The Chains May Be Heavy, But They Are Not Cruel and Unusual: Examining the Constitutionality of the Reintroduced Chain Gang

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NOTE

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I. INTRODUCTION

On May 3, 1995, Alabama became the first state in the Union to reintroduce the practice of chained inmate labor, “chain gangs,” which until that time had not been used in America for at least three decades. Several other states have either instituted similar programs, will do so in the near future, or have proposals pending in their legislatures that establish committees to investigate the possibility of using chain gangs.

1. In Alabama, “chain gangs” originally consisted of five medium security inmates; their feet were chained together, as well as to the rest of the gang. Chain Gangs Return to Prisons in Alabama and Arizona, CRIM. JUST. NEWSL., May 15, 1995, at 1. However, on May 21, 1996, as per a settlement agreement between the Alabama Department of Corrections and lawyers representing inmates, the Department of Corrections decided to shackle inmates individually to “allow[] more productive and efficient management of inmates, with increased safety and security.” Michael Pearson, Alabama to End “Cruel” Chain Gangs, PHILADELPHIA DAILY NEWS, June 21, 1996, at 8.


3. See, e.g., Chain Gangs Challenged in Court, PRISON LEGAL NEWS (Lake Worth, Fla.), Sept. 1995, at 10, 11 (noting that on May 15, 1995, Arizona began using prisoners in shackles to cut weeds along Interstate 191); see also Florida Is Third State to Revive Chain Gangs, BERGEN REC. (N.J.), November 22, 1995, at A22; Cheatham County Puts Its Prisoners to Work, COM. APPEAL (Tenn.), December 7, 1995, at B2 (Cheatham County, Tennessee reestablished chain gangs for the first time in three decades); USA TODAY, May 3, 1996, at A3 (“Iowa became the fourth state to put prison chain gangs to work along roads and in parks.”).

This reintroduction of chain gangs has occurred in conjunction with the restriction of other prisoner amenities and privileges.\(^5\)

A complaint was filed by the Southern Poverty Law Center on behalf of several prisoners and "on behalf of the class of all present and future Alabama inmates who have been or may be assigned to work in chain gangs on the Alabama roadsides."\(^6\) The complaint alleged that "the substantial and constant risk of serious harm to plaintiffs . . . has inflicted cruel and unusual punishment on plaintiffs in violation of the Eighth\(^7\) and Fourteenth Amendments\(^8\) to the United States Constitution."\(^9\)

Part II of this Note focuses on the history of prison labor, leading up to the reintroduction of chain gangs. Part III analyzes the historical development and interpretation of the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. This Part explains that the historical meaning of the Cruel and Unusual Punishment Clause, as derived from the English Bill of Rights of 1689, only intended to prohibit methods of punishment that were not proportional to the crime committed.\(^10\) This Part also investigates the leading Eighth Amendment cases in an attempt to determine what constitutes a violation of the Cruel and Unusual Punishment Clause. Part IV addresses . . .

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5. For a breakdown of various amenities and privileges being withdrawn from prisoners in different states, see Peter Morrison, *States Cut Back on Inmates' Privileges*, NAT'L. L.J., Aug. 21, 1995, at A22 (including restrictions or prohibitions on smoking, weightlifting, family visits, and good-time reductions); see also *Chain Gangs Return to Prisons in Alabama and Arizona*, supra note 1, at 3 (noting that the National Prison Project considers chain gangs part of a "'mean-spirited and vicious movement to make prisons more punitive,' which includes . . . restrictions on use of recreational equipment, limits on educational opportunities, reducing the quantity and quality of food, tighter limits on visits and family contacts, and . . . 'regulations about personal appearance.'").


7. U.S. Const. amend. VIII.


9. Complaint at 6, Austin (No. 95-T-637-N). The most substantial argument presented in the complaint was that since the inmates were chained together and working in such close proximity to the road, if one inmate was hit by a car, the whole gang could be dragged along. *Id.* at 4. The complaint also alleged that since the inmates worked in such close proximity to their fellow chain gang members for extended periods of time, serious conflicts between the tool-wielding inmates were a constant risk and that the limited guard to inmate ratio made it unlikely that the inmates would be sufficiently protected. *Id.* at 4-5. An Amended Complaint was filed on May 17, 1995, and a Second Amended Complaint was filed September 19, 1995. The major additional allegations were that the inmates feared that the guards would fire into the crowd during an altercation between inmates and that the chained inmates were unable to protect themselves from snakes, wasps, or falling trees. Second Amended Complaint at 4-6, Austin v. James, Jr. (M.D. Ala. filed Sept. 19, 1995) (No. 95-T-637-N).

10. See infra notes 42-56 and accompanying text.
cruel and unusual punishment as it relates to prisoners, focusing on the standards to be applied in reviewing condition of confinement cases and determining which problems, if any, rise to the level of a constitutional violation. This part also argues that courts should defer to prison officials when condition of confinement cases are brought. The reason for this deference is twofold; prison officials have more expertise and experience in dealing with prison labor and discipline, and second, there is a lack of guidance provided by the text of the Eighth Amendment itself. This lack of textual guidance is also a reason to leave the determination of what constitutes cruel and unusual punishment to the political process instead of the courts. Part V reviews the established standards for prisoners and analyzes past court decisions to determine the constitutionality of chain gangs. This part demonstrates that despite the state’s seeming violation of its duty to protect prisoners in its custody, the use of chain gangs does not violate the “deliberate indifference” standard the courts require to prove an Eighth Amendment violation. Chain gangs, while neither serving as a beneficial deterrent to crime nor having any measurable effect on the inmates assigned to it, still do not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Finally, this Note offers some suggestions that prison officials should implement in order to make the chain gangs safer and more efficient, and thus possibly avoid future lawsuits.

II. THE HISTORY OF PRISON LABOR AND CHAIN GANGS

Historically, state and county inmates were a reliable source of labor for mines, lumber camps, and farms. A system of convict leasing was initiated, whereby inmates were leased out to private companies at a low cost. This system, however, was very corrupt; often more convic-

11. See infra notes 134-43 and accompanying text.
12. See infra notes 93-114 and accompanying text.
14. WARD & ROGERS, supra note 13, at 32 (The “convict lease system was a natural result; it proved profitable both to the state and to the lessee, as the latter could almost always underbid free labor.”) (quoting 6 WILLIAM O. SLOGGS, THE SOUTH IN THE BUILDINGS OF THE NATION 48 (1919)); see also SANFORD BATES, PRISONS AND BEYOND 102 (1971) (Tennessee state prisoners built a road for $100,000 where the estimated cost if the W.P.A. would have built it was $750,000; however, “[i]t’s $650,000 worth saving in addition to the improved health of a few hundred men?”).
15. See WARD & ROGERS, supra note 13, at 30-50.
innocent people were convicted to bolster the number of convicts available for labor. As a result of the harsh conditions faced under this system and a high fatality rate among the inmates, states stopped leasing the convicts to private companies and began using the inmates for state projects.

Prison labor in the South started with the premise that prisoners should be forced to work to earn their keep; it was not cost effective for inmates to sit in their cells at the taxpayer’s expense. If, during incarceration, the physical or mental labor of prisoners can be used “to produce things of value for the [state], the sum total of the cost of [the prisoner’s] keep [will] be reduced.” The overall economic situation in

in the name of fiscal responsibility and . . . private [greed] motives . . . .” Id. at 77. From 1910-1914, the Alabama prison system’s profit from the convict leasing system was over two million dollars. Id. at 116. See also id. at 29, 45 (noting that hard labor laws had allowed counties to hire out misdemeanor convicts for labor, but those convicted of felonies were sent to the state penitentiary; therefore, the tendency would be to convict for a misdemeanor, in order to keep the labor force of the county strong).


[O]nce [a county] adopted the plan of convict roadwork, it becomes necessary to maintain a convict road force sufficient in number to justify the overhead charges for equipment and supervision. Under such circumstances the local criminal courts tend to be looked upon as feeders for the chain gang, and there is evidence in some instances that the mill of criminal justice grinds more industriously when the convict road force needs new recruits.

Id.

18. On April 8, 1911, there was an explosion at the Banner Mine, resulting in 128 deaths, mostly black convicts. Ward & Rogers, supra note 13, at 5, 6-7. The convict-leasing system was so harsh that in 1870, 41% of its prisoners were killed. Id. at 30; see also Booth, supra note 13, at E1, E8.

19. Blake McKelvey, American Prisons 105 (Patterson-Smith Pub. Corp. 1968) (1936) ("‘The most desirable system for employing convicts is one which provides primarily for the punishment and reformation of the prisoners and the least competition with free labor, and, secondarily, for the revenue of the State.’" (quoting House of Representatives Industrial Comm’n, Prison Labor, H.R. Doc. No. 476, 56th Cong., 1st Sess.)); see also J. Thorsten Sellin, Slavery and the Penal System 166 (1976) (chain gangs were meant “to exploit the labor of the prisoners, [obtaining] maximum profits at minimum cost . . . [with the] chains [serving as] a substitute for the locks and bars of [the] . . . prison”).

20. Ward & Rogers, supra note 13, at 26. But see McKelvey, supra note 19, at 36 (prison labor was used not to make prisoners earn their keep but to discourage petty criminals from migrating to prison during winter months). Those who sought refuge during the winter in Albany would commit petty offenses to enter the penitentiary; in 1843, the state tried “to correct [the problem] by building . . . local penitentiary[ies] for . . . confinement at hard labor of short-term drunk[s] and vagrants.” Id.

