History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns

Lynn M. Burley*

Introduction

When Abraham Israel McCord was fatally shot by a prison guard on May 15, 1996, while working on a chain gang near Montgomery, Alabama, he unexpectedly earned a place in history by changing the direction of American prison management.[1] After being de-shackled to board a prisoner bus, McCord attacked another prisoner with a bush ax, prompting a guard to shoot McCord to protect the other prisoner.[2] Partly because of this incident, the state of Alabama reformed its year-old use of prisoner chain gangs, abandoning the practice of chaining five inmates to each other for work duty.[3]

McCord's death prompted a settlement[4] between Alabama prison officials, Alabama's governor and attorneys representing

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1. *See State Changes Restraints for Chain Gang Inmates*, MONTGOMERY ADVERTISER, May 25, 1996, at 3F. For the purposes of this Article, "chain gang" describes the practice of chaining inmates together in groups.

2. *Id.*

3. *Id.*

4. Alabama prison officials quit chaining inmates to each other six days after the shooting, and parties reached a settlement just one month after McCord was shot. *Id.*; *Alabama Agrees to Abolish Chain Gang Shackles*, MONTGOMERY ADVERTISER, June 21, 1996, at 1A. Although other factors led up to the settlement (*see infra* Part I.C.), McCord's death appeared to be the final impetus. *See Alabama Agrees to Abolish Chain Gang Shackles, supra*, at 1A; *Alabama Backtracks on Its Chain Gangs*, TAMPA TRIB., June 21, 1996, at 1; *Settlement Will Ban Alabama's Prison Chain Gangs*, L.A. TIMES, June 21, 1996, at A14.

prisoners in an extant class-action suit[5] which alleged that chain gangs constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.[6] The settlement bans Alabama from chaining prisoners to each other but allows prisoners to be individually shackled.[7] Seen as a re-

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5. Alabama prisoners filed a class-action lawsuit in May 1995 against Governor Fob James and then-Commissioner of the Alabama Department of Corrections Ron Jones alleging that chain gangs violate their constitutional rights. Second Am. Compl. at 1-2, Austin v. James, No. 95-T-637-N (D. Ala. filed May 15, 1995) [hereinafter Complaint]. The prisoners' complaint focused heavily on the risks imposed on chain gangs, as well as asserting that chain gangs violate the right to be treated with fundamental human dignity. *Id.* at 4-9. These claims are expanded in Part III.

Prisoners claim several further conditions are unconstitutional: (1) the practicing of handcuffing inmates to a "hitching post" if they refuse to work; (2) unsanitary toilet facilities and (3) the denial of visitation imposed on chain gang inmates. *Alabama Agrees to Abolish Chain Gang Shackles*, *supra* note 4, at 1A. *See also* Complaint, *supra*, at 4; Telephone Interview with Rhonda Brownstein, Attorney, Southern Poverty Law Center (Sept. 12, 1996). The Southern Poverty Law Center in Montgomery, Alabama, represented the prisoners in this action. *Id.* Trial is set for October 1996 for the remaining claims in the lawsuit. *Id.*

For a discussion of the lawsuit, see *Alabama Backtracks on Its Chain Gangs*, *supra* note 4, at 1. *See also Alabama Agrees to Abolish Chain Gang Shackles*, *supra* note 4, at 1A; *Chain Gangs are Halted in Alabama*, N.Y. TIMES, June 21, 1996, at A14; *Settlement Will Ban Alabama's Prison Chain Gangs*, *supra* note 4, at A14.

6. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

7. *Alabama Backtracks on Its Chain Gangs*, *supra* note 4, at 1. Prior to May 21, 1996, an Alabama chain gang prisoner had a shackle around each ankle, with eight feet of chain connecting each ankle to another prisoner's ankle. John Leland & Vern E. Smith, *Back on the Chain Gang*, NEWSWEEK, May 15, 1995, at 58, 58; Mark Schone, *Alabama Bound*, SPIN, Oct. 1995, at 76, 78. Five prisoners were connected to each other for ten-hour workdays. Complaint, *supra* note 5, at 4. *But see* Leland & Smith, *supra*, at 58 (reporting that chain gang prisoners worked twelve-hour days). Pursuant to the settlement, prisoners can still be forced to work in chains, but they will not be chained to each other in groups of five. *State Changes Restraints for Chain Gang Inmates*, *supra* note 1, at 3F. Instead, an individual prisoner's ankles will be connected by a chain. *Id.*

The distinction between chaining inmates together in groups and individually shackling them is important because the bulk of the constitutionality argument relies on the risk involved when inmates are chained to one another. The risks a prisoner may encounter from the elements or his chain-mates are magnified when he is chained to four other inmates. *See* Schone, *supra*, at 78. The Alabama Department of Corrections admits that chaining prisoners together results in "marginal safety." Stipulation at 1, Austin v. James, No. 95-T-637-N (D. Ala. filed May 15, 1995) [hereinafter Stipulation]. The settlement reached by Alabama officials and attorneys for Alabama prisoners states, in part:

> [T]he Department of Corrections . . . believes that the latter practice [of individually chaining inmates] allows more productive and efficient management of inmates, *with increased safety* and security. . . . [T]he Defendant Commissioner of the Department of Corrections knows of no reason to resume the practice of chaining inmates together because of its inherent inefficiency and *marginal safety*.

treat by Alabama prison officials from their purported get-tough-on-crime policies, the settlement represented a marked departure from the enthusiasm that accompanied the re-introduction of prisoner chain gangs in May 1995.[8]

This Article argues that prisoner chain gangs, intended to appease a crime-weary public, are not only a simplistic solution to complex penal problems, but are also unconstitutional under the Eighth Amendment of the United States Constitution. Chain gangs are constitutionally infirm because of the risk they pose to prisoners, the intent behind the use of chain gangs and the deprivation of fundamental human dignity that accompanies being chained to other prisoners.[9]

Since the parties involved in the Alabama lawsuit reached a pre-trial settlement,[10] the constitutional questions raised by Alabama prisoners remain unanswered. The purpose of this Article is to provide potential plaintiffs seeking to challenge the constitutionality of chain gangs with an arsenal of arguments against the practice. Part I of this Article documents Alabama's year-long experience with prisoner chain gangs, examining why the experiment failed. Part I then examines other areas of the country, where, despite Alabama's experience, prisoners are still at risk of being placed on chain gangs. Part II provides an overview of pertinent Eighth Amendment precedent. Part III contends that chaining prisoners together is cruel and unusual punishment in violation of the Eighth Amendment and further analyzes how a chain gang prisoner could use specific characteristics unique to chain gangs to argue that chain gangs are unconstitutional.

I. The Alabama Chain Gang Experiment

A. History of Chain Gangs

The chain gang was first integrated into the prison system in the United States shortly after the Civil War.[11] Many of the pris-

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Id. (emphasis added).

8. *See generally Alabama Prison Commissioner Says Inmates Enjoying Prison Too Much*, JET, Apr. 10, 1995, at 37 (describing Jones' planned revival of chain gangs); Leland & Smith, *supra* note 7, at 58 (reporting on the six weeks of practice runs and first week of official chain gang work in Alabama—the first state since the 1960s to return to the use of shackles).

9. Complaint, *supra* note 5, at 1.

10. Stipulation, *supra* note 7 at 1.

11. *See* BLAKE MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS 197-98 (1977).

ons in the South were destroyed during the Civil War.[12] Chaining prisoners together to complete much-needed work assignments was an immediate and inexpensive alternative to rebuilding prisons.[13] During Reconstruction, Southern states commonly used prisoners on road construction and other rebuilding efforts.[14] In addition, chains provided an easy means of preventing escape.[15]

These prisoners, who were almost exclusively African American, suffered the tensions of Reconstruction as well as mercilessly long sentences and laws designed to criminalize unemployment.[16] Northern states, without slavery to influence penological direction, were instead influenced by concepts of religion and education.[17] These influences prevented the introduction of chain gangs to the Northern states.[18]

Chain gangs were deadly for prisoners. There was no master to protect the lives of his labor force, and without such paternalistic protection,[19] chain gang prisoners died at alarming rates.[20] Life on a chain gang was brutal:

> Convicts labored, ate, and slept with chains riveted around their ankles. Work was done "under the gun" from sun-up to sundown, shoveling dirt at fourteen shovelfuls a minute. Food was bug-infested, rotten and unvarying; "rest" was taken in unwashed bedding, often in wheeled cages nine feet wide by twenty feet long containing eighteen beds. Medical treatment and bathing facilities were unsanitary, if available at all. And, above all, corporal punishment and outright torture—casual blows from rifle butts or clubs, whipping with a leather strap, confinement in a "sweat-box" under the southern sun, and hanging from stocks or bars—was meted out for the most insignificant transgressions, particularly to African-Americans who remained the majority of chain gang prisoners.[21]

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12. *Id.* at 198-99.

