere insinuation and contain facts that document the child’s risk level.116 It is helpful, too, that there can be no presumption of necessity where a record is silent on the question.117

Yet the lack of a formal hearing poses numerous legal and moral problems—most importantly, without a formal hearing, a juvenile court judge is far less likely to understand the full impact of his or her decision to shackle any given juvenile.118 A hearing allows a juvenile to call witnesses who can rebut the state’s evidence of risk and offer mitigating physical or psychological evidence.119 Withholding this opportunity can cause a shackled juvenile significant harm.120 First, a juvenile may perceive that the court is not giving him the chance to be heard fully on such a crucial point, and thereby runs afoul of Woodhouse’s agency

112 See James Benjamin, Note, Failure to Object to In-Court Restraints: The Boose and Plain Error Doctrines in People v. Allen, 57 DePaul L. REV. 193, 206 (2007); Tuskowski, supra note 94, at 176.
118 See Nabha, supra note 50, at 1576.
119 See Allen, 856 N.E.2d at 377–78 (Freeman, J., dissenting).
120 See Nabha, supra note 50, at 1575–78.
principle. Second, without the ability to introduce mitigating evidence, an especially vulnerable juvenile might suffer special physical or psychological harm due to shackling, beyond the already substantial harms that exist for the average juvenile in the justice system.

B. Passive Appellate Review

Not only do juveniles face due process difficulties at trial, but they also face formidable obstacles on appeal. To counter the state’s evidence that shackling was needed, the petitioner-juvenile is expected to produce concrete evidence that he or she posed no risk of harm or escape and therefore was prejudiced below. But as Justice Freeman commented in People v. Allen, “How exactly is a defendant to show that his presumption of innocence was compromised? What type of record evidence would support a finding of a compromised presumption of innocence?”

Justice Freeman explained that the negative effects of shackling, such as nervous twitching or shaking, likely would not appear on the record because they are non-verbal. In fact, a juvenile may purposefully refrain from verbalizing his or her discomfort out of fear that he or she would receive worse treatment from security personnel in the future. These non-verbal cues are important because they can represent the difference between finding a juvenile delinquent or not delinquent, particularly when the case is heard by a jury. Yet a dilemma arises because “a defendant’s nontestifying demeanor is not a traditional form of courtroom evidence.”

The gaps in the record due to non-verbal factors place shackled juveniles at a tremendous disadvantage on appeal. With appellate courts generally declining to conduct a de novo review of a juvenile court judge’s shackling decision, those juvenile court judges have wide

121 See id. at 1587-88; Woodhouse, supra note 28, at 37.
122 See infra at Part I.C; cf. Allen, 856 N.E.2d at 377–78 (Freeman, J., dissenting); Tuskowski, supra note 99, at 180.
124 See Allen, 856 N.E.2d at 373 (Freeman, J., dissenting).
125 Id.; see Benjamin, supra note 112, at 211.
126 See Allen, 856 N.E.2d at 374 (Freeman, J., dissenting).
127 See id.
129 See id. at 600.
discretion. Appellant-juveniles are not granted relief unless there was an abuse of discretion by the trial judge. Moreover, a juvenile who meets the high abuse of discretion standard is not automatically victorious. Upon finding an abuse of discretion, an appellate court will then inquire into whether the abuse constituted harmful, as opposed to harmless, error. Yet when the harms alleged are not reflected in the record, an appellate court cannot conduct a full analysis. In many cases, therefore, appellate courts reach the paradoxical conclusion that a trial judge’s decision about shackling was in error but resulted in no harm.

C. Limited Factors in the Court’s Analysis

Courts’ failures to perceive real harm in what they admit to be cases of wrongful and unnecessary shackling are indicative of a failure to fully appreciate the high stakes of shackling decisions. In defining the question as one of a technical legal error, courts gloss over the fundamental right- and dignity-based errors at the heart of the matter. In addition to the due process protections lost when juveniles do not get a formal hearing or strident appellate review, shackled juveniles lose protections through courts’ overly narrow analyses, which do not include any consideration of juveniles’ dignity.