21. Bates, supra note 14, at 91. “[T]here are] thousands of able-bodied idle laborers being fed at public expense . . . , millions of dollars [of enrichment to the public] to be done, [and] no money to compensate free labor to [complete] it.” Id. at 101.
the South, coupled with the southern climate, "caused [state-run] convict road [labor] to grow . . . until it became [a] . . . major method[] of punishing [prisoners]." There were two reasons judges sought to send convicts to county chain gangs instead of state prison: economics and retribution: chain gangs were considered a more "disgraceful and humiliating" punishment than the penitentiary. The early chain gangs were extremely harsh and violent, and despite the movement to improve inmate safety and living conditions as the states changed from convict leasing (private) to chain gangs (public), the inmates fared no better in the state's hands.

The chain gang members were subjected to extremely harsh conditions of confinement. The chains were welded onto the prisoner's ankles, requiring a blacksmith to remove them. The inmates would work from early in the morning until dark, were often not given medical treatment, and were forced to live in squalid conditions. "The chief reliance for security was on the chains, the dogs, and armed guards."

22. STEINER & BROWN, supra note 17, at 4. Most southern states had "some sort of county prison labor system." Id. at 16. Since the climate was more temperate than other parts of the United States, the inmates could work all year long and less money was needed for inmate clothing and equipment. Id. at 18. However, chain gangs existed in all states of the Union except for Rhode Island as late as 1923. Id. at 3-4.

23. Id. at 6 ("Without [a] doubt the motive underlying the establishment and the continuance of the county chain gang is primarily economic.").

24. Id. The North Carolina population of road camps was almost double that of the state prison. Id. at 5. From the county administrator's point of view, "[t]he chain gang . . . has no further purpose than to punish criminals through the exploitation of their labor for the public good." Id. at 10.

25. WARD & ROGERS, supra note 13, at 54 ("Alabama enslaves her convicts and consigns them to a dangerous and vile existence, that is happiest when it terminates in the rigor of death." (internal citations omitted)); see also SELLIN, supra note 19, at 168 (the "nature of the punishment depended on the attitude of the [chain gang] camp captain[s]," who often ignored limits set by law or regulation in administering punishment). Additional punishments included floggings, stockades, sweatboxes, and solitary confinement on a bread and water diet. Id. at 168-69.

26. SELLIN, supra note 19, at 176 (noting that the poor treatment of prisoners resulted from "deeply rooted public view of punishment as retribution . . . ").

27. VINCENT G. BURNS, THE MAN WHO BROKE A THOUSAND CHAINS 29-30 (1968) (describing how the chains from the ankles ran through a collar around the inmate's waist and then connected to a rod running above the beds to restrain the men at night). For background information on the various methods of chaining and restraining prisoners, see STEINER & BROWN, supra note 17, at 95 (describing how the inmates had shackles on either one or both ankles with approximately twenty inches of chain in between); SELLIN, supra note 19, at 167 (often a two-pronged device known as a spike was attached to the shackle, which served as a hindrance to movement).

28. BURNS, supra note 27, at 29-30.

29. MCKELVEY, supra note 19, at 183; cf. STEINER & BROWN, supra note 17, at 179-83 (noting that some counties did not use chain gangs and adopted the honor system; the inmates knew if they violated the trust, they would be sent to a regular chain gang).
The constructive demise of chain gangs began in the 1930s. As the harsh conditions of the chain gangs became known, public pressure was placed on state legislatures to investigate the allegations of violence and corruption. Governor Ellis Arnell of Georgia was a major driving force behind the phasing out of southern chain gangs. Alabama, however, never repealed the statute authorizing prison officials to shackle and chain inmates; the practice just fell into disuse. What has brought about the return of chain gangs to Alabama and several other states?

Alabama offers several reasons why the Department of Corrections reintroduced chain gangs. First, there is nothing new about forcing

30. The reform movement reached its zenith with the 1932 film "I am a Fugitive from a Chain Gang," the story of a man who had been charged with a minor crime, sentenced to a chain gang, later escaped, and was living his life in fear of being returned. Cohen, supra note 2, at 26. The man was returned to the chain gang, escaped again, and a year after New Jersey refused to extradite him, he received a pardon from the state of Georgia. Id.; see also BURNS, supra note 27, at 12. Burns notes that:

The chain gangs of [several states] were beyond a doubt as flagrant a violation of human rights as anything on earth. By democratic means, by the power of the press as exemplified in our book I am a Fugitive from a Chain Gang, and by the power of an aroused public opinion this grave injustice was eliminated and the chains were taken off the bodies of the prisoners.

Id. See also Mary Jo Melone, Prison Crew Law Unfettered by Details, ST. PETERSBURG TIMES, June 22, 1995, at B1 (reporting that on July 16, 1967, thirty-eight of fifty inmates died when roadside barracks they were sleeping in burned down in Santa Rosa County in northern Florida).

31. As a result of the film "I am a Fugitive from a Chain Gang," and the subsequent book, citizens went to their legislators and forced change at a time where the prison officials were trying to get tougher on inmates. BURNS, supra note 27, at 327-28. In 1933, a legislative investigation into Georgia chain gangs was ordered. Id. at 323-24. The Prison Industries Reorganization Board was formed in 1937 to evaluate ways to eliminate Georgia's chain gangs. Id. at 327.

32. Id. at 7-8. When he took office in 1943, Governor Arnell "immediately abolished the use of stripes, shackles and leg irons on chain gang prisoners." Id. at 338. Former Governor of Georgia Ellis Arnell said:

There was not a good penal system in the United States in 1943. There is not a good penal system in the United States in 1968 . . . . There have been changes; there have been improvements; but the basic concept of the penal system is still much the same, and it is this concept that must be altered drastically and fundamentally in our society.

Id. at 7-8.


34. The chain gangs of the 1930s grew into a system of road camps where the inmates where housed. Ala. Dept. of Corrections, Briefing Paper on Chain Gang Program 2 (1995) [hereinafter DOC Briefing Paper] (on file with the Hofstra Law Review). "Sometime between the 1930s and 1950s, the chains were dropped and the inmates" just worked under armed guards. Id. During the 1950s, the road camps were phased out. Id.; see also Booth, supra note 13, at E1 (old chain gangs were continued in the South until the 1960s, when widespread abuse led to reform, then extinction).
inmates to work in Alabama, for on any given day, there are as many as sixteen squads of inmates working under armed guards. The chain gangs will allow twice as much work to be accomplished at half the cost and the possibility of escape has been drastically reduced.

Another argument in favor of chain gangs is that it is indisputable that "an industrious man makes less trouble than an idle one," and, historically, riots and disturbances are less likely when good industrial programs are in order. Chaining medium security prisoners to work clearing the roads enables minimum security prisoners to work closer to civilian areas, where a significant amount of work has gone undone because of a lack of eligible inmates.

The return to chain gangs is also a result of a changing public policy that favors harsher, less expensive prisons. State officials have been responding to citizen's requests that the state get tougher on criminals. In Alabama, the public reaction to the reintroduction of

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35. DOC Briefing Paper, supra note 34, at 2.
36. Id. Before the reintroduction of chain gangs, one correctional officer was used to guard twenty unchained inmates. Once the inmates were chained together in groups of five, one officer could then guard forty inmates. Id. However, since Alabama's recent decision to shackle the inmates individually, it is unclear what the new ratio of inmates to guards will be and if the new system will be as cost effective as the chain gangs were intended to be. See Pearson, supra note 1.
38. Letter from Chas. H. Simmons, Senior Research Analyst, Ala. Dep't of Corrections, Research, Monitoring, and Evaluations, to Yale Glazer (Sept. 28, 1995) [hereinafter DOC Evaluations] (on file with the Hofstra Law Review). Prior to chain gangs, only minimum security prisoner were used on out-of-prison projects. With an increased number of inmates available to work, more public work projects can be accomplished. Id.
39. Peter Morrison, The New Chain Gang, NAT'L. L.J., Aug. 21, 1995, at A22. States are also being swayed by new federal legislation such as H.R. 663 and S. 930, which would only give federal money to states that end privileges such as smoking, weightlifting, and family visits, as well as withholding funds from prisons failing to establish a forty-eight hour work week and a sixteen hour per week study limit. Id. Compare Alabama with Arizona, which uses chain gangs to "instill self-discipline and an improved work ethic in all inmates." Chain Gangs Return to Prisons in Alabama and Arizona, supra note 1, at 2. Arizona chain gangs are also intended to "stigmatize crime violators and signal to the public and any would-be criminals that prison life consists of hard work and few creature comforts." Id.; see also John Barry, Chain Gangs: Cruelty, or Justice?, BRADENTON HERALD DAILY (Fla.), May 29, 1995, at 13 (reporting that a Florida Senator wants to see "dregs of the system—killers, rapists, armed robbers—sweating in shackles in muddy highway ditches under the shotgun, where everyone can see them and know that Florida has no mercy on criminals").
40. See Booth, supra note 15, at E1 (characterizing the masses as "an electorate scared of crime, fed up with what it sees as coddling"); see also Cohen, supra note 2, at 26; see generally Recent Legislation, 109 HARV. L. REV. 876, 876 (1996) (Florida's chain gangs established in response to pressures to "reduce expenditures on corrections and to emphasize the punitive nature of incarceration").
chain gangs has been generally positive.  