13. *See id.* (explaining how political leaders sought to cut the tax burden and to rebuild railroads).

14. *Id.* at 211.

15. *Id.* at 210, 212-13.

16. *See id.* at 198, 210-11.

17. *Id.* at 207.

18. *See id.* (contrasting Northern ideas with Southern traditions of slavery and penology).

19. *Id.* at 207-08.

20. *Id.* at 210. In the 1880s, the average death rate of twenty-eight Northern prisons was 14.9 per thousand, while the corresponding rate in the South was 41.3 per thousand. *Id.* at 209-10.

21. ALEX LICHTENSTEIN, TWICE THE WORK OF FREE LABOR: THE POLITICAL ECONOMY OF CONVICT LABOR IN THE NEW SOUTH 183 (1996) (citing FRANK TANNENBAUM, DARKER PHASES OF THE SOUTH 73-113 (1924); JOHN SPIVAK, *On the Chain Gang*, INTERNATIONAL PAMPHLETS No. 32 (1932); ARTHUR RAPER, PREFACE

Chain gangs survived in one form or another until the 1960s, when they finally succumbed to economic forces and negative public pressure.[22] At least one chain gang critic, Alex Lichtenstein, has argued that the demise of chain gangs was prompted primarily by economic reasons.

> Despite the scandal generated by *I am a Fugitive* [movie depicting horrors of southern chain gangs], the southern convict road gang, like its predecessor the convict-lease, eventually began to succumb to economic and social forces which redefined the place of penal labor in the South's political economy, rather than to the renewed clamor for humanitarian penal reform.[23]

Lichtenstein further explains that pressure to end chain gangs began during the Great Depression when the unemployed sought jobs that were being performed by prisoners.[24]

Widespread penal reform in the 1950s and 1960s also contributed to the abandonment of chain gangs. A series of prison riots across the country in the 1950s led authorities to examine methods of incarceration and to experiment with new types of classification and treatment of prisoners.[25] One commentator, Blake McKelvey, examined the shortcomings of both "progressive and backward" states' prison management practices that led to the self-evaluation and campaign to win public support for successful prison programs.[26] Although McKelvey does not assert that chain gangs were abandoned in the 1960s as a result of prison riots and subsequent reforms, it is likely that widespread penal reform contributed to their demise.[27]

B. A Tale of Two Politicians: Chain Gangs Return to Alabama

Not surprisingly, Alabama officials treated the reappearance of chain gangs as an original idea rather than a return to the

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TO PEASANTRY: A TALE OF TWO BLACK BELT COUNTIES 294-96 (1936); BAYARD RUSTIN, *Twenty-Two Days on a Chain Gang, in* DOWN THE LINE: THE COLLECTED WRITINGS OF BAYARD RUSTIN 26-49 (1971)).

22. LICHTENSTEIN, *supra* note 21, at 190-91. *Also see* Schone, *supra* note 7, at 82 ("By the mid-60's, chains were scrap metal throughout the South. Shackles joined 'WHITES ONLY' as dimly remembered relics of apartheid.").

23. LICHTENSTEIN, *supra* note 21, at 190.

24. *Id.*

25. *Cf.* MCKELVEY, *supra* note 11, at 322-36 (arguing that riots in the 1950s forced prison officials and the American Prison Association to move forward with prison reforms).

26. *Id.* at 322.

27. *See supra* note 25.

slave-like approach of the original chain gangs.[28] As one newspaper article pointed out, "No one at the state Corrections Department can recall when Alabama did away with chain gangs or why."[29]

The decision to reinstate chain gangs in Alabama was made on the campaign trail.[30] Ron Jones, a prison warden, recommended the step to Republican gubernatorial candidate Forrest "Fob" James during the 1994 campaign.[31] James subsequently mentioned the idea of reinstating chain gangs on a radio talk show.[32] The idea was met with great public approval.[33] After James won the gubernatorial race, he appointed Jones Commissioner of the Alabama Department of Corrections.[34]

The make-up of Alabama chain gangs was determined in one of two ways. Prisons sent parole or probation violators to work on a chain gang, based on the perception that these convicts needed additional deterrence.[35] Prisons also used chain gangs as punishment for violations of prison rules.[36]

The first chain gangs appeared in the spring of 1995 and worked along public roads clearing debris and weeds.[37] Prisoners wore white uniforms and caps marked with "CHAIN GANG" while working in groups of five for at least ten hours per day with three-pound ankle shackles and eight feet of chain continuously connecting one inmate to the next.[38] The chain gangs worked next to

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28. *Alabama to Reinstate Chain Gangs*, COM. APPEAL (Memphis, Tenn.), Mar. 4, 1995, at A14.

29. *Id.*

30. Schone, *supra* note 7, at 82.

31. *Id.*

32. *Id.* (describing how James accepted as a compliment the host's reference to chain gangs as "Operation Humiliation").

33. Alabamans have responded 'favorably' to the return of chain gangs. "Drivers roll down their windows to taunt the prisoners, barking like dogs. Others look on the predominantly black gangs and feel nostalgia for the South they knew as children. 'I love seeing 'em in chains,' one elderly white woman said. 'They ought to make them pick cotton.'" Brent Staples, *The Chain Gang Show*, N.Y. TIMES MAG., Sept. 17, 1995 at 62, 62.

34. *See* Schone, *supra* note 7, at 82.

35. Telephone Interview with Rhonda Brownstein, Attorney, Southern Poverty Law Center (Nov. 20, 1995). Prison officials allowed minimum security prisoners—unlike medium security prisoners—to work free of chains. State prisons did not use maximum security prisoners on chain gangs because of the belief that these prisoners posed too great a risk on a chain gang. *Id.*

36. *Id.* Brownstein indicated that most Alabama chain gang prisoners were placed on gangs because they were repeat offenders. *Id.*

37. Leland & Smith, *supra* note 7, at 58.

38. *Id.* Prisoners remained chained together even while using a makeshift latrine. *Id.*

public highways for the express purpose of satisfying the public desire for vengeance.[39] In August 1995, Alabama officials began using chain gangs to break rock on prison grounds.[40] Prisoners broke large boulders into little pieces with sledgehammers while chained together in groups.[41] Although the Alabama state highway department professed no need for the resulting gravel,[42] prison officials maintained the gravel would be used on prison roads.[43]

C. Alabama Retreats from Its Chain Gang Policy

Although Abraham McCord's death sealed the fate of Alabama's chain gangs,[44] other factors laid the groundwork for the change in policy.[45] The shooting, pressure from the lawsuit[46] and Commissioner Jones' over-zealous suggestion that women be placed on chain gangs[47] forced Alabama officials to re-examine chain gang policies. Although Alabama's original policy main-

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39. Staples, *supra* note 33, at 62. While the effectiveness of the gangs is uncertain, they seem to have a societal purpose:

> The highway crews allegedly clear weeds and debris, but this is impossible to do on any useful scale with five men chained eight feet apart, each stumbling when the next does. The real reason for stretching legions of chained, white-suited men for a mile or so along the highway is to let motorists gorge on a visible symbol of punishment and humiliation.

Id. *See also* Schone, *supra* note 7, at 85 (noting that Alabama's form of vengeance is gaining national attention).

40. Schone, *supra* note 7, at 85, 132. To defend the merits of the program, Jones stated, "The rock-breaking program is our way of finding something meaningful for these inmates to do." *Alabama Inmates Return to Chain Gangs Today*, STAR LEDGER (Newark, N.J.), Aug. 21, 1995, at 2.

Under Joe Hopper, the new Commissioner of the Alabama Department of Corrections (hereinafter Corrections Commissioner), Alabama inmates no longer broke boulders. Said Hopper, "I've done away with [the rock pile]. It was nonproductive." *Hopper Says He's No Softy*, MONTGOMERY ADVERTISER, July 8, 1996, at 5A. Commissioner Hopper reassigned inmates at Limestone Correctional Facility to dig up tree stumps because "[t]hat's productive and, at the same time, it's a lot harder work than was being performed on the rock pile." *Id.* Hopper was appointed when Jones was demoted in April 1996. *See infra* note 51 and accompanying text.