131 See Commonwealth v. Chase, 217 N.E.2d 195, 197 (Mass. 1966) (“[A] judge’s refusal to order the removal of the shackles, where there exists any reasonable basis for anticipating that a prisoner may attempt to escape, will not be overruled.”) (emphasis added); Jona Goldschmidt, “Order in the Court!”: Constitutional Issues in the Law of Courtroom Decorum, 31 HAMLINe L. REV. 1, 51–52 (2008) (discussing the possibility of trial judges shackling a juvenile because the judge was “personally slighted or annoyed” at the accused); David R. Wallis, Note, Visibly Shackled: The Supreme Court’s Failure to Distinguish Between Convicted and Accused at Sentencing for Capital Crimes, 71 Mo. L. REV. 447, 447 (2006).


135 See Kenneth T., 2008 WL 3856658, at *10; Tuskowski, supra note 99, at 198.

136 See Kenneth T., 2008 WL3856658, at *10; Christian G., 2007 WL 1302433, at *2; R.W.S., 728 N.W.2d at 331.

137 See Deshaun, 56 Cal. Rptr. 3d at 630–31; In re Staley, 364 N.E.2d 72, 75–76 (Ill. 1977) (“[I]n my opinion it is better to offend the dignity of the defendant than to suffer violence to erupt in the courtroom.”).

138 See R.W.S., 728 N.W.2d at 331 (holding that shackling the juvenile was harmless error even though the court below “made no findings that [the juvenile] posed an immediate and serious risk of dangerous or disruptive behavior or of escape or flight”).

139 See People v. Wallace, 189 P.3d 911, 927 (Cal. 2008); Millican, 906 P.2d at 860–61.
Discriminate shackling only exacerbates the physical and psychological harms that indiscriminate shackling induces.\textsuperscript{140} The discriminate approach does not necessarily exclude the most vulnerable juveniles, for whom the effects of shackling are heightened.\textsuperscript{141} Juveniles in this class might include the exceptionally young, the physically abused, and the sexually abused.\textsuperscript{142} Not only does the approach fail to consider factors like abuse history, but were such histories to be taken into account, there would be no way to know how much weight they would be given.\textsuperscript{143}

It is at best uncertain that invoking a juvenile’s dignity principle would be sufficient to overcome even the most scant indicia of that juvenile’s dangerousness.\textsuperscript{144} For instance, assume someone physically abused the juvenile during early childhood, but (or perhaps as a result) the juvenile also has a history of unpredictable violent outbursts.\textsuperscript{145} While violent tendencies would almost certainly appear in the court’s shackling analysis, there is nothing to ensure that even the most insidious abuse history would likewise appear.\textsuperscript{146} And even if factors like abuse history were part of the analysis, there is also no measure of how much the shackles would have to impact the juvenile—how much anxiety he or she would have to display—before the line between acceptable and unacceptable discomfort would be crossed.\textsuperscript{147} In this way, even