III. HISTORICAL DEVELOPMENT OF THE EIGHTH AMENDMENT CRUEL AND UNUSUAL PUNISHMENT CLAUSE

The Eighth Amendment Cruel and Unusual Punishment Clause was derived from section nine of Virginia’s Declaration of Rights, which was a verbatim copy of a prohibition in the English Bill of Rights of 1689. Historically, prohibitions on punishment did not forbid “cruel and unusual” punishment, but instead stated that the punishment should be proportional to the crime. The biblical concept of lex talionis authorized heinous punishments for heinous crimes. The Magna Carta, written in 1215, prohibited excessiveness of punishment, stating that “[a] free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence.” A fourteenth century document, which purported to be a copy of the Laws of Edward the Confessor (1042-66), extended the policy of the Amercements Clause to cover physical punishment” in addition to monetary penalties.

During the political turmoil in England in 1668, a new Declaration of Rights was drafted, containing general statements “securing . . . our religion, laws, and liberties.” Clause nineteen of the original draft read “[t]he requiring excessive bail of persons committed
in criminal cases and imposing excessive fines, and illegal punishments, to be prevented, but when the final draft was enacted, it had somehow been changed to "that excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." The only contemporary recorded use of the terms "cruel and unusual" and "cruel and illegal" occurred during the Oates affair (1678-79), which made it clear that no prohibition was intended on the methods of punishment; prohibition was intended only if the punishment was unauthorized by statute and its imposition was outside the jurisdiction of the court. By 1689, England, despite having adopted the Bill of Rights, merely prohibited excessive punishment; death or torture remained the penalty for several crimes. The Framers of the United States Constitution were unsure whether it was necessary to include a protection against cruel and unusual punishment in the Constitution, or whether it was a matter best left to legislative determination. However, when Virginia's version of what

51. Id. at 855 (quoting 10 H.C. Jour. at 17 (1688-1689)).
52. Id. This final draft changed the language, but no contemporary document gives any reason for the change. Id. Granucci says the final phraseology, especially the use of the word "unusual," must simply be the result of chance and sloppy draftsmanship. Id. All evidence also points away from the "Bloody Assize," a series of treason trials in 1685 to which many historians accredit the origins of the terminology "cruel and unusual punishment." Id. at 853-56 (noting that none of the "cruel" methods of punishment ceased to be used after the passing of the Bill of Rights, including drawing and quartering, beheading, and the burning of female felons at the stake). A leading member of the committee drafting the Bill of Rights was the chief prosecutor of the "Bloody Assize," thus making it unlikely that he would have drafted a document condemning his own actions. Id. Moreover, "Bloody Assize" is only mentioned once in the Commons debate, and is never referred to as either "cruel," "unusual," or "illegal." See Granucci, supra note 43, at 857-59. Titus Oates, minister of the Church of England, proclaimed the existence of a plot to assassinate the king. His perjury resulted in several deaths, and after being found guilty of perjury, Oates appealed his sentence of a fine of 2,000 marks, life imprisonment, whippings four times a year, and a defrocking. Id. at 858. The dissent in the House of Lords held that being contrary to the Bill of Rights, "it doth appear, that excessive bail ought not to be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." Id.
54. None of the punishments inflicted upon Oates amounted to torture. Life imprisonment is still used today, whippings continued for several years, and although the fine may have been excessive and the defrocking unusual, neither was inherently cruel. Id. at 859.
55. Id. at 848.
56. "Branding, mutilation, the stock and pillory, the bilbo, the ducking-stool, hard labor, death, and flogging were all used by the British government to punish criminals." Hall, supra note 47, at 413; see also Granucci, supra note 43, at 863 (Blackstone's England allowed drawing and quartering, beheading, burning, slitting of noses, and the mutilation of felons).
became the Cruel and Unusual Punishment Clause was adopted, it was accepted with little debate. The indefiniteness of the terms used was questioned, but the Clause was "agreed to by a considerable majority."

The relevant terms, cruel, unusual, and punishment have

his supporters wanted to avoid potential abuses of legislative power, such as extortion and oppression: "It must have come to [the founders] that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." *Weems*, 217 U.S. at 372. "In contrast, William Wilson strongly believed 'the spirit of liberty could be trusted' to legislators[,] . . . 'the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious behavior.'" *Vold*, supra, at 224 (citations omitted).

Perhaps because Virginia and eight other states had incorporated some sort of cruel and unusual punishment protection, as well as the federal government using a similar protection for the Northwest Ordinance of 1787, the states wanted the assumed protection of such a clause, even if it turned out to be boilerplate language that was often adopted without debate. Granucci, *supra* note 43, at 840.

The following discussion regarding the Cruel and Unusual Punishment Clause took place:

MR. SMITH, of South Carolina, objected to the words, "nor cruel and unusual punishment," the import of them being too indefinite.

MR. LIVERMORE [of New Hampshire]-the [C]lause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have not meaning in it, I do not think it necessary . . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whippings, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel?

Granucci, *supra* note 43, at 842 (citing 1 *ANNALS OF CONG.* 782-83 (1789)).

The definition of cruel in the seventeenth century was much less onerous than today, meaning hard or severe. *Id.* at 860. The Supreme Court's first definition of cruel is found in *In re Kemmler*, 136 U.S. 436, 447 (1890), where the Court found that punishment was cruel when it "involve[d] torture or a lingering death . . . something inhumane and barbarous, something more than mere extinguishment of life." *Vold*, *supra* note 57, at 243 (quoting *Kemmler*, 136 U.S. at 447). The Court next defined cruelty in *Weems*, 217 U.S. at 377, equating cruelty with a punishment's "excess of imprisonment and that which accompanies and follows imprisonment." *Id.* Punishment without a legitimate purpose was also held to be cruel by the *Weems* Court. *Id.* at 381. Severity should not be equated with cruelty, for a severe punishment is not always an unconstitutional one. LARRY C. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 10 (1975).

"If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." *Trop v. Dulles*, 356 U.S. 86, 101 n.32 (1958); *see Vold*, *supra* note 57, at 243; *see also Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) ("unusual" means "such as [does not] occurr in ordinary practice" (quoting *WEBSTER'S SECOND INTERNATIONAL DICTIONARY* 2804 (1954))); *see, e.g., Berkson*, *supra* note 61, at 25 (hangings, while not considered unusual, sometimes were cruel, but electrocutions were instantaneous, so it was difficult to see how they could be cruel).

"As a legal term of art, 'punishment' has always meant a 'fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.'" *Helling v. McKinney*, 509 U.S. 25, 38 (1993) (Thomas, J., dissenting) (citations omitted).
been defined differently over time, which may account for confusion in the interpretation of the Clause.\textsuperscript{64} One question that was never answered is, at what point does a practice that had become unusual due to a long period of nonuse, such as chaining convict laborers, become "usual" again when that practice is reimplemented by several states?

A review of the leading Eighth Amendment Cruel and Unusual Punishment Clause cases provides insight for defining such violations. In \textit{Weems v. United States},\textsuperscript{65} the Supreme Court held that the Eighth Amendment was progressive and needed to keep pace with changing public sentiment.\textsuperscript{66} The Court, in finding proportionality to be part of the Eighth Amendment, held that the punishment imposed on Weems was improper in both method and quantity.\textsuperscript{67} In \textit{Trop v. Dulles},\textsuperscript{68} the Court held that the punishment received as a result of the soldier's conviction for desertion violated the Eighth Amendment.\textsuperscript{69} The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{70} The Court again examined proportionate punishment when it held that the application of the death penalty as a punishment for rape violated the Eighth Amendment.\textsuperscript{71} According to \textit{Coker v. Georgia}, the Eighth Amendment

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  \item \textsuperscript{64} The colonists relied upon 4 \textsc{William Blackstone, Commentaries} (1768), which was the only treatise of the day that discussed punishment. Granucci, \textit{supra} note 43, at 861-62. Blackstone noted that punishments that "savor of torture or cruelty" were prohibited in England not by statute, but "by the `tacit consent' of the English people." \textit{Id.} at 863-64. A misapplication of Blackstone's use of "cruel and unusual" language to torture could have occurred as the American Framers interpreted the Cruel and Unusual Punishment Clause. \textit{Id.} at 865 (arguing that if the Delaware Supreme Court in 1963 could misunderstand Blackstone in \textit{State v. Cannon}, 190 A.2d 514, 515-16 (Del. 1963), it was possible for the Framers of the U.S. Constitution to misunderstand Blackstone's \textsc{Commentaries} to mean that the words cruel and unusual punishment proscribed torturous, not excessive punishment).
  \item \textsuperscript{65} 217 U.S. 349 (1910).
  \item \textsuperscript{66} \textit{Id.} at 378 ("The [Cruel and Unusual Punishment] [C]lause [is] ... progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.").
  \item \textsuperscript{67} Hall, \textit{supra} note 47, at 438. Weems' punishment for the crime of falsification by a public official of a public and official document was fifteen years imprisonment at hard and painful labor, carrying a chain at the ankle, as well as civil interdiction, perpetual absolute disqualification from holding political office and voting, and being subject to surveillance during the remainder of his life. \textit{Weems}, 217 U.S. at 364.
  \item \textsuperscript{68} 356 U.S. 86 (1958).
  \item \textsuperscript{69} \textit{Id.} at 102. The soldier, besides being imprisoned at hard labor and given a dishonorable discharge, was also stripped of his citizenship pursuant to the Nationality Act of 1940. \textit{Id.} at 89.
  \item \textsuperscript{70} \textit{Id.} at 101. The Court also held that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man." \textit{Id.} at 100.
  \item \textsuperscript{71} \textit{Coker v. Georgia}, 433 U.S. 584, 592 (1977); see also Bicka A. Barlow, Comment, \textit{Severe Penalties for the Destruction of "Potential Life"-Cruel and Unusual Punishment?}, 29 U.S.F. L. REV.
bars punishments that are both "barbaric" and excessive.\textsuperscript{72}