41. Schone, *supra* note 7, at 132.

42. *Id.*

43. *Alabama Becomes First State to Bring Back Chain Gangs*, BALTIMORE SUN, Aug. 22, 1995, at 6A. Alabama officials' statements about the meaningful nature of chain gang work were undermined by statements about chain gangs' additional goals of humiliation and embarrassment. Schone, *supra* note 7, at 82.

44. *See supra* notes 1-4 and accompanying text.

45. *See Alabama Backtracks on Its Chain Gangs*, *supra* note 4, at 1.

46. *See supra* note 5 and accompanying text (describing class-action lawsuit filed by Alabama chain gang prisoners).

47. *See infra* note 50 and accompanying text.

tained that guards would not hesitate to shoot if a prisoner attempted to escape,[48] officials quickly changed the policy and stopped chaining inmates together after realizing the threat of being shot was not enough to deter prisoners from causing trouble on chain gangs.[49] If the creation of chain gangs had been motivated by a sincere attempt to curb recidivism rather than by public impatience with the criminal justice system, the shooting death of a prisoner might have functioned as a firm warning to other prisoners, rather than as the impetus to abandon the entire get-tough policy.

Sexism played an unexpected role in the demise of Alabama's chain gangs. After Commissioner Jones suggested in April that female prisoners be put on chain gangs, Governor James declared that "[t]here will be no woman on any chain gang in the state of Alabama today, tomorrow or any time under my watch."[50] James quickly demoted Jones and appointed a new prison commissioner who was more willing to compromise on chain gang issues.[51] Social progressives who had argued from the beginning that the chain gangs were degrading and inhumane suddenly became strange bedfellows with conservatives like Governor James, whose disapproval for female chain gangs seemed to stem from contempt

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48. Adam Cohen, *Back on the Chain Gang*, TIME, May 15, 1995, at 26, 26. Alabama officials were very clear about the purpose of the gun-wielding chain gang guards. Commissioner Jones stated, "If they try to escape, our officers are going to shoot them." *Id.* Additionally, Jones stated, "It became real humane on my part to put these inmates out there in leg irons because they have virtually no chance of escaping . . . . Therefore they're not going to get shot." Leland & Smith, *supra* note 7, at 58.

49. McCord was shot and killed on May 15, 1996, and the practice of chaining inmates together was stopped on May 21. *State Changes Restraints for Chain Gang Inmates*, *supra* note 1, at 3F. McCord was not attempting to escape when he was shot; he was attacking another chain gang prisoner. *Id.* Presumably, it was easier for state officials to defend a prison guard's actions in shooting an escapee than it was for them to defend McCord's death, because of the public safety concerns involved in a prisoner escape.

50. *Official Fired over Female Chain Gangs*, L.A. TIMES, Apr. 27, 1996, at A17. Apparently Sheriff Joe Arpaio of Arizona's Maricopa County does not share Governor James' aversion to female chain gangs. Declaring himself to be an "equal opportunity incarcerator," Arpaio announced in August 1996 that female prisoners would begin chain gang duty the following month. *Chain Gang for Females*, PATRIOT LEDGER (Quincy, Mass.), Aug. 26, 1996, at 4. "Women do hard labour at home—washing floors and housework—so I don't think this labour is going to bother them." *Equality on Chain Gangs as Women Get the Call-Up*, DAILY MAIL (London, Eng.), Aug. 27, 1996, at 24, *available in* LEXIS, Associated Newspapers Ltd., Daily Mail file.

51. *See Official Fired over Female Chain Gangs*, *supra* note 50, at A17. Governor James appointed Joe Hopper to replace Jones as Corrections Commissioner. *State Changes Restraints for Chain Gang Inmates*, *supra* note 1, at 3F.

for another opportunity for gender equality.[52] In the end, just a year after reintroducing chain gangs, Alabama officials acquiesced to critics who argued that chain gangs were dangerous and simply a bad idea.[53]

D. The Future of Chain Gangs: A Look at Florida

Questions remain about the future of prisoner chain gangs. The social consciousness that prompted the rebirth of chain gangs is still evidenced in public concern about crime and frustration with the criminal justice system.[54] Although Alabama has banned

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52. Governor James' paternalistic statement that he would not allow women on Alabama chain gangs "under [his] watch" demonstrates his sexist views. *See* text accompanying note 50. Additionally, the fact that he promptly demoted Jones when Jones announced plans for female chain gangs shows James' strong convictions about keeping women off chain gangs. In one newspaper account, the Governor's director of information, Alfred Sawyer, stated that the Governor "opposes women on chain gangs as a matter of principle." Malcolm Daniels, *Lawyer: All-Male Chain Gangs Illegal*, MONTGOMERY ADVERTISER, May 4, 1996, at 3F. Sawyer also said that "state law forbids 'a woman from being used to do manual labor' on a highway." *Id.*

53. *See Chain Gangs Falling Apart*, CHI. SUN TIMES, June 23, 1996, at 37; *Corrective Moves*, ST. PETERSBURG TIMES, June 22, 1996, at 10A; *Inmate Work: Alabama Sees the Light on Dated Chain Gangs*, COM. APPEAL (Memphis, Tenn.), June 24, 1996, at 6A; *No Great Loss, Chain Gangs Had Many Drawbacks*, MONTGOMERY ADVERTISER, June 23, 1996, at 2F.

54. *See* Peter J. Benekos & Alida V. Merlo, *Three Strikes and You're Out!: The Political Sentencing Game*, FED. PROBATION, Mar. 1995, at 3. A recent newspaper editorial in Arizona demonstrates that some advocates of chain gangs have been deterred by neither Alabama's abandonment of chain gangs nor a recent escape of an inmate from an Arizona work crew:

> Abandon all prisons because some inmates escape? That is unadulterated nonsense . . . . [H]ere, roadside, is the application of justice: Inmates are working in full view of the taxpayers. They are engaged in honest labor. They are not lifting weights. They are not smoking marijuana in the prison yard. They are not crafting weapons from the prison cafeteria. They are working, sweating, producing. They are being punished and in that punishment, they are providing restitution to the core of society they have harmed.

Work as a Corrective, PHOENIX GAZETTE, July 16, 1996, at B4.

Modern penological theories support the proposition that decisions to reinstate chain gangs are being made in spite of evidence that rehabilitative efforts such as education and vocational training contribute better than punitive "deterrence" to lower recidivism rates. *See generally* Jurg Gerber & Eric J. Fritsch, *Adult Academic and Vocational Correctional Education Programs: A Review of Recent Research*, 22 J. OFFENDER REHAB. 119 (1995) (explaining that studies show a high success rate for academic and vocational correctional education programs). The debate between proponents of retributive deterrence and proponents of rehabilitation continues but retribution is currently the predominant influence in North American prison policy. *See* R.A. DUFF & DAVID GARLAND, A READER ON PUNISHMENT 12 (1994) (discussing the movement in the United States for determinate sentencing).

Although studies of the effect of prisoner education on recidivism do not pres-

the practice of chaining prisoners together, state prisoners and county jail inmates in other states remain at risk of being put on chain gangs.

Arizona, Florida, Iowa and Wisconsin followed Alabama's lead and implemented chain gang programs.[55] Tennessee and Oklahoma each have at least one county that operates inmate chain gangs.[56] In Cheatham County, Tennessee Sheriff Pat Chandler began chaining inmates to each other in December 1995.[57]

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ent overwhelming statistics, there are reasons for guarded optimism about the possibilities of prisoner rehabilitation. Gerber & Fritsch, *supra*, at 135-37. Gerber and Fritsch compiled the results of studies spanning about twenty years and concluded that "the research shows a fair amount of support for the hypotheses that adult academic and vocational correctional education programs lead to fewer disciplinary violations during incarceration, reductions in recidivism, to increases in employment opportunities, and to increases in participation in education upon release." *Id.* at 136-37. They point out that many factors influence recidivism, such as employment stability, living arrangements, income and chemical use, which may explain why the inverse correlation between prisoner education and recidivism is not stronger. *Id.* at 136. In addition to evidence that rehabilitation effectively reduces recidivism for at least some prisoners, studies have produced no substantial evidence that retributive methods effectively deter crime. DUFF & GARLAND, *supra*, at 11.