\begin{footnotes}
\item[140] See, Perlmutter, \textit{supra} note 51, at 19–20; \textit{supra} Part I.C.
\item[141] Cf. Tuskowski, \textit{supra} note 99, at 180 (noting that the defendant’s shackling aggravated his preexisting physical and psychological conditions).
\item[142] See Perlmutter, \textit{supra} note 51, at 19–20.
\item[143] See Wallace, 189 P.3d at 927 (refusing to “depart from the prejudice analysis we have applied for over [thirty] years” and thereby declining to consider “the psychological effects on a defendant—specifically, mental impairment, physical pain, and obstruction of communication with defense counsel—that result from the imposition of restraints”)
\item[144] See Illinois v. Allen, 397 U.S. 337, 351–52 (1970) (Douglas, J., dissenting) (expressing uncertainty as to the balancing between a mentally ill defendant who creates a disturbance in the courtroom); see also Millican, 906 P.2d at 860–61 (declining to embrace the juvenile’s argument that “his demeanor itself—that is, the manner in which he presented himself to the court through posture, facial expressions, and the like—was affected by his shackling”).
\item[145] See Perlmutter, \textit{supra} note 51, at 19–20.
\item[146] See Press Release, Legal Aid of N.C., \textit{supra} note 50. In North Carolina, a fourteen-year old girl was shackled in court despite having a history of sexual abuse in which she was handcuffed by her abuser. \textit{Id.} The girl was reminded of her past abuse by being shackled in court, where she cried and became very emotional. \textit{Id.} The trial judge did not consider the girl’s abuse history as a mitigating factor warranting unshackling the girl. \textit{See id.} However, based upon this case, the North Carolina legislature passed a bill in 2007 shifting state policy from indiscriminate to discriminate shackling. \textit{See Banks et al., \textit{supra} note 51, at 10.}
\item[147] See Benjamin, \textit{supra} note 112, at 214–15.
\end{footnotes}
if a hearing on shackling were to occur, the hearing would be unfairly skewed against the juvenile. While it is possible that courtroom security may well outweigh any particular juvenile’s case for freedom from restraint, this determination cannot be made under the current analytical framework.

IV. Improving the Discriminate Approach to Shackling

A. Require a Hearing upon the Juvenile’s Request

In order to protect the fundamental rights of juveniles in delinquency proceedings, juvenile court judges should adopt and expand the discriminate approach by holding a formal hearing on the issue of shackling, at a juvenile’s request. Hearings will ensure that judges have a full understanding of the implications of shackling on any given juvenile, and will further enhance the process of assessing the individual juvenile’s risk level. Additionally, hearings will allow the most vulnerable juveniles to present mitigating factors to the court, thereby increasing the probability that they will be shackled only when absolutely necessary. This result is precisely what the discriminate approach seeks to achieve, and is consistent with what Woodhouse encourages under the agency principle of her child-centric perspective.

The desired result is possible to achieve if we build upon the foundations already in place. In Illinois, for instance, a trial judge must “give defense counsel an opportunity to present reasons why the defendant should not be shackled.” This practice at least allows the juvenile to place mitigating circumstances like abuse history before the

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148 See Wallace, 189 P.3d at 927; Millican, 906 P.2d at 860–61.
149 See Wallace, 189 P.3d at 927; Millican, 906 P.2d at 860–61.
150 See State v. Kunze, 738 N.W.2d 472, 478 (N.D. 2007) (“[T]he physical indicia of innocence are so essential to a fair trial that the better practice is to hold a hearing so that factual disputes may be resolved and evidence of the facts surrounding the decision are made a part of the record.”) (quoting Kennedy v. Cardwell, 487 F.2d 101, 107 (6th Cir. 1973)); see also Brian D. Gallagher & John C. Lore III, Shackling Children in Juvenile Court: The Growing Debate, Recent Trends and the Way to Protect Everyone’s Interest, 12 U.C. DAVIS J. JUV. L. & POL’Y 453, 478–79 (2008) (proposing a statute that would require a brief on the record hearing on the propriety of shackling a juvenile and suggesting a ten-point checklist of factors for the court to consider).
152 See id.
153 See Woodhouse, supra note 28, at 37–38.
155 Id.
court, which can then be fleshed out at a hearing with the examination of witnesses.\textsuperscript{156}

Another source of options for reform comes from the adult criminal justice system in Massachusetts, in which a defendant must receive a hearing before it is permissible to shackle the defendant in the courtroom.\textsuperscript{157} The required hearing is by nature flexible, without a “rigid legislative formulation.”\textsuperscript{158} At the hearing, facts on both sides are able to be “thrashed out.”\textsuperscript{159} Given the extent to which due process in Massachusetts’ juvenile system echoes its adult system, this would not be a difficult procedure to implement in juvenile court.\textsuperscript{160}