The Court next attempted to establish objective standards under the Eighth Amendment when reviewing the severity of a sentence.\textsuperscript{73} The majority proposed a three-part analysis to determine Eighth Amendment criteria.\textsuperscript{74} The dissent, written by Chief Justice Burger, stated that the Court had only applied the proportionality test in extraordinary cases,\textsuperscript{75} and that it was clear error for "appellate courts to second-guess legislatures as to whether a given sentence of imprisonment is excessive in relation to the crime . . . ."\textsuperscript{76}

The Court's plurality decision in \textit{Harmelin v. Michigan},\textsuperscript{77} upholding a mandatory sentence of life in prison without possibility of parole for possession of 672 grams of cocaine, supports the proposition that the constitutionality of chain gangs is either not an Eighth Amendment question at all, or alternatively, does not violate the Eighth Amendment. Justice Scalia authored the opinion and was joined in his reasoning by Chief Justice Rehnquist.\textsuperscript{78} Scalia concluded that the decision in \textit{Solem} was incorrect, stating that the Eighth Amendment does not contain a proportionality guarantee,\textsuperscript{79} except for "aspect[s] of our death penalty

\begin{footnotes}
\footnotetext[72]{463, 491 (1995).}
\footnotetext[73]{433 U.S. at 592. The Court held that "[a] punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." \textit{Id.}}
\footnotetext[74]{463 U.S. at 277, 290 (1983) (Burger, C.J., dissenting).}
\footnotetext[75]{"[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." \textit{Id.} at 292; see also \textit{Barlow}, supra note 71, at 490.}
\footnotetext[77]{463 U.S. at 311. Chief Justice Burger, in his dissent, cites \textit{Rummel v. Estelle}, 445 U.S. 263 (1980), and \textit{Hutto v. Davis}, 454 U.S. 370 (1982), both of which disapproved of the "objective" factors the majority established. \textit{Solem}, 463 U.S. at 311 n.3 (leaving open the possibility for a court to review a sentence that is grossly disproportionate to the offense only "where reasonable men cannot differ as to the inappropriateness of a punishment").}
\footnotetext[78]{501 U.S. 957 (1991).}
\footnotetext[79]{\textit{Id.} Justice Kennedy filed an opinion joining in the holding, but wrote a concurrence that offered an alternative reason to support the Court's affirmance. \textit{Id.} at 996-1009; see \textit{Barlow}, supra note 71, at 490; see also \textit{Hall}, supra note 47, at 440-41.}
\end{footnotes}
Mandatory sentences may be cruel, but they are not unusual, as they have been used throughout this nation’s history.

In Justice Kennedy’s concurrence, he noted several limitations on the use of proportionality review, but unlike Scalia and Rehnquist, he believed that such a review still existed. The overriding theme of Justice Kennedy’s concurrence is that the legislature is the proper body to determine prison sentences, and the Eighth Amendment is only implicated when extreme sentences are imposed that are grossly disproportionate to the crime committed. Justice Kennedy also noted that “the Eighth Amendment does not mandate adoption of any one penological theory,” since the state and federal courts have at times accorded different weights to the various goals of punishment.

Courts should proceed cautiously when making an Eighth Amendment judgment for, unless the Supreme Court reverses it, “a decision that a given punishment is impermissive under the Eighth Amendment cannot be reversed short of a constitutional amendment.” To see if the form of punishment violates the Eighth Amendment, one view requires that “the court . . . first determine whether the punishment would have been considered cruel and unusual at the time of the adoption of the Amendment; [i]f so, the punishment is forever forbidden.” If a punishment

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XVIII (1784)) or had separate provisions for cruel and unusual punishment and proportionate sentencing. Id. at 977; see also Barlow, supra note 71, at 490.

80. Harmelin, 501 U.S. at 994.
81. Id. at 994-95 (“There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is ‘mandatory.’”); see also Christopher E. Smith, The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas, 43 DRAKE L. REV. 593, 601 (1995).
82. Harmelin, 501 U.S. at 998-1001; see Hall, supra note 47, at 441.
83. Harmelin, 501 U.S. at 998. The first principle is that the fixing of prison terms for specific crimes involves a substantive penological justification that is “properly within the province of legislatures, not courts.” Id. The sentencing system can not be evaluated without agreement on the purposes and objectives of the penal system, and the responsibility for making these decisions lies with the legislature. Id. Justice Kennedy also finds that divergences in theories of sentencing and length of prison terms are both inevitable and beneficial parts of the federal structure of government. Id. at 999.
84. Harmelin, 501 U.S. at 1001.
85. Id. at 999. Various penological goals include “retribution, deterrence, incapacitation, and rehabilitation.” Id.; see also Hudson v. Palmer, 468 U.S. 517, 524 (1984) (stating that as a practical matter, restrictions on prisoners rights serve as a reminder that “under our system of justice, deterrence and retribution are factors in addition to correction”).
87. Hall, supra note 47, at 410. “Courts universally agree . . . [that] the Framers [of the Constitution] intended to forbid certain types of punishment; particularly, those penalties that were unnecessarily cruel or involved torture and lingering death.” Id. at 411-12 (citing In re Kemmler,
is inconsistent with "contemporary standards of decency," the Eighth Amendment would forbid its use, even if originally permissible.\(^8\) Legislatures should be afforded great deference in assigning punishment, and as long as the punishment imposed is within the legislatively created jurisdiction of the court, judicial review should be limited to those cases that are "extreme examples that no rational person, in no time or place, could accept."\(^9\)

However, one can imagine a situation where even rational people would vote for a "cruel" punishment, such as beheadings. Should the will of the majority of the people decide what is cruel and unusual, or should the members of the Court? The "evolving standards of decency" test that the Court espoused in \textit{Trop v. Dulles}\(^10\) is problematic because the Court itself is forced to define what exactly are the "evolving standards of decency." Since the Eighth Amendment Cruel and Unusual Punishment Clause is so vague and open-ended, courts should defer to the political process to determine the types of punishment allowed.\(^9\) Where there is a lack of textual standards provided by the Constitution, the role of the Court should remain narrow. The hands-off approach to the condition of confinement and to cruel and unusual prison punishment claims is further examined in part IV.\(^9\)

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\(^{8}\) Hall, \textit{supra} note 47, at 410.


\(^{10}\) Id.

\(^{11}\) See infra notes 134-43 and accompanying text.
IV. THE EIGHTH AMENDMENT, CONDITIONS OF CONFINEMENT, AND APPLICABLE STANDARDS

The standards used to define when conditions in penal institutions, as opposed to sentences imposed for crimes, violate the Eighth Amendment Cruel and Unusual Punishment Clause were first addressed by the Court in Estelle v. Gamble. The Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,'" forbidden by past court decisions. The Court noted that an accident or inadvertence on the part of the medical provider is insufficient to constitute wanton infliction of pain; instead, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."

The Court addressed actual conditions of confinement for the first time in Rhodes v. Chapman, holding that double-celling inmates does not violate the Eighth Amendment. The Court held that "the Constitution does not mandate comfortable prisons, and prisons... cannot be free of discomfort."

The next prison conditions case involved an inmate who was shot as guards attempted to quell a prison riot. The Court found that...
unlike Estelle, where the deliberate indifference standard was sufficient to protect prisoners from the actions of prison officials, the officials’ actions to restore order resulting from a disturbance did not violate the Eighth Amendment since the “force was applied in a good faith effort to maintain or restore discipline, [and not] maliciously and sadistically for the very purpose of causing harm.”

The next issue addressed by the Court was whether a prisoner, claiming that various conditions of confinement constituted cruel and unusual punishment, “must show a culpable state of mind on the part of prison officials, and, if so, what state of mind is required.” The Court reasoned that if the pain inflicted is not formally meted out as punishment by statute or sentencing judge, some mental element must be attributed to the prison officials before the Eighth Amendment is implicated. “[A] prisoner challenging official conduct that is not part of the formal penalty for [the] crime must demonstrate . . . ‘a sufficiently serious’ deprivation, and . . . that the officials acted with a ‘sufficiently culpable state of mind.”

A 1994 Supreme Court decision followed the recent trend of limiting prisoner’s rights. In Farmer v. Brennan, the Court further defined the previously established two-pronged ‘deliberate indifference’ standard to be applied in a prison condition case. The Court held that a prison official could only be found liable in a condition of confinement case when the official knew of and disregarded an excessive cruel and unusual punishment).

101. Id. at 320-21 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973)).

102. Wilson v. Seiter, 501 U.S. 294, 304 (1991) (holding that some conditions of confinement may establish an Eighth Amendment violation when combined with others that would not individually be a violation, “but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise”).

103. Id. at 296. The Whitley standard “requires behavior marked by persistent malicious cruelty. . . . At best, [the inmates’] claim evidences negligence [and] . . . negligence, clearly, is inadequate to support an Eighth Amendment claim.” Id. at 305 (citations omitted).