55. *Alabama Backtracks on Its Chain Gangs*, *supra* note 4, at 1; *Settlement Will Ban Alabama's Prison Chain Gangs*, L.A. TIMES, June 21, 1996, at A14. In June 1996, Wisconsin became the most recent state to reinstate chain gangs. *See* Amy Rinard, *Quiet Disapproval: Chain Gang Curb Draws Veto*, MILWAUKEE J. SENTINEL, June 8, 1996, at A1. Wisconsin Governor Tommy Thompson vetoed part of the chain gang bill that would have limited chain gangs' work to prison grounds, thereby approving legislation permitting chain gangs to work in public. *Id.*

56. Cheatham County, Tennessee, continues to operate chain gangs with county jail inmates despite what happened in Alabama. Renee Robinson, *Alabama Drops Gangs' Chains; Are We Next?*, TENNESSEAN, June 21, 1996, at 1A. Cheatham County Sheriff Pat Chandler said in response to Alabama's settlement: "We're running at full blast. . . . We will continue our program until it is confirmed by the state attorney general to stop." *Id.*

Creek County, Oklahoma, is operating voluntary chain gangs, which Sheriff Larry Fugate is administering. Jerry Hereden, *Chain Gangs Re-Emerge in One Oklahoma County—Some Say Crews Exist for Political Reasons*, DALLAS MORNING NEWS, Aug. 18, 1996, at 45A. Inmates are not forced to work on chain gangs, but if they do not, "they're stuck in a cell with just a mattress, a blanket and three meals a day. . . . If they choose not to work, they lose all privileges. This includes smoking cigarettes and watching television." *Id.* Creek County inmates wear chains around their waists and are chained to each other in groups of five. *Id.* Although Fugate denies that he created chain gangs for political gain, critics point out that he changed inmates' garb to conspicuous striped "jailbird" suits and that inmates are transported in a bus with lettering on the side that reads: "Larry Fugate—Inmate Work Program." *Id.*

It is difficult to track county sheriffs' use of chain gangs because chain gangs in the county context are implemented by prison officials without the legislation or administrative action that accompanies the use of chain gangs at the state level. Telephone Interview with Rhonda Brownstein, *supra* note 35; *see generally* Hereden, *supra*, at 45A (explaining policies which the sheriff implemented).

57. Ellen Margulies, *Counties Don't Agree on Chain Gangs: Some Awaiting*

None of the states chains inmates to each other as Alabama did; instead, they chain prisoners individually.[58] In Florida, however, State Senator Charlie Crist is not satisfied with individually chained prisoners and he is not willing to follow Alabama's retreat from chain gangs.[59] Although the legislation did not specify that prisoners be chained together, Crist, who sponsored Florida's 1995 legislation creating chain gangs,[60] now argues that working prisoners in individual chains does not do enough to shame them.[61] He plans to introduce a clarifying bill during the next legislative session to strengthen Florida's chain gang message.[62]

Court's Decision, TENNESSEAN, Dec. 12, 1995, at 1B. Sheriff Chandler apparently acted alone in implementing chain gangs in Cheatham County because neither the state Department of Corrections nor any other Tennessee county operates inmate chain gangs. *Id.* As of September 1996, no lawsuits challenging the chain gangs have been filed by Cheatham County inmates. Telephone Interview with Staff Member, Cheatham County Sheriff's Department (Sept. 12, 1996). In the words of a Sheriff's Department official, "Everybody's happy—they're just thrilled to be out [working on chain gangs]." *Id.*

58. Telephone Interview with Staff Member, Cheatham County Sheriff's Department (Sept. 12, 1996). For further clarification of the different methods of chaining inmates, see *supra* note 7 and accompanying text.

Wisconsin utilizes stun belts to provide security and ensure individually chained inmates do not escape. State Rep. Eugene Hahn, *Two Views: Seeking the Best Way to Reduce Crime and Its Cost; 'Chain Gangs,' Stun Belts Provide Security, Deterrent*, WIS. ST. J., June 27, 1996, at 13A. Proponents argue that stun belts are a humane and medically safe alternative to lethal force. *Id.* Opponents, such as Amnesty International, argue that stun belts are inhumane and a form of torture. *Id.* Gene Atherton, a Federal Department of Corrections security specialist in Florida, said of stun belts: "It doesn't hurt that bad and doesn't cause any serious damage or injury, and it certainly gets people's attention." *Stun Belts on Inmates Humane or Torture?*, ORLANDO SENTINEL, Aug. 3, 1996, at A20. Stun belts pack a 45,000-volt charge which can render a person unconscious. *Id.*

In the wake of McCord's death in Alabama, the use of stun belts creates a conundrum. It is difficult to evaluate which is worse: using lethal gunfire as security for chain gangs or placing stun belts on each prisoner, factoring in the possibility for non-lethal but inhumane abuse of such measures.

59. Rob Shaw, *Senator Wants Chain Gains* [sic] *on the Highways*, TAMPA TRIB., Aug. 8, 1996, at Metro 6. Crist has been nicknamed "Chain Gang Charlie" for his chain gang efforts in Florida. *Cheatham County Puts Its Prisoners to Work*, COM. APPEAL (Memphis, Tenn.), Dec. 7, 1995, at B1. An official in the legal department for Florida's Department of Corrections stated that as of January 17, 1997, no lawsuits over chain gangs were pending. Telephone Interview with Jeanne Murray, Law Clerk, Florida Department of Corrections (Jan. 17, 1997).

60. *Senator Wants to Strengthen Chain Gang Law*, LEDGER (Lakeland, Fla.), Aug. 8, 1996, at B3.

61. *Crist's Shame Gangs*, ST. PETERSBURG TIMES, Aug. 12, 1996, at 6A.

62. *Senator Wants to Strengthen Chain Gang Law*, *supra* note 60, at B3; Reena Shah Stamets, *Crist Seeks to Tighten Shackles*, ST. PETERSBURG TIMES, Aug. 8, 1996, at 5B; *see generally Crist's Shame Gangs*, *supra* note 61, at 6A (discussing the development of Crist's chain gang program).

Crist's proposed bill clarifies three things: (1) chain gangs must work alongside major highways,[63] (2) they must include violent offenders and (3) inmates must be chained together in groups of at least five.[64] If such a bill becomes law in Florida, it is highly probable that an inmate will bring a lawsuit similar to the one settled in Alabama to challenge the constitutionality of chain gangs.[65] Because Alabama's chain gangs were abandoned before a court could rule on their constitutionality, the constitutional questions raised by Alabama prisoners remain unanswered.

II. Eighth Amendment Precedent

Besides raising serious health and safety concerns, chain gangs violate a fundamental—if as yet unrecognized—right to be treated with human dignity. Although other constitutional arguments may be available, the Eighth Amendment is most appropriate for challenging this penal practice.[66] This section offers a brief background of pertinent Eighth Amendment precedent.

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63. *See* Stamets, *supra* note 62, at 5B. Crist is concerned that the symbolic value of chain gangs is lost when inmates do not work alongside busy highways. Expressing the reason behind this belief, Crist said, "We shouldn't have pretend chain gangs for people who do not commit pretend crimes. . . . It is symbolic and dramatic and it is intended to be." *Id.* Crist's focus on punishment is unambiguous: "This is not cruel, this is not inhumane . . . the people who need to be on these chain gangs are cruel and inhumane." Shaw, *supra* note 59, at Metro 6.

64. Stamets, *supra* note 62, at 5B.

65. One Florida inmate has sued, claiming chain gangs violate the Constitution as ex-post facto laws. Helms v. Crist, No. GC-G-95-2196 (Fla. Cir. Ct. filed Sept. 15, 1995). The inmate had not, nor was he likely to, perform chain gang labor and the Tenth Judicial Circuit of Florida dismissed his claim for lack of standing. *Id.*

66. Claims under the Fourteenth Amendment's Equal Protection Clause and the Thirteenth Amendment may be possible. The Fourteenth Amendment's Equal Protection Clause states: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The premise of an Equal Protection argument would be that a prisoner who is forced to labor on the chain gang is being treated differently than another prisoner in the same state who committed the same crime, or a crime of like degree, who is not forced to labor on a chain gang. However, at least one appellate court has held that as long as a state is not doing something illegal, it can generally make rules that affect different prisoners differently. *See* Wendt v. Lynaugh, 841 F.2d 619, 621 (5th Cir. 1988) (applying this rationale for different treatment to prisoners' compensation for work). Under this formulation, chain gangs would have to be proven illegal before an Equal Protection claim would become effective, which would make the Equal Protection claim moot.