B. Re-evaluate Notions of Harmless Error

In addition to reforms at trial, changes are needed on appeal.\textsuperscript{161} Appellate courts must serve as more of a check on trial judges, and should adopt a broader interpretation of the harmless error standard.\textsuperscript{162} Rather than focus on whether a trial judge made a technical error of law, an appellate court should center its analysis on whether a juvenile’s fundamental rights were fairly weighed at trial.\textsuperscript{163} This shift in focus would allow juveniles an additional opportunity to present evidence of mitigating factors where the juvenile court denies or disregards that opportunity.\textsuperscript{164} Defense counsel and juvenile court judges should be encouraged to place their observations of the juvenile on the record so that the non-verbal harms of shackling will be more readily

\textsuperscript{156} See id.


\textsuperscript{158} See Martin, 676 N.E.2d at 456; Benjamin, \textit{supra} note 112, at 206.

\textsuperscript{159} See Martin, 676 N.E.2d at 456 (citing Commonwealth v. Brown, 305 N.E.2d 830, 836 (Mass. 1973)).

\textsuperscript{160} See Barbara Kaban, \textit{Rethinking a “Knowing, Intelligent, and Voluntary Waiver” in Massachusetts’ Juvenile Courts}, 5 J. CTR. FOR FAMS., CHILD. & CTS. 35, 37 (2004) (“In Massachusetts, children are afforded the full panoply of due process rights and protections enjoyed by adults.”).

\textsuperscript{161} See People v. Allen, 856 N.E.2d 349, 373–74 (Ill. 2006) (Freeman, J., dissenting).


\textsuperscript{163} See Allen, 856 N.E.2d at 373–74 (Freeman, J., dissenting); People v. Blue, 724 N.E.2d 920, 940–41 (Ill. 2000) (“We ask whether a substantial right has been affected to such a degree that we cannot confidently state that defendant’s trial was fundamentally fair. . . . [W]hen an error arises at trial that is of such gravity that it threatens the very integrity of the judicial process, the court must act to correct the error, so that the fairness and the reputation of the process may be preserved and protected.”).

\textsuperscript{164} See Allen, 856 N.E.2d at 373–74 (Freeman, J., dissenting).
apparent to appellate courts.\textsuperscript{165} Defense counsel, of course, should be especially careful to object to shackling when, in his or her experience, the shackling appears unjustified or excessive.\textsuperscript{166} Further, defense counsel should encourage their clients to speak up and tell sitting judges about their discomforts, assuring the youths that they will not be punished for doing so.\textsuperscript{167} This would encourage the juvenile to become a more active and engaged participant in the court proceeding and would provide him or her with an enhanced sense of agency, regardless of how the court ultimately rules.\textsuperscript{168}

C. Institute a More Expansive Analysis

In addition to these changes, juvenile court judges should also consider a wider array of factors than they do at present, including juveniles’ dignity.\textsuperscript{169} This would make the discriminate approach more fair, humane, and rehabilitative.\textsuperscript{170} Moreover, by taking a more child-centric perspective, the court would better satisfy Woodhouse’s dignity principle.\textsuperscript{171} One promising option is to look to the international stage.\textsuperscript{172} One scholar has critiqued shackling juveniles in light of the United Nations Declaration of Human Rights, which bans “cruel, inhuman or degrading treatment.”\textsuperscript{173} The scholar further cites to the United Nations Convention on the Rights of the Child (CRC).\textsuperscript{174} The CRC requires that children’s dignity receive respect.\textsuperscript{175}