105. Wilson, 501 U.S. at 298; see Criminal Procedure Review, supra note 104, at 1474-75 n.2974-77. For a look at the difference, if any, between challenging chain gangs as discipline or as part of the sentence, see infra notes 120-23 and accompanying text.

106. See Morrison, supra note 5, at A22.


108. Id. at 1974.
risk to the inmate's health or safety, the official was aware of facts from which the inference of a substantial risk of harm could be drawn, and the official had drawn that inference. The Court noted several examples of how the deliberate indifference standard, as defined, would be applied before vacating and remanding the case.

The Alabama prison administrators have established policies to identify many problems that may arise as a result of the chain gangs and have attempted to avoid such problems through explicit rules and regulations. These policies illustrate that prison officials are aware of potential problems and that reasonable efforts have been made to prevent incidents, such as those feared by the inmates who filed the lawsuit in Alabama, from becoming problems.

Using standards established by prior cases, courts have held that various prison conditions violate the Cruel and Unusual Punishment Clause. Prison labor, as addressed by the courts, violates the Eighth

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109. Id. at 1979 (rejecting petitioner's plea to adopt an objective test to determine deliberate indifference).

110. "[A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." Id. at 1981 (emphasis added). A prison official can not "escape liability . . . by showing that while he was aware of an obvious, substantial risk . . . , he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." Id. at 1982. Prison officials who knew of, and responded reasonably to, a substantial risk would not be liable, even if the harm was not averted. Id. at 1982-83.

111. Id. at 1986.

112. See Ala. Dept. of Corrections, Chain Gang Orientation, Limestone Correctional Facility 1-5 (1995) [hereinafter DOC Orientation] (on file with the Hofstra Law Review). The DOC Orientation provides a standard operating procedure for the chain gangs, in which many contingencies are covered such as preventing possible escapes, providing for the inmate's safety, and outlining for prisoners the requirements and responsibilities regarding their time on the chain gang. See also infra notes 180-90 and accompanying text (noting current chain gang conditions and the increased protection of inmate safety from chain gangs of past).


114. Although Alabama prison officials would deny that the "substantial risks" alleged in the complaint exist at all, under the Farmer test, they would only be liable if they knew "that inmates face a substantial risk of serious harm and disregard[ ] that risk by failing to take reasonable measures to abate it." Farmer, 114 S. Ct. at 1984. Alabama decided to shackle inmates individually after a guard shot and killed a prisoner while breaking up a fight between two shackled inmates. Margot Homblower, Three Strikes Are Out: A California Court Cries Foul on the Get-Tough Sentencing Law; Alabama Unchains the Gang, TIME, July 1, 1996, at 54. Thus, once the Alabama prison administrators recognized the potential safety hazard of chaining inmates to one another, the Department of Corrections took reasonable measures to prevent its reoccurrence.

115. See Helling v. McKinney, 509 U.S. 25 (1993) (Thomas, J., dissenting) (holding that involuntary exposure of an inmate to environmental tobacco smoke may show deliberate indifference by officials to the inmate's serious medical needs); Wright v. McMann, 387 F.2d 519, 526 (2d Cir. 1967).
Amendment only when inmates are compelled to perform physical labor which "(1) causes undue pain; or (2) endangers the prisoner's life or health; or (3) exceeds the prisoner's physical capacity."\(^{116}\) In *Holt v. Sarver*,\(^{117}\) the court held that "while confinement, even at hard labor and without compensation, is not considered to be necessarily a cruel and unusual punishment[,] it may be so in certain circumstances and by reason of the conditions of the confinement."\(^{118}\)

Other factors that a court may evaluate in determining whether prison labor violates the Eighth Amendment include the number of hours worked per day and the type of labor performed.\(^{119}\) In *Howard v. King*, however, the conditions complained about by the inmates had been imposed as punishment for disciplinary infractions,\(^{120}\) assignment to the

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118. *Id.* at 373, 385 (holding conditions in the Arkansas penitentiary system were so poor that the entire system was found unconstitutional). For background information about the conditions of the Arkansas penal system, see Hutto v. Finney, 437 U.S. 678, 681 n.3, 682 nn.5-6 (1978). Inmates would work the field ten hours per day, "six days a week, using mule-drawn tools and tending crops by hand. . . . [The inmate] worked in all . . . weather . . . above freezing, sometimes in unsuitably light clothing or without shoes." *Id.* at 681 n.3. Whippings were common, as was the use of the "Tucker telephone," a hand cranked device used to deliver electric shocks to the genitals. *Id.* at 682 nn.4-5. Inmates served as guards and were given the authority to use deadly force against escapees. *Id.* at 682 n.6. Rape was so common that many would not sleep but spent the night clinging to the bars nearest the guards' station. *Id.* at 681-82 n.6.

119. See *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (holding that the inmates stated a cause of action when they alleged that because they had been forced to work seven days per week in the field for over a year, they had been deprived of proper rest, and that "each [plaintiff] has been fully exhausted to the extreme"); see also Jackson v. Cain, 864 F.2d 1235, 1239, 1247 (5th Cir. 1989) (holding that an inmate who was forced to work unmasked shoveling unshucked corn infested with rat's nests and insects, forced to mow grass two hours per day with a substandard mower, required to smash concrete blocks with an eighty-five pound hammer in the summer sun, all while he was not supposed to be working in the sun and heat as a result of having syphilis, should have been given an opportunity to prove the work aggravated his injury and that the officials knew of his condition and ignored it). "When the type of work to which the convict is assigned admittedly worsens a pathological condition, such work must be deemed cruel and unusual punishment . . . ." *Id.* at 1246 (quoting Black v. Ciccone, 324 F. Supp. 129, 133 (W.D. Mo. 1970)).

120. *Howard*, 707 F.2d at 219.
chain gang in Alabama is the punishment for the conviction of a crime.\textsuperscript{121} Even if the second phase of the chain gang system is imposed, where inmates are sent to the gangs for disciplinary problems instead of being sentenced there,\textsuperscript{122} the inmates would still have no recourse available through the courts to contest this confinement.\textsuperscript{123}

Furthermore, an inmate's argument against the use of shackles was dismissed by the court, finding that “[shackles] cannot be considered cruel and unusual punishment unless great discomfort is occasioned deliberately as punishment or mindlessly, with indifference to the prisoner’s humanity.”\textsuperscript{124} An inmate who is hurt on the chain gang as a result of the chains may not have a claim rising to the level of cruel and unusual punishment, since the injury or discomfort needs to be deliberate and resulting from a restraint not commonly used on inmates.\textsuperscript{125}

Despite giving prison officials a great deal of leeway in the administration of their prisons, the courts will not hesitate to act in order to protect inmates from potentially dangerous situations.\textsuperscript{126} Entire prison systems have been held to be in violation of the Eighth Amendment.\textsuperscript{127} In \textit{Cruz v. Beto}, the Court held that “[f]ederal courts sit not to

\begin{itemize}
  \item \textsuperscript{121} Although future plans do intend to include disciplinary problems among the chain gang members, most of the program participants will be repeat offenders who have committed new crimes. \textit{See} DOC Briefing Paper, \textit{supra} note 34, at 2 (second phase of chain gang program will be expanded to include inmates who have chronic disciplinary problems).
  \item \textsuperscript{122} \textit{Id.}
  \item \textsuperscript{123} \textit{See supra} notes 89-92 and accompanying text. If courts are to be deferential to states in allowing them to decide what punishment is acceptable and what is “cruel and unusual,” prison officials should be accorded just as much, if not more discretion, when deciding whether to send chronically disruptive inmates to chain gangs. Prison officials have the expertise in dealing with disciplinary problems and courts should be accordingly deferential. For more information on prison officials' expertise in dealing with the peculiar problems of prisons, \textit{see infra} notes 134-43 and accompanying text.
  \item \textsuperscript{124} Jackson v. Cain, 864 F.2d 1235, 1243 (5th Cir. 1989). Even though less restrictive alternatives of ensuring security may be available, the Eighth Amendment does not require “that the state use the best means available for confining its prisoners.” \textit{Id.} (quoting Fulford v. King, 692 F.2d 11, 14 n.7 (5th Cir. 1982)).
  \item \textsuperscript{125} \textit{See Cain,} 864 F.2d at 1244.
  \item \textsuperscript{126} \textit{See Mark Curriden,} \textit{Hard Time,} 81 A.B.A. J., July 1975, at 72, 75 (1995) (“More than 320 prisons in 39 states are under some type of federal court order . . . [including] \textit{t}he entire corrections systems of seven states—Alaska, Delaware, Mississippi, New Mexico, Rhode Island, South Carolina, and Texas . . . .”).
  \item \textsuperscript{127} \textit{See Holt v. Sarver,} 309 F. Supp. 362, 364 (E.D. Ark. 1970). The \textit{Holt} court held that the term cruel and unusual punishment “is flexible and tends to broaden as society tends to pay more regard to human decency and dignity and becomes . . . more humane . . . [A] punishment that is not inherently cruel and unusual may become so by reason of the manner in which it is inflicted.” \textit{Id.} at 380. The conditions of confinement in the Arkansas prison system were deemed unconstitu-
supervise prisons but to enforce the constitutional rights of all ‘persons,’ including prisoners.”

“The prohibition against cruel and unusual punishment ‘is not limited to specific acts directed at selected individuals, but is equally pertinent to general conditions of confinement that may prevail at a prison.”