It would also be difficult to prove that chain gangs are racially motivated, since they are applied to male inmates of all races. However, about two-thirds of Alabama prisoners are African-American. Schone, *supra* note 7, at 80; *cf.* Leland & Smith, *supra* note 7, at 58 (noting that chain gangs are up to eighty percent African-American). In *Jones v. Mayer Co.*, the Court noted Congress' broad power to regulate invidious, racially motivated discrimination, i.e., the badges and incidents

Throughout Eighth Amendment precedent, the Supreme Court has required plaintiffs to fulfill objective and/or subjective standards to prove Eighth Amendment violations. The importance of both the objective and subjective elements of an Eighth Amendment claim will be noted throughout this section and expanded further in Part III.

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of slavery, even by private citizens, pursuant to the Thirteenth Amendment. *See* 392 U.S. 409, 438-41 (1968) (citations omitted). *Jones* involved a private real estate developer's refusal to sell to African-Americans and the plaintiffs' invocation of § 1982 of the 1866 Civil Rights Act, created under the power of the Thirteenth Amendment, as prohibiting such discrimination. *Id.* at 412, 438-39. The Court's extension of the Amendment's reach to the "badges and incidents of slavery" does not apply to a direct reading of the Amendment, absent such a statute. *See id.* at 438-41. The *Jones* Court's recognition of Congress' broad power to eradicate racial barriers focuses on section two of the Thirteenth Amendment, the Enabling Clause. *Id.* at 439. Chain gang prisoners would need to affix their claim to federal legislation such as § 1982 to receive the benefit of such a broad reading of the Thirteenth Amendment's reach.

The Thirteenth Amendment reads:

> Section 1. Neither slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII. The most obvious challenge to using the Thirteenth Amendment to argue against the use of chain gangs is that it explicitly excepts prisoners from "involuntary servitude." An Arkansas case exemplifies the limitations of the Thirteenth Amendment in the convict labor context:

> The Arkansas system of working convicts is not "slavery" in the constitutional sense of the term. The State does not claim to own the bodies of its prisoners. The situation does involve "servitude," and there is no doubt whatever that the "servitude" is "involuntary."
>
> But, it is equally clear that this servitude has been imposed as punishment for crimes whereof the inmates have been duly convicted. . . .

Holt v. Sarver, 309 F. Supp. 362, 372 (E.D. Ark. 1970).

Despite these practical limitations, the presence of convict chain gangs is strongly associated with images of slavery. Lichtenstein explains, "Everywhere . . . slavery and punishment have been an inseparable dyad, in advanced as well as primitive societies." LICHTENSTEIN, *supra* note 21, at 187. He notes:

> Racial disproportion is the most striking continuity in the history of southern, and indeed US, prisons. . . . Not only in the South, but in the USA as a whole, there is still no separating the question of punishment from the matter of race; and punishment has always been related to labor, both forced and free.

Id. at 191-92. It is clear that chain gangs invoke powerful images of slavery, but it is not as clear how to utilize the Constitution to invalidate the practice. Lichtenstein addresses the possibility of a legal challenge to forced prisoner labor: "[T]hese restrictions are likely to withstand constitutional challenge, since the 13th Amendment allows involuntary servitude as a punishment for crime and may thus attach some of the characteristics of slavery to prisoners. . . ." *Id.* at 194 (quoting JOAN MULLEN ET AL., NAT'L INST. OF JUSTICE, THE PRIVATIZATION OF CORRECTIONS, ISSUES AND PRACTICES 24 (1985)).

Prior to the 1970s, prisoners were unsuccessful in raising prison condition claims under the Eighth Amendment.[67] The

67. 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 2.01 at 23-24 & n.11 (2d ed. 1993) (citations omitted). The Eighth Amendment's creation serves as a guide to its interpretation. The language comes from the English Bill of Rights, written in 1689. LARRY CHARLES BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 3 (1975). The Articles of Confederation, as well as many original state constitutions, contained a cruel and unusual punishments clause, supporting the inference that even prior to the 19th century the freedom from cruel and unusual punishment was considered a fundamental right by lawmakers. *Id.* at 5-6.

The Eighth Amendment remained relatively dormant for nearly 100 years after it became part of the Constitution. It was not until 1878 that the Supreme Court issued its first significant Eighth Amendment opinion. In *Wilkerson v. Utah*, the Court upheld a sentence of death by shooting and concluded that the Eighth Amendment was meant only to prohibit torture in addition to death, such as being dragged to an execution. 99 U.S. 130, 135-36 (1878). In what turned out to be an understatement, the Court found that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." *Id.*

Beginning in 1910, the Court entered a new era of more progressive, socially-conscious Eighth Amendment interpretation. *See* Weems v. United States, 217 U.S. 349 (1910). *Weems* involved a Coast Guard official convicted of falsifying records in a cash book. *Id.* at 357. The statute under which he was found guilty provided for severe minimum punishments, including twelve years and a day of imprisonment in chains from wrist to ankle, deprivation of parental and property rights, the permanent loss of the right to vote and lifetime surveillance by authorities. BERKSON, *supra*, at 66.

The Supreme Court held that these penalties were "repugnant to the [B]ill of [R]ights." *Weems*, 217 U.S. at 382. Justice McKenna wrote for the majority, stating, "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Id.* at 373. *Weems* is rich with such language, advocating a dynamic reading of the Constitution. Justice McKenna further stated that the cruel and unusual punishment clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.

The next case that contributed significantly to the development of Eighth Amendment interpretation was *Trop v. Dulles*, 356 U.S. 86 (1958). In *Trop*, the Supreme Court held that denationalization of an Army deserter violated the Eighth Amendment. *Id.* at 101. *Trop*'s significance in the Eighth Amendment line of cases was established by its paraphrase of *Weems*: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101. Similar to the *Weems* decision, the *Trop* opinion at length advocated a dynamic interpretation of the cruel and unusual punishment clause. 365 U.S. at 99-104. The Court examined the history behind the Amendment, stating that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Id.* at 100.

Trop discussed many aspects of the Eighth Amendment. Chief Justice Warren's opinion began its analysis of the Eighth Amendment by pointing out that simply because the death penalty is legal, it does not follow that anything less than death is legal: "[I]t is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." *Id.* at 99. The Court then parsed the clause and examined what was meant by "unusual." *Id.* at 100-01 & n.32. The Court defined

Cruel and Unusual Punishment Clause was interpreted to apply only to sentencing, and not to what happened to a prisoner while serving a sentence.[68] Beginning in 1976 with *Estelle v. Gamble*,[69] federal judges began to create minimal constitutional standards for treatment of prisoners and used the Cruel and Unusual Punishment Clause to enforce these standards.[70]

In *Estelle*, the Court introduced "deliberate indifference" as the governing standard for determining whether the denial of medical care to a prisoner was unconstitutional.[71] Although limited to medical care, the *Estelle* decision is significant for its groundbreaking role in applying the Eighth Amendment to prison conditions.[72]

In *Rhodes v. Chapman*, the Court used an objective standard to identify Eighth Amendment violations, holding that the Constitution is violated if inmates are deprived of "the minimal civilized measure of life's necessities."[73] The *Chapman* Court took the position that harsh conditions "are part of the penalty that criminal offenders pay for their offenses against society."[74]

"unusual" in the ordinary sense, "signifying something different from that which is generally done." *Id.* at 101 n.32. In Trop's case, the Court stated, "[t]here may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development." *Id.* at 101. The Court then moved into a general discussion of its duty to uphold the Constitution employing reason and judgment, not personal passions. *Id.* at 103. *Trop* represents a well-rounded, thorough and forward-looking interpretation of the Eighth Amendment.

68. MUSHLIN, *supra* note 67, at 23-24.

69. 429 U.S. 97 (1976).

70. *See* Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 374-75 (1995).

71. *Estelle v. Gamble*, 429 U.S. at 104. Gamble, an inmate in a Texas prison, alleged that he hurt his back during a work assignment and that the medical care he received for the injury was inadequate. *Id.* at 107. The Court reasoned that the government has an "obligation to provide medical care for those whom it is punishing by incarceration" and held that "deliberate indifference to serious medical needs" would violate the Eighth Amendment. *Id.* at 103, 106.

Estelle's "deliberate indifference" standard is subjective, requiring a showing that officials deliberately ignored prisoners' needs. *See id.* at 104-05.