\begin{thebibliography}{99}
\bibitem{note165} See id.
\bibitem{note166} See Thompson, supra note 91, at 980. The level or frequency of the objections required by defense counsel remains unclear. Benjamin, supra note 112, at 216. The best advice to practitioners, therefore, is to object strenuously and continuously. See id.
\bibitem{note167} Cf. Allen, 856 N.E.2d at 374 (Freeman, J., dissenting).
\bibitem{note168} See WOODHOUSE, supra note 28, at 37.
\bibitem{note169} See Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring) (stating that shackling an accused without cause “offends not only judicial dignity and decorum, but also that respect for the individual, which is the lifeblood of the law”).
\bibitem{note170} See Tiffany A., 59 Cal. Rptr. 3d at 372–76; State ex rel. Juv. Dep’t of Multnomah County v. Millican, 906 P.2d 857, 860 (Or. Ct. App. 1995).
\bibitem{note171} See WOODHOUSE, supra note 28, at 40–41.
\bibitem{note175} See id. art. 37.
\end{thebibliography}
Some U.S. jurisdictions are already off to a good start. In California, for instance, one of the justifications for the requirement of necessity is “the affront to human dignity” that accompanies indiscriminate shackling. In Texas, Chief Justice Hedges of the Texas Court of Appeals issued a recent dissent in which he considered the accused’s dignity by accounting for potential embarrassment to the accused as well as “physical burden and pain of restraints.” Finally, Illinois practice, once again, offers a good model for reform. The factors in an Illinois court’s shackling analysis include:

(1) the seriousness of the present charge against the defendant; (2) the defendant’s temperament and character; (3) the defendant’s age and physical characteristics; (4) the defendant’s past record; (5) any past escapes or attempted escapes by the defendant; (6) evidence of a present plan of escape by the defendant; (7) any threats by the defendant to harm others or create a disturbance; (8) evidence of self-destructive tendencies on the part of the defendant; (9) the risk of mob violence or of attempted revenge by others; (10) the possibility of rescue attempts by other offenders still at large; (11) the size and mood of the audience; (12) the nature and physical security of the courtroom; and (13) the adequacy and availability of alternative remedies.

It is noteworthy that Illinois courts consider such factors as the juvenile’s age, character, and temperament, and that they make room for alternatives.

The expansive list in the Illinois analysis gives juvenile court judges the ability to balance both child-centric and security concerns. The addition of factors such as a juvenile’s abuse history would further bolster the courts’ attention to the particular child at issue. Of course,

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176 See, e.g., Tiffany A., 59 Cal. Rptr. 3d at 372–76; R.W.S., 728 N.W.2d at 329, 331 (noting, as a matter of first impression, that North Dakota juvenile courts should consider “the accused’s physical condition” in the shackling analysis).

177 See People v. Wallace, 189 P.3d 911, 927 (Cal. 2008) (citing People v. Duran, 545 P.2d 1322, 1327 (Cal. 1976)).


179 See Allen, 856 N.E.2d at 353.

180 See id.

181 Cf. id.

182 See id.

183 See id.; Perlmutter, supra note 51, at 19–20.
the weight given to a juvenile’s dignity would vary with the severity of the risk posed, as balanced by other mitigating factors. The key task for courts in the future will be to build off of this foundation, more fully weighing the child-centric concerns as outlined in this Comment.

**Conclusion**

While the discriminate approach to shackling is certainly preferable to the indiscriminate approach, it nevertheless fails to provide juveniles with the due process they dearly need. By requiring a hearing, encouraging more active appellate review, and adopting a more expansive totality test that includes a juvenile’s dignity, juveniles’ fundamental rights will be much better protected. Moreover, Woodhouse’s agency and dignity principles will be more fully observed.

With a child-centric framework in hand, substantive reforms may be just off the horizon. On the national scale, current efforts in Florida and North Carolina will provide a good barometer for just how far we have come and just how far we have yet to go. Yet we must remain confident that the courts will soon come to realize the fact that, even in states that have progressed beyond the indiscriminate approach to the discriminate approach, the fundamental rights of juveniles are under restraint.

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184 See Allen, 856 N.E.2d at 353.
185 See Woodhouse, *supra* note 28, at 34–35.
188 See Woodhouse, *supra* note 28, at 34–35.
189 See id.
190 See Perlmutter, *supra* note 51, at 25.
191 See Tiffany A. v. Superior Court, 59 Cal. Rptr. 3d 363, 375 (Ct. App. 2007).