Individual factors may not rise to the level of a constitutional violation, but the totality of these circumstances may result in the infliction of punishment in violation of the Eighth Amendment.

Even if no individual aspect of Alabama’s reintroduced chain gang system subjected convicts to conditions in violation of the Eighth Amendment, the system could have been held unconstitutional if a court deemed that the totality of the circumstances regarding the chain gangs showed “institutional treatment of such character or consequences as to shock general conscience or to be intolerable in fundamental fairness.” However, the fact that Alabama decided to voluntarily alter its program of chaining convicts in gangs does not mean that the original method violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. It is unlikely that the federal courts would have disturbed the decision of Alabama Department of Correction officials.

Traditionally, federal courts have adopted a broad “hands-off approach” toward the problems of prison administration and have been

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128. 405 U.S. 319, 321 (1972) (holding that denying an inmate reasonable opportunity to pursue his faith comparable to other inmates violated the Constitution).

129. Smith v. Sullivan, 553 F.2d 373, 378 (5th Cir. 1977) (quoting Williams v. Edwards, 547 F.2d 1206, 1212 (5th Cir. 1977)).

130. Factors include “overcrow[ed] dormitory barracks, lack of [inmate] classification according to severity of offense, ... lack of supervision by civilian guards, [and] absence of a procedure for confiscation of weapons ...” Id. at 378 (quoting Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974)).

131. Id.; see also Howerton v. Arkansas, 361 F. Supp. 356, 362 (E.D. Ark. 1973). In Howerton, the court held that confinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonable civilized people even though a particular inmate may never personally be subject to any disciplinary action.

Id. at 363 (quoting Holt, 309 F. Supp. at 372-73).


133. See generally Pearson, supra note 1; Hornblower, supra note 114.

134. Procunier v. Martinez, 416 U.S. 396, 404 (1974) (holding that federal courts will only discharge their duty to protect constitutional rights “[w]hen a prison regulation or practice offends
reluctant to interfere with the internal administration of prisons.\textsuperscript{135} This long-standing policy requires a clear abuse of discretion before any action is taken.\textsuperscript{136} In \textit{Procunier v. Martinez}, the Court held that “[p]rison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape . . . .”\textsuperscript{137} In \textit{Bell v. Wolfish},\textsuperscript{138} the Court held that prison officials must be accorded wide-ranging deference in the adoption and execution of policies deemed necessary to maintain institutional security, and that “such considerations are peculiarly within the province and professional expertise of corrections officials . . . .”\textsuperscript{139} “The federal courts [were not intended to be] part of the appellate

a fundamental constitutional guarantee”). \textit{But see} Smith, \textit{supra} note 81, at 602 (fearing a return to the hands-off approach of the 1960s and 1970s, which would place the “actualization of prisoners’ constitutional rights . . . in the hands of the same elected [officials] that [historically] created and maintained civil rights violations in the first place”).

\textsuperscript{135} The problems of prisons in America are complex and intractable . . . . Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform . . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities. \textit{Procunier}, 416 U.S. at 404-05; \textit{see also} Cruz v. Beto, 405 U.S. 319, 321 (1972) (“We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations”); Jackson v. Cain, 864 F.2d 1235, 1249 (5th Cir. 1989) (the Supreme Court has emphasized that “day-to-day operation[s] of prisons must be left to the broad discretion of prison officials”).


\textsuperscript{137} \textit{Procunier}, 416 U.S. at 404; \textit{see also} Gray v. Levine, 455 F. Supp. 267, 269 (D. Md. 1978) (“Particularly broad discretion should be accorded to prison authorities in their responses to conditions which may threaten the security of the institutions they manage.”), aff’d, 605 F.2d 1202 (4th Cir. 1979). In \textit{Gray}, the prison was locked down during a work stoppage, and various functions were limited, including showers, recreation, visits, religious services and library privileges. \textit{Id.} at 269-70. The court, despite “the confinement, the serving of cold meals, and the other restrictions imposed . . . conclude[d] that there ha[d] been no violation of the Eighth Amendment’s proscription of cruel and unusual punishment.” \textit{Id.}

\textsuperscript{138} 441 U.S. 520 (1979).

\textsuperscript{139} \textit{Id.} at 547-48. The Court further stated that without substantial evidence that prison officials have exaggerated their response to prison considerations, courts should defer to the administrators’ judgments since they are in a better position to know what action or remedies are necessary and proper. \textit{Id.; see also} Jones v. North Carolina Prisoners’ Labor Union, Inc. 433 U.S. 119, 125 (1977) (holding that the district court “got off on the wrong foot [by] . . . not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement” in limiting a prisoner’s labor union).
process for prison disciplinary proceedings, \textsuperscript{140} \textit{[and]} absent infringement upon constitutional rights, such courts are reluctant to interfere with internal discipline or operations of prisons.\textsuperscript{141} Since hard labor, solitary confinement, and other forms of inmate discipline are left to the discretion of correction officials,\textsuperscript{142} the complaint filed against Alabama's chain gangs probably would not have survived the preliminary stages of litigation. The arguments presented in the complaint, even if true as alleged, are insufficient to reach the level of federal court review under an Eighth Amendment standard.\textsuperscript{143}

Justice Thomas, with Justice Scalia joining, has written two dissents in which he argues that the Eighth Amendment is not intended to protect state prisoners from bringing cruel and unusual punishment claims on the basis of conditions of their confinement.\textsuperscript{144} In both cases, the dissenting Justices questioned whether the Eighth Amendment should apply to anything but the actual sentence imposed by the court.\textsuperscript{145} The Eighth Amendment, by regulating punishments, does not regulate the procedures of sentencing, only the substance of the punishment.\textsuperscript{146} Justice Thomas stated that the "primary responsibility for preventing and punishing [improper] conduct by corrections officers rests not with the Federal Constitution but with the laws and regulations of the various states."\textsuperscript{147} Thomas also stated that he "would draw the line at actual, serious injuries and reject the claim that exposure to the risk of injury can violate the Eighth Amendment."\textsuperscript{148}

\begin{thebibliography}{147}
\bibitem{ToombsHicks} Toombs v. Hicks, \textit{773 F.2d 995, 997} (8th Cir. 1985).
\bibitem{Hutto} \textit{Id. at 997} (citing Hutto v. Finney, \textit{437 U.S. 678, 688 n.12} (1978)).
\bibitem{Hall} Hall, \textit{supra} note 47, at 455 (whipping as punishment does not appear barbaric in relation to the disciplinary methods currently available).
\bibitem{JacksonBishop} \textit{See} Jackson v. Bishop, \textit{268 F. Supp. 804, 807} (1967) (holding that there are some exceptions to the rule that state prison officials should be deferred to, but the special circumstances and the constitutional rights required are not present here).
\bibitem{HudsonMcMillian} \textit{See} Hudson v. McMillian, \textit{503 U.S. 1} (1992) (Thomas, J., dissenting) (holding that prisoner beaten while handcuffed, which beating resulted in minor bruises, swelling, and loosened teeth, presented a colorable Eighth Amendment claim); Helling v. McKinney, \textit{509 U.S. 25} (1993) (Thomas, J., dissenting) (holding that prisoner being subjected to secondhand tobacco smoke may have an Eighth Amendment claim).
\bibitem{Hudson} \textit{Hudson}, \textit{503 U.S. at 18}; \textit{Helling}, \textit{509 U.S. at 37}; \textit{see also} Smith, \textit{supra} note 81, at 602-03.
\bibitem{Hudson1990} \textit{Hudson}, \textit{503 U.S. at 27}; \textit{see} \textit{Helling}, \textit{509 U.S. at 37} (finding that the founding generation knew how to make prison conditions a matter of constitutional guarantee by citing the Del. Decl. of Rights art. I, § XI (1792)). "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted: And in the construction of [jails], a proper regard shall be had to the health of prisoners." \textit{Id}.
\bibitem{Helling} \textit{Helling}, \textit{509 U.S. at 42}.
\end{thebibliography}
V. APPLYING THE EIGHTH AMENDMENT TO THE REINTRODUCED CHAIN GANG SYSTEM OF PENAL LABOR

"It has long been held that hard labor as a penalty for a crime is expressly permitted by the Thirteenth Amendment and not prohibited by the Eighth [Amendment]." When work is conducted in a reasonable manner under public authority, there is no constitutional deprivation. Formally imposed punishment is cruel and unusual if it involves the unnecessary and wanton infliction of pain and if it is "totally without penological justification." The Supreme Court has held that retribution, rehabilitation, incapacitation, and deterrence are all legitimate punishment objectives.

There is also no right for prisoners to refuse to work if required to by prison protocol. Forcing inmates to work is entirely consistent with the institution's duty to maintain effective prison discipline. Prisoners validly convicted may be forced to work, whether or not compensated and even if not relevant to their rehabilitation, so long as the work does not amount to cruel and unusual punishment. Therefore, forcing the Alabama prisoners to break rocks would be permitted, even if the rocks will never be used and the entire exercise is futile. Breaking rocks could even eliminate the need for weightlifting equipment, and as one prison official said, "They'll come back out here...