72. MUSHLIN, *supra* note 67, at 24.

73. 452 U.S. 337, 347 (1981). *Chapman* involved a constitutional challenge to the practice of housing two prisoners in one cell at an Ohio state prison. The Court reasoned that while "the Constitution does not mandate comfortable prisons," *id.* at 349, "[c]onditions [of confinement] must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment[,]" *id.* at 347. The Court held that the overcrowding did not violate the Constitution. *Id.*

74. *Id. Chapman* emphasized that discomfort in prison is simply part of the punishment. *Id.* This view comports with current attitudes toward any asserted prisoner claims. *See* Wesley Smith, *Jailhouse Blues*, NAT'L REV., June 13, 1994, at

The Court returned to a subjective test in 1986 in *Whitley v. Albers*.[75] *Albers* involved a prisoner shot during a prison riot. The Court determined that the appropriate question was whether the prison official acted "in good faith" or with "obduracy and wantonness."[76] The Court's opinion emphasized the need to defer to prison officials in dealing with emergencies.[77]

In 1991, the Court finally reconciled the subjective and objective standards it had used to evaluate potential Eighth Amendment violations in the context of incarceration. In *Wilson v. Seiter*, the Court required that prisoners satisfy both subjective and objec-

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40. Smith places quotation marks around the words "rights," "overcrowding" and "cruel and unusual punishment." *Id.* at 40-42. This indicates that he does not see these concepts as legitimate.

Smith argues that the rights of law-abiding citizens should not apply to prisoners. He advocates harsher prisons, stating:

> Groups like the ACLU's National Prison Project argue that states must treat prisoners much as they do citizens at large. Federal judges have agreed; and in their pursuit to elevate the legal status of prisoners to that of law-abiding people, they have removed the concept of prison as punishment, and with it much of the deterrent effect of imprisonment.

Id. at 40. Smith does not offer facts to back up his implicit assertion that imprisonment previously offered more deterrence than it currently does. He claims that prisoners' rights and the rights of others in the community are mutually exclusive:

> The federal judiciary's activism stems from an abstract theory of individual rights that disregards the rights of the community. Deliberately detached from the effects of their decisions on society, federal judges have acted as if they intended to strip communities of any power to defend themselves.

Id. at 44. This view is misguided. Smith's approach might be better placed in the context of inadequate sentence lengths. In the context of excessive force or prison condition cases, however, the fact that prisoners assert their rights does not have a negative effect on average citizens. As noted, there is no real evidence that punitive prison conditions deter crime. *See supra* note 54.

75. 475 U.S. 312 (1986). Justice O'Connor wrote for a five-member majority including Chief Justice Burger and Justices White, Powell and Rehnquist. Justices Brennan, Marshall, Blackmun and Stevens dissented. *Id.*

76. *Id.* at 319. Rioting prisoners took a guard hostage and in the process of controlling the situation, another guard shot Albers, an inmate who was not involved in the riot. *Id.* at 314-17. The Court held that the shooting did not violate the Eighth Amendment. *Id.* at 320-22.

77. *Id.* at 319-20. Justice O'Connor seemed very concerned about the danger of employing hindsight to fault prison officials. "The infliction of pain in the course of a prison security measure, therefore, does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." *Id.* at 319. Justice O'Connor characterized quelling a prison riot as an activity which required prison officials to balance interests, more than in a situation like *Estelle*. She wrote, "The deliberate indifference standard articulated in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Id.* at 320.

tive elements to prove Eighth Amendment violations.[78] Justice Scalia, writing for a five-member majority, reasoned that there must be an objective "deprivation of a single, identifiable human need such as food, warmth, or exercise" for an Eighth Amendment violation.[79] The Court explicitly stated that such a violation can never occur without subjective intent.[80] Something that is more than "accidental" meets the requisite level of intent.[81]

The next year, in *Hudson v. McMillian*, the Court differentiated between excessive force cases and prison conditions cases but continued to require fulfillment of both subjective and objective components to establish an Eighth Amendment violation.[82] Prison guards beat Hudson, an inmate, causing painful injuries but no permanent damage.[83] The Court held that in this excessive force context, serious injury is not required to find an Eighth Amendment violation.[84] However, in the prison conditions context, "extreme deprivations" are required to fulfill the objective component of the Eighth Amendment.[85] The Court utilized the subjective tests established in *Estelle* ("deliberate indifference"[86]) and *Whitley* ("maliciously and sadistically"[87]) and applied them to prison conditions and excessive force cases, respectively.[88]

Helling v. McKinney, the next Supreme Court Eighth Amendment case, involved an inmate who claimed that his Eighth

78. 501 U.S. 294, 297-98 (1991). Wilson, an inmate in an Ohio prison, alleged that overcrowding, excessive noise, inadequate heating, cooling and ventilation, unclean and inadequate restrooms, unsanitary dining facilities, insufficient locker storage space, as well as housing with mentally and physically ill inmates violated the Eighth Amendment. *Id.* at 296. The Court held that Wilson's combination of claims did not amount to an Eighth Amendment violation. *Id.* at 305-06.

79. *Id.* at 304.

80. *Id.* at 300. Subjective intent is described as "some mental element . . . attributed to the inflicting officer." *Id.*

81. *Id.*

82. 503 U.S. 1 (1992). Justice O'Connor wrote for a five-member majority, in which Chief Justice Rehnquist and Justices White, Kennedy and Souter joined; Justices Blackmun and Stevens concurred in the judgment and Justices Thomas and Scalia dissented. *Id.* at 3.

83. *Id.* at 4. One prison official held Hudson in place while another beat him. *Id.* Hudson suffered bruises and swelling of his face and mouth and a cracked dental plate. *Id.* The supervisor on duty watched and told the officers "not to have too much fun." *Id.*

84. *Id.* at 9-10.

85. *Id.* at 9.

86. *Id.* at 5-6; *see supra* note 71 and accompanying text (describing the *Estelle* test).

87. *Hudson*, 503 U.S. at 7; *see supra* note 76 and accompanying text (identifying the *Whitley* standard).

88. *Hudson*, 503 U.S. at 5-8.

Amendment rights were violated because he was exposed to second-hand smoke from his cellmate.[89] Although McKinney had not suffered any identifiable harm at the time he sued, the Court held that he had stated a valid claim, extending the reach of the Eighth Amendment to include the risk of future harm.[90] The Court reasoned that if a prisoner is exposed to a risk "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk," the Eighth Amendment is violated.[91]

The most recent Supreme Court Eighth Amendment case, *Farmer v. Brennan*, maintained the Court's adherence to subjective and objective components of the Eighth Amendment test.[92] *Farmer* involved a transsexual prisoner who claimed officials acted with deliberate indifference to his safety in violation of the Eighth Amendment.[93] Farmer, although biologically male, dressed as a woman.[94] After a transfer to a higher security penitentiary, Farmer was placed in the general male population and was allegedly raped by a cellmate.[95] Farmer's attorneys argued that officials should have considered the history of violence at the prison to which Farmer was transferred and the fact that Farmer's feminine appearance increased the likelihood of being assaulted.[96] The Su-

89. 113 S. Ct. 2475 (1993). Justice White wrote for a seven-member majority; Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Kennedy and Souter joined the majority opinion, while Justices Scalia and Thomas dissented. *Id.* at 2477. McKinney complained that his cellmate smoked five packs of cigarettes a day. *Id.* at 2478.

90. *Id.* at 2480. The Court analogized second-hand smoke to drinking water, stating that a prisoner would not have to wait for dysentery to set in before asserting an Eighth Amendment claim. *Id.*

91. *Id.* at 2482. The Court did not determine whether second-hand smoke reached the level of a constitutional violation, but sent the issue to the lower court on remand. *Id.*

92. 114 S. Ct. 1970 (1994). Justice Souter wrote for the majority, in which Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, Scalia, Kennedy and Ginsburg joined; Justices Blackmun and Stevens filed concurring opinions and Justice Thomas concurred in the judgment. *Id.* at 1974.

93. *Id.* at 1975.

94. *Id.* Farmer underwent estrogen therapy, received silicone breast implants and made an unsuccessful attempt at a black-market testicle-removal surgery. *Id.* (citing Farmer v. Haas, 990 F.2d 319, 320 (7th Cir. 1993)). Although wearing the standard uniform, Farmer was described as wearing prison clothing "in a feminine manner, as by displaying a shirt off one shoulder." *Farmer*, 114 S. Ct. at 1975. It is the regular practice of federal prisons to house preoperative transsexual inmates with prisoners of the same biological sex. *Id.*

95. *Id.* Farmer was housed in several prisons, sometimes in the general male prison population and sometimes in segregation. *Id.* Farmer was transferred from a federal correctional facility in Wisconsin to a penitentiary in Indiana, and "penitentiaries are typically higher security facilities that house more troublesome prisoners than federal correctional institutes." *Id.*

96. *Id.*

preme Court held that an official will be liable under the Eighth Amendment if they know that an inmate faces a "substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[97]

III. Chain Gangs as a Violation of the Eighth Amendment

In 1958, the Supreme Court coined a phrase that has become a cornerstone of Eighth Amendment jurisprudence: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[98] The problem with this hopeful statement lies in its assumption that society will be able to come to a consensus about what is decent.[99] It is painfully obvious that contemporary society contains viewpoints that could not be farther apart in the perception of what is a decent, humane way to treat prisoners. Although the courts, and not the whole of society, are responsible for determining these elusive standards of decency, Eighth Amendment precedent has consistently relied on *society's* standards as the measure for how the Cruel and Unusual Punishment Clause

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97. *Id.* at 1984. The Supreme Court remanded the case for a determination of whether prison officials violated the Eighth Amendment by failing to prevent harm to Farmer. *Id.* at 1984-85.

98. Trop v. Dulles, 356 U.S. 86, 100-101 (1958). *See supra* note 67 and accompanying text (discussing the *Trop* decision). Courts continue to cite this passage from *Trop*. *See* Hudson v. McMillian, 503 U.S. 1, 8 (1992) (challenging use of excessive force under the Eighth Amendment); Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (challenging prison conditions under the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153, 172-73 (1976) (challenging the death penalty under Eighth Amendment).

99. Additionally, the quoted language assumes that society's standards of decency *will* evolve. Although there are certain torturous punishments that almost no one would currently advocate, it is not clear that as a society we are maturing with regard to standards of decency in the treatment of prisoners. The mere fact that chain gangs are appearing around the country supports the view that society is regressing, not maturing, in the area of standards of decency.

The Director of the National Center on Institutions and Alternatives, Rob Hoelter, sums up this argument: "I find it fascinating the corrections system is turning back the hands of time when the rest of the world is moving forward." *Alabama to Reinstate Chain Gangs*, *supra* note 28, at A14.

However, it is difficult to consider a better way to allow the Eighth Amendment to evolve:

> In an area where court decisions must necessarily be predicated upon "evolving standards" and "the progress of a maturing society", it is self-defeating to be bound by one's apprehensions of the limits of prior cases. Else, how did we develop from the days of pillorying, disemboweling, decapitation, and drawing and quartering, and how are we to continue to protect "the dignity of man"?

Novak v. Beto, 456 F.2d 1303, 1307 (5th Cir. 1972).

must adapt to changing times.[100] Chain gangs fall squarely into the midst of this dilemma.

Precedent suggests that three characteristics of chain gangs could be the basis of an Eighth Amendment claim: (1) the risks imposed on chain gang prisoners, (2) the intent behind chain gangs and (3) the deprivation of human dignity that accompanies being chained to other prisoners. In the argument which follows, section A applies the objective component of Eighth Amendment analysis to the risks involved in chain gang labor. Section B applies the subjective component of Eighth Amendment analysis to the intent behind the use of chain gangs. Section C relies on both the objective and subjective standards of Eighth Amendment analysis in making a claim based on the deprivation of human dignity for chain gang prisoners: objective because labor in chains is a particularly degrading task by most standards, and subjective because the explicit intent behind chain gangs is to humiliate and degrade. The human dignity deprivation claim would attempt to establish "human dignity" as a tangible concept, deserving of constitutional protection.[101]

A. The Objective Component: Risk of Harm to Prisoners

Prisoners assigned to chain gangs are exposed to substantial risk, above and beyond what they would be exposed to in the course of regular prison life. The hazards include danger from nearby traffic, danger from other prisoners to whom they are chained[102] and danger from any natural event that would threaten the safety of a group of people chained together, such as an encounter with a poisonous snake.[103]

Morris Dees, founder of the Southern Poverty Law Center, said of the danger experienced by chain gangs: "[Trucks are] moving past the chain gangs at 70 miles per hour . . . . It's un-

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100. *See* Helling v. McKinney, 113 S. Ct. 2475, 2482 (1993); *Hudson*, 503 U.S. at 8; *Trop*, 356 U.S. at 101; Weems v. United States, 217 U.S. 349, 378 (1910) ("The clause . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning *as public opinion becomes enlightened by humane justice*.") (emphasis added).

101. Alabama prisoners construed "human dignity" as a tangible, protectable interest in their complaint. Complaint, *supra* note 5, at 1.

102. The events leading to McCord's death serve as an example. *See supra* notes 1-3 and accompanying text.

103. The complaint notes risks from poisonous snakes, wasps, hornets and falling trees cut down by prisoners. Complaint, *supra* note 5, at 6. It states: "Many inmates have encountered snakes during their work." *Id.* Poisonous snakes found in Alabama include rattlers, water moccasins and corals. *United States of America: Alabama*, *in* 29 NEW ENCYCLOPAEDIA BRITANNICA 316, 317 (1996).

safe."[104] The complaint filed in the prisoners' class-action suit noted several near-accidents in the first two weeks of roadside chain gangs.[105] One explanation for this may be that the "drivers' attention is diverted away from the roads, thus increasing the likelihood of accidents."[106]

The potential for violence between chain-mates also raises significant danger for chain gang prisoners. Being chained together for ten hours a day would cause tension between even the most patient people. Such action is particularly likely to cause tension between prisoners, who may already be in prison because of a tendency towards violence or a lack of judgment in stressful situations.[107] The prisoners are armed with blades, sledgehammers, shovels and axes, creating the potential for deadly violence if tension escalates. The fact that prisoners are chained together greatly reduces their ability to defend themselves against any violent eruptions.

The general risk is exacerbated by the presence of guards who may shoot if an altercation breaks out or if someone appears to be attempting to escape.[108] It is easy to visualize situations in which it may appear that an escape attempt is being made when a prisoner is reacting to a swarm of hornets, a poisonous snake or a falling tree. The panic that can quickly spread among individuals chained together places the prisoners at risk of being shot.

In addition to outside factors, each prisoner may be placed in danger as a result of the actions of his chain-mates. For example, one prisoner may be working diligently and his chainmate may start an altercation, causing a guard to shoot at the prisoners, unfairly placing the innocent prisoner in great danger.[109] While pris-

104. Schone, *supra* note 7, at 84. The complaint filed on behalf of the class of prisoners suing over chain gangs echoed Dees' safety concerns. "The use of leg irons to chain inmates together poses a substantial risk of serious harm or death to plaintiffs as they labor on the roadside in close proximity to cars and trucks driving at speeds of over fifty-five miles per hour." Complaint, *supra* note 5, at 4.

105. Complaint, *supra* note 5, at 5.

106. *Id.* at 4.

107. *See supra* notes 63-64 and accompanying text (explaining that Senator Crist's proposed legislation in Florida specifies that chain gangs must include violent offenders).

108. *See supra* notes 1-2 and accompanying text. Prisoner McCord's death is direct evidence of the risks posed by chain gangs.

109. Alabama's system proved "effective" at protecting chain gang inmates from each other in the situation involving McCord. *See Chain-Gang Prisoner Killed During Fight*, MONTGOMERY ADVERTISER, May 16, 1996, at 1A. The prisoner McCord attacked was not seriously hurt, and the guards shot and killed the "right" prisoner—the attacker instead of a victim or bystander. However, describing a system as "efficient" or "effective" that artificially places inmates at increased risk,

oners face risks just by being incarcerated, on chain gangs the tension is heightened because guards do not have the security of locked doors to contain prisoners if a disturbance occurs. This heightened tension, further increased by public visibility, results in unfair risks to prisoners.

Unless a prisoner is physically injured while performing chain gang work, the ability to sue based on risk is critical for the argument against chain gangs. The many risks faced by chain gang prisoners—particularly the risk of being shot—present a strong factual base with which to satisfy the objective component of the Eighth Amendment. *Helling v. McKinney* established that an inmate does not have to have suffered any identifiable harm at the time he sues.[110] A prisoner can sue based solely on risk, and the Eighth Amendment is violated if a prisoner is exposed to a risk "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk."[111] The challenge for a chain gang plaintiff would be proving that the degree of risk is sufficiently unacceptable.