152. Hall, supra note 47, at 452; see also Criminal Procedure Review, supra note 104, at 1474 n.2973.
153. United States v. Reynolds, 235 U.S. 133, 149 (1914) ("There can be no doubt that the State has authority to impose involuntary servitude as a punishment for crime. This fact is recognized in the Thirteenth Amendment, and such punishment expressly excepted from its terms."); see Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963) (no federally protected right of a state prisoner not to work exists while imprisoned for conviction, even though that conviction is being appealed), cert. denied, 375 U.S. 915 (1963); see also Fallis v. United States, 263 F. Supp. 780, 783 (M.D. Pa. 1967) ("There is no question but that federal prisoners may be required to work in accordance with institution rules.") (citing United States v. Pridgeon, 153 U.S. 48 (1894)).
154. Fallis, 263 F. Supp. at 783 (holding that forced labor does not constitute cruel and unusual punishment, double jeopardy, or involuntary servitude).
and work their soreness out ten hours a day, five days a week."\(^{157}\)

Inmates also have no right to select the work detail to which they will be assigned.\(^{158}\) In *Jackson*, the court held that the decision to remove an inmate from a work assignment is left to the unfettered discretion of prison officials.\(^{159}\) The fact that one facility may offer rehabilitative programs and less strenuous work than another does not entitle inmates to either be transferred or compensated for not having such programs.\(^{160}\) Inmates assigned to the chain gangs, therefore, may not refuse to perform any assigned work,\(^{161}\) and disciplinary actions are appropriate for violations of the prison labor policies.

Prison labor is not required to meet all the safety requirements and standards applicable to the private workplace.\(^{162}\) The court in *Sampson v. King* found that the pesticide complained of was used in a similar fashion by farmers in the area and prison officials should not be held to a higher standard of care than "that practiced by responsible farmers in the surrounding agricultural community."\(^{163}\)


\(^{158}\) See *Jackson v. O’Leary*, 689 F. Supp. 846, 849 (N.D. Ill. 1988) (no colorable claim of cruel and unusual punishment raised by inmate not receiving preference of clerical rather than manual labor job); see also *Berkson*, supra note 61, at 59 (imprisonment at hard labor is not itself cruel and unusual and assigning convicts to work on roads or on chain gangs is not per se violative of Eighth Amendment); *Fidtler v. Rundle*, 316 F. Supp. 535, 536 (E.D. Pa. 1970) (absent specific allegations of extreme hardship in his working conditions, bare conclusion that inmate was forced to work in the prison laundry does not constitute cruel and unusual punishment).

\(^{159}\) *Jackson*, 689 F. Supp. at 849 (inmate has no reason to expect he can keep his current job assignment even if he performs his work adequately and otherwise follows prison rules).

\(^{160}\) McLamore v. South Carolina, 186 S.E.2d 250, 255 (S.C. 1972), cert. denied, 409 U.S. 934 (1972). “[T]here is no constitutional duty imposed on any governmental entity to educate or rehabilitate [its prisoners]. Efforts [to do so] are to be commended; to require that every prisoner be exactly alike might discourage rather than encourage the programs.” *Id.* at 254; see also *Wilson v. Kelley*, 294 F. Supp. 1005, 1012 (N.D. Ga. 1968), aff’d, 393 U.S. 266 (1968) (denying inmate’s claim that a work camp per se violates the Eighth Amendment, where certain institutions offer academic and trade programs and others just physical labor).

\(^{161}\) As long as the work assigned does not fall in one of the three categories for a labor violation, see *Sampson*, supra notes 116-18 and accompanying text, the inmates could be penalized for failure to complete assigned work. For example, if the inmates were forced to remove asbestos from a building without adequate protection, they could successfully challenge the work as endangering their life or health.

\(^{162}\) *Sampson v. King*, 693 F.2d 566, 569 (5th Cir. 1982) (reversing magistrate’s monetary judgment to inmate who claimed he was forced to work in fields recently sprayed with pesticide). The safety codes set by private organizations and standards suggested by experts are merely advisory to the prison officials. *Id.*

\(^{163}\) *Id.* “A prison farm which adheres to the reasonable customs and usages of the surrounding area cannot be said to be imposing cruel and unusual punishment.” *Id.*; see also *Jackson v. Cain*, 864 F.2d 1235, 1244-45 (5th Cir. 1989).
Similarly, prison officials have no obligation to either pay prisoners for their work or to provide employment to the prisoners at all. A state legislature may grant a favor to an inmate in the form of compensation for labor, but the state may attach such conditions to the favor as it sees fit.

One major point argued by the inmates challenging the reintroduced chain gangs is that inmate safety could not be adequately protected if inmates were chained together. When a state places a person into its custody, it assumes a duty for that individual’s safety and well-being and “if by affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and [provide for his own basic needs],” the Eighth Amendment is violated. “Prison conditions may be restrictive and even harsh,” but . . . allowing the beating . . . of one prisoner by another serves no ‘legitimate penological objectiv[e].’” Prison officials who know that a strong likelihood

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164. Woodall v. Partilla, 581 F. Supp. 1066, 1077 (N.D. Ill. 1984) (prisoners have no constitutional right to be paid for their services); see Manning v. Lockhart, 623 F.2d 536, 538 (8th Cir. 1980); see also Sigler v. Lowrie, 404 F.2d 659, 661 (8th Cir. 1969) (“There exists no constitutional right for such payment and it is readily apparent that such compensation is by the grace of the state.”), cert. denied, 395 U.S. 940 (1969); Howerton v. Arkansas, 361 F. Supp. 356, 364 (E.D. Ark. 1973) (“no court has imposed the requirement that, as a condition precedent to the imposition of a compulsory work program, a state must agree to compensate inmates”).

165. Jackson v. O'Leary, 689 F. Supp. 846, 848 (N.D. Ill. 1988) (“At the outset it must be recognized that a prison inmate has no constitutional right to prison employment.”); see also Campbell v. District of Columbia, 881 F. Supp. 42, 43 (D.D.C. 1995) (“[M]ere denial . . . of the opportunity [for an inmate] to work does not on its face set forth cruel and unusual punishment.”).

166. Sigler, 404 F.2d at 661 (holding that some of monies previously earned would be used to reimburse state for cost of inmate's escape).


169. Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994) (citation omitted); see Williams v. Edwards, 547 F.2d 1206, 1214 (5th Cir. 1977) (finding that “it is the obligation of penitentiary officials to ensure that inmates are not subjected to any punishment beyond that which is necessary for the orderly administration of the prison”); see also Streeter v. Hopper, 618 F.2d 1178, 1182 (5th Cir. 1980) (“The state has the responsibility under the Eighth Amendment to protect the safety of its prisoners.”).
Prison officials who know that a strong likelihood exists that a prisoner will be assaulted have an Eighth Amendment duty to protect that inmate.\(^{170}\)

The class of chain gang members anticipate that its complaint will be interpreted in accordance with the Court's holding in *Helling v. McKinney*, that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing had yet happened to them."\(^{171}\) However, the problems noted in *Helling* include threats to personal safety from exposed electrical wiring, deficient fire fighting equipment, and the co-mingling of inmates with serious contagious diseases.\(^{172}\) The threats alleged in the chain gang members' complaint are merely a fear of fights between the inmates and a fear of "create[ing] serious conflicts between the prisoners"\(^{173}\) as a result of working in close proximity to other inmates on the chain gang. This very theory was addressed in *Rhodes v. Chapman*,\(^{174}\) where the inmates argued that "double-celling [of inmates] for long periods [of time] creat[ed] a dangerous potential for frustration, tension, and violence."\(^{175}\) The Court dismissed their contention that double-celling was therefore cruel and unusual by holding that "[a]t most, these considerations amount to a theory that double-celling inflicts pain."\(^{176}\)

Fights and violence are problems inherent in any prison, and to eliminate the chain gang method of prison labor because of a theoretical threat of violence that *could* result would deny the states the opportunity

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169. Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994) (citation omitted); see Williams v. Edwards, 547 F.2d 1206, 1214 (5th Cir. 1977) (finding that "it is the obligation of penitentiary officials to ensure that inmates are not subjected to any punishment beyond that which is necessary for the orderly administration of the prison"); see also Streeter v. Hopper, 618 F.2d 1178, 1182 (5th Cir. 1980) ("The state has the responsibility under the Eighth Amendment to protect the safety of its prisoners.").

170. Matzker v. Herr, 748 F.2d 1142, 1149-50 (7th Cir. 1984). "The prisoner must identify who is threatening him to allow the corrections officers a reasonable opportunity to protect the threatened prisoner from harm." Id. at 1150; see also Mosby v. Mabry, 697 F.2d 213, 215 (8th Cir. 1982) (liability for an assault exists only if the warden knew or should have known of risk of injury and with actual or constructive knowledge, failed to prevent such an attack).

171. 509 U.S. at 33. "The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event." Id.

172. Id.


175. Id. at 349 n.14.

176. Id. at 348-49.
to operate their prisons as they chose. The argument that the inmates are armed with a variety of potential weapons is also insufficient to raise the problem to a level meriting constitutional consideration.

VI. CONCLUSION

Chain gangs do not violate the Eighth Amendment Cruel and Unusual Punishment Clause. In order for a prison practice or condition to be found violative, the practice must be inconsistent with the evolving standards of decency as established by Trop and its progeny. Prison officials would need to be deliberately indifferent to the basic human needs of its prisoners before the inmates could successfully bring a suit. Deliberate indifference entails both a subjective and objective component, both of which must be present for a condition of confinement violation. These standards, which have been clearly set forth by the Supreme Court, are unnecessary according to Justices Thomas and Scalia, who contend that condition of confinement cases should not be brought into federal court at all. Instead, those Justices argue that the Cruel and Unusual Punishment Clause applies only to punishments imposed by the courts and sanctioned by the legislatures, and not to prison conditions or the actions of prison officials, for which other remedies exist.

The conditions of confinement for those inmates assigned to...
The work shackled in Alabama are much different from the brutal conditions of past chain gangs.\footnote{86} The majority of the work assigned to the inmates involves cleaning up and clearing weeds and brush from the side of the highway where mowing crews cannot reach.\footnote{187} The inmates work eight to ten hours per day,\footnote{188} and their privileges during their time on the chain gang are severely limited.\footnote{189}

Despite the long hours and reduction in privileges, the modern chain gang has been dubbed "chain gang lite" by many observers.\footnote{190} The chains themselves are much lighter; eight feet long and weighing just over three pounds.\footnote{191} There are also established regulations and procedures to ensure the safety and well-being of the inmates.\footnote{192} As a result of the agreement reached between the Alabama Department of Corrections and attorneys for inmates, inmates will no longer be chained in groups; thus, this would further protect the inmates from the problems

\begin{footnotes}
\footnotetext{186}{With good behavior, the inmate will only serve a short sentence on the chain gang, generally thirty days, instead of serving the full sentence under hard labor as in past decades. DOC Orientation, supra note 112, at 1.}
\footnotetext{187}{DOC Briefing Paper, supra note 34, at 1. Another assigned task is to break boulders down into smaller rocks, which are shipped into the prisons for future use on prison roads. Chain Gangs Get 'Rock Duty', supra note 156, at N10; see also Alabama to Make Prisoners Break Rocks, supra note 156, at A5.}
\footnotetext{188}{DOC Briefing Paper, supra note 34, at 1. A typical day working on a chain gang includes getting up at 4:30 a.m., loading the bus at 6:00 a.m., returning to the prison after work at 4:00 p.m., with lights out at 9:00 p.m. five days per week. Ala. Dept. of Corrections, Standard Operating Procedure 8E-46 (1995) [hereinafter DOC Operating Proc.] (on file with the Hofstra Law Review). A three sandwich lunch is provided at the site, along with water and toilet facilities. Id. at 4-5. The hours worked and restrictions imposed will probably be the same even though the inmates are now shackled individually. See Pearson, supra note 1.}
\footnotetext{189}{While on the chain gang, no smoking is allowed, no television privileges are granted, and canteen privileges are withheld. DOC Orientation, supra note 112, at 1.}
\footnotetext{190}{Chained to the Past, supra note 2, at 26 (cleaning up the roadside does not compare to being leased to mining companies). The mere threat of bad weather is enough to keep the chain gang inside for the day. Id.; see also Booth, supra note 13, at E1 (relating how the chain gangs are not really about work, where each squad on the rock pile "may actually swing one of the 15-pound sledgehammers for five, or at most, 10 minutes [per hour]").}
\footnotetext{191}{DOC Briefing Paper, supra note 34, at 1 (the chains also cost $43.95 each). However, with the new system of chaining inmates individually, a much shorter and lighter chain will be used.}
\footnotetext{192}{Some protective measures include: monitoring the weather to return to the prison if conditions become dangerous, forbidding horseplay or wrestling among the inmates, and prohibiting men from crossing the highway in chains unless absolutely necessary. DOC Operating Proc., supra note 187, at 2-3. Water breaks are provided at least every hour, more depending upon the heat. Id. at 3. The health care unit periodically checks the inmates for injuries. Id. The men breaking the rocks are provided with safety glasses to protect their eyes from rock pieces, as well as given rest breaks every twenty minutes. Chain Gangs Get 'Rock Duty', supra note 156, at N10.}
\end{footnotes}
alleged in *Austin v. James, Jr.* As the number of prisoner’s rights cases filed by prisoners have increased in the past decades, and civil liberties groups such as the ACLU and the Southern Poverty Law Center have become increasingly involved in protecting inmates rights, it is unlikely that any state transgression from the established rules and regulations regarding the chained inmates would go unnoticed, thus preventing the uncontrolled injustices that occurred during the early half of the 1900s.

Despite the radical differences between the current chained labor system and those of the past, inmates are still expected to complete the work assigned, and despite the media’s criticism of chain gangs, refusals to work are dealt with strictly and immediately. In addition, the official policy regarding escape attempts states that “every lawful means available to halt an escape should be taken.”

Although the court would most likely have dismissed this complaint had this agreement not been reached, there are several changes the

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193. Complaint at 6, Austin v. James, Jr., (M.D. Ala. filed May 15, 1995) (No. 95-T-637-N); see Pearson, supra note 1; see also Hornblower, supra note 114.

194. *Work Awaits Arizona’s Condemned*, L.A. TIMES, Dec. 7, 1995, at A30 (alternative to work is for inmates to sit in cells and file frivolous lawsuits against states that costs taxpayers millions of dollars); see also Curriden, supra note 126, at 75 (in 1993, more than 34,000 lawsuits were filed from prison cells; in Tennessee, “[a]bout one-fourth of all the lawsuits against the state are by state prisoners”).

195. See Complaint at 6, Austin (No. 95-T-637-N) (inmates represented by SPLC); see also *Chain Gangs Return to Prisons in Alabama and Arizona*, supra note 1, at 3 (“ACLU’s National Prison Project is monitoring the spread of chain gangs and considering filing suits against other state’s programs.”).

196. See supra notes 15-30 and accompanying text.

197. See *Chain Gangs Challenged in Court*, supra note 3, at 10; see also *Chain Gangs Return to Prisons in Alabama and Arizona*, supra note 1, at 1; Booth, supra note 13, at El.

198. If an inmate refuses to work, he is to be removed from the gang and transported back to the prison, where he is to be placed on the security rail. *DOC Operating Proc.*, supra note 188, at 3. Any negative reports received while working or failure to report to work on time can result in extended time on the chain gang. *Id.* If a prisoner refuses a direct order, prison guards are allowed to use force to restrain the prisoner. *Id.* at 4; Soto v. Dickey, 744 F.2d 1260, 1267 (7th Cir. 1984) (“When an order is given to an inmate there are only so many choices available to the correctional officer . . . . Discipline [in prisons] no doubt is difficult, but it is essential if the prison is to function . . . . Orders given must be obeyed.”), cert. denied, 470 U.S. 1085 (1985).

199. *DOC Operating Proc.*, supra note 188, at 1. The guard must first shout for the inmate to stop and if the inmate fails to, the officer should fire to halt the escape; deadly force may be used to halt an escape. *Id.* at 1-2. If it becomes necessary to take a shot at a fleeing suspect, the officer must ensure that officers, inmates and passing vehicles are not in the field of fire and the officer may not fire if the shot to be taken jeopardizes the safety of others. *Id.* at 2. An inmate was in fact shot and killed after being unchained from the gang as he attacked a fellow inmate. See Pearson, supra note 1, at 8.
Alabama Department of Corrections could or has implemented to better protect their inmates and to avoid future lawsuits. Alabama properly decided to chain the men individually, as do Arizona and Florida, instead of chaining them in groups of five. Even though the unspoken purpose (in Alabama at least) of the chain gangs is publicity, the prisoners will be more productive and less likely to get injured now that they are chained individually. Alabama could also look toward North Carolina’s progressive prison-work program for methods to keep both the inmates and citizens in favor of the chained labor system.

The state should also look for a more appropriate method of taking care of the sanitary needs of the inmates. A portable toilet can be provided that allows the inmates privacy while maintaining the required security. The state also should allow the inmates to wash their hands after using the facilities and before eating.

Finally, the prison officials should consider an alternate method of punishing those who refuse to work instead of the hitching post. Although the post is not a per se violation, the inmates who are chained to it for the day can be better disciplined in other ways. Eliminating the post will reduce the number of complaints that the opponents of chained labor have and probably result in fewer lawsuits.

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200. See Chain Gangs Return to Prisons in Alabama and Arizona, supra note 1, at 2 (Arizona requires each inmate to have his own ankles chained together to prevent escape); Florida Is Third State to Revive Chain Gangs, supra note 3, at A22; see also Cheatham County Puts Its Prisoners to Work, supra note 3, at B1.

201. Alabama claims that chain gangs will be justified on grounds of its perceived deterrent value, its contribution to public safety and security, and its economic advantages. DOC Evaluations, supra note 38, at 1-2. But see Chain Gangs Return to Prisons in Alabama and Arizona, supra note 1, at 2 (Arizona admits they intend to stigmatize the inmates on their chain gang); see also Barry, supra note 39, at B7 (introducing chain gang legislation so that convicts can be seen working “where everyone can see them and know that Florida has no mercy on criminals”).

202. See supra note 9.

203. See North Carolina Keeps Inmates' Hands Busy/Prisoners Save Taxpayers Money Through Program, S.F. CHRON., Dec. 11, 1995, at A5 (inmates paid from 40¢ to $1 per day and receive time off sentence for days worked, inmates work in areas where communities request assistance by using a toll-free hotline, and inmates often learn a trade).

204. See Cohen, supra note 2, at 26. Now that the inmates are chained individually, they can go into the portable toilet without having to fashion a device to allow them to use the facilities while still attached to their fellow chain gang members; see also Pearson, supra note 1, at 8 (chain gang members no longer are connected to each other by chains).

205. The hitching post is merely a rail upon which inmates who refuse to work are chained. DOC Operating Proc., supra note 188, at 3.