The obvious difficulty presented in bringing an Eighth Amendment claim after *Helling* is showing that chain gangs create a risk that "violate[s] contemporary standards of decency."[112] Perhaps the best way for opponents of chain gangs to construe this phrase would be to return to its origins in *Trop* and focus on the emphasis the Court placed on the evolution of such standards of decency.[113] *Trop* assumed that society would mature in its treatment of prisoners, and, by implication, even if the public is hungry for vengeance, it is the responsibility of the Supreme Court to act as the voice of humanity and reason.[114] The spirit of *Trop* could be used to argue against chain gangs based on what should be the maturing and evolving standards of society, even if these standards do not yet match public opinion.[115]

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necessitating the killing of one prisoner to save another, is tragic, and should be unconstitutional under *Helling* and *Farmer*. *See infra* text accompanying notes 110, 117.

110. 113 S. Ct. 2475, 2481 (1993).

111. *Id.* at 2482. The risk in *Helling* came from the prisoner's cellmate's constant smoking. *Id.* The Court did not make a finding as to whether second-hand smoke was a grave enough risk to satisfy this new standard, but the Court clearly established that a prisoner did not have to show present injury to establish an Eighth Amendment claim. *Id.*

112. *Id.*

113. *Id.*

114. "This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising." Trop v. Dulles, 356 U.S. 86, 100 (1958).

115. *Id.* at 99-104.

The analysis in *Farmer v. Brennan* also offers a general approach toward prisoner claims that may be helpful in potential chain gang lawsuits.[116] The *Farmer* Court recognized that prisoners are in a vulnerable position with limited capabilities to defend themselves against danger.[117] As already discussed, this vulnerability is intensified in the case of chain gangs.[118] The progressiveness of the Court in *Farmer* is promising for the case against chain gangs. Since the Court has expressed sympathy for a transsexual exposed to danger in prison, it may also extend sympathy to prisoners who are forced to labor on chain gangs.

B. The Subjective Component: Intent Behind Chain Gangs

The subjective requirement of an Eighth Amendment analysis of chain gangs would probably apply to the prison officials who use their authority to implement the programs.[119] Commissioner Jones, for example, served in this capacity in Alabama,[120] and similar figures would fill this role for other states that may implement chain gangs, such as Florida.[121]

Comissioner Jones claimed that chain gangs served both a cost-saving[122] and a deterrent purpose.[123] Since saving money and

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116. *See supra* note 97 and accompanying text.

117. Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994).

118. *See supra* notes 108-109 and accompanying text.

119. "Our cases have held that a *prison official* violates the Eighth Amendment only when two requirements are met." *Farmer*, 114 S. Ct. at 1977 (emphasis added). *See supra* notes 94-99 and accompanying text.

120. Although this point was not litigated, the settlement reached in the Alabama lawsuit repeatedly named the "Defendant Commissioner of the Department of Corrections" as the official in control of the chain gang program. Stipulation, *supra*, note 7 at 1. At the time the suit was filed, this was Ron Jones, and at the time of the settlement, it was Joe Hopper. *See id.* at 1-2. The settlement also dismissed Governor James from the case because "[t]here is no evidence that demonstrates that Governor James knew that inmates chained together may face a substantial risk of serious harm or that he disregarded any such risk by failing to take reasonable measures to abate it." *Id.*

121. After McCord's death in Alabama, it would be difficult for Florida's Senator Crist to argue that he did not know about the risk involved with chain gangs. He has stated that he is "not particularly concerned with the welfare of . . . murderers, rapists and robbers." Shaw, *supra* note 59, at 6.

122. Commissioner Jones backed up the idea to reinstate chain gangs by arguing that they save money. Schone, *supra* note 7, at 82. He claimed that by chaining men together, he could put twice as many prisoners to work per guard. *Id.* However, one reporter watching the chain gangs at work suggested that the cost savings might not be as great as Commissioner Jones predicted. *Id.* The reporter noted that the ratio of guards to prisoners was not one to forty as claimed, but was actually one to twenty-three. *Id.* Southern Poverty Law Center Attorney Rhonda Brownstein agreed that Jones' prisoner-to-guard ratios were incorrect. Telephone Interview with Rhonda Brownstein, *supra* note 35.

deterring crime are not only legal but praiseworthy goals, chain gang plaintiffs facing such claims in another state would have to identify the real intent behind the establishment of chain gangs.[124]

Commissioner Jones' cost-saving justifications were misleading because Alabama was not actually *saving* money; it was merely *spending less* money than if chain gang prisoners were doing the same work while unchained.[125] Commissioner Jones' financial justification for chain gangs is further undermined by his and Governor James' additional stated goals of humiliation and embarrassment.[126] Jones' credibility is strained when he argues that money was the primary motivator for implementing chain gangs and that humiliation of prisoners was merely a fringe benefit. Jones stated that "[t]he whole concept is to put inmates into a restrictive environment. They are devoid of all things while they're on the chain gangs and they are required to work very long hours. It's punitive in and of itself."[127] Governor James accepted a reference to chain gangs as "Operation Humiliation" as a compliment and agreed that "[p]art of the deterrence [was] to be embarrassed."[128]

Once startup costs of over $1 million were added, the savings became even more illusory. *Id.* Startup costs included 375 sets of chains for $17,000, $1 million to adapt school buses to hauling prisoners to worksites and an unspecified amount to convert one wing at the Limestone Correctional Facility to a 400-bed chain gang dorm, stripped of many comforts. *Id.* at 80, 82. It would be misleading to calculate startup costs without contemplating the expense of the state's defense in the prisoners' lawsuits, which came as no surprise to Jones. *See Working on a Chain Gang Rattles Alabama Prisoner*, COM. APPEAL (Memphis, Tenn.), May 9, 1995, at A1.

123. Alabama administrators readily admitted that a primary goal of the chain gangs was simply to make prisoners' lives so miserable that they will never return to prison. Mark Curriden, *Hard Time*, A.B.A. J., July 1995, at 74. This goal is also evidenced by the other privileges that are taken away during a prisoner's one to three months stay on a chain gang—for example, coffee, cable TV and other inmate frills. *Id.* Upon his appointment as Alabama's corrections chief, Joe Hopper declared that he planned to continue to deny these privileges to individually chained prisoners. *Hopper Says He's No Softy*, *supra* note 40, at 5A.

Jones made many comments which supported the assertion that the chain gangs are meant to make prison stays miserable. For example, he stated that prisoners "are absolutely complaining and I think the success of the program is proportionate to their complaints." *Alabama Inmates Return to Chain Gangs Today*, *supra* note 40, at 2.

124. In Florida, Senator Crist's comments seem sufficiently clear to establish intent behind the formation of chain gangs. *See* text accompanying note 80 (noting the *Wilson* Court's subjective intent requirement).

125. *See supra* note 122 and accompanying text (critiquing the cost-saving justification).

126. See *supra* note 43 and accompanying text for a discussion of the weaknesses of Jones' rationale for chain gangs.

127. *Alabama Inmates Return to Chain Gangs Today*, *supra* note 40, at 2.

128. Schone, *supra* note 7, at 82.

Plaintiffs would have to satisfy *Estelle's* "deliberate indifference" standard, adopted in the context of prison conditions cases, in order to fulfill the subjective component of Eighth Amendment analysis.[129] The most recent Eighth Amendment case, *Farmer v. Brennan*, could once again be used as a model for chain gang plaintiffs. The *Farmer* analysis is based entirely on risk.[130] The Court likened deliberate indifference to reckless disregard of a substantial risk of serious harm.[131] The Court, however, declined to define recklessness and instead held that the standard is satisfied if an official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn . . . and he must also draw the inference."[132]

After Alabama's experience, the risks involved with chain gangs should be undeniably clear to prison officials in Florida or any other state. Neither officials implementing chain gangs nor guards supervising them can reasonably argue that they are unaware of the danger involved. As long as the degree of risk can be successfully established, prison officials' knowledge of and disregard for that risk would likely follow. Unlike *Estelle*,[133] which involved one prisoner's need for medical care, and *Farmer*,[134] which involved danger to one transsexual prisoner, chain gangs involve risks created and imposed by state officials on numerous prisoners. Deliberate indifference would be easier to prove in the chain gang context than it would be in the case of an individual prisoner.

C. *Pushing for Eighth Amendment Evolution: Human Dignity Deprivation as a Tangible Concept*

The images of slavery raised by prisoner chain gangs bring to mind some of this country's most regrettable acts and policies. Considering the number of African-American prisoners in the United States,[135] chain gangs offend human dignity by paying tribute to such an inhumane practice. No doubt, convict labor in the post-Civil War era was much more brutal than are today's

129. *See supra* notes 84-88 and accompanying text.

130. 114 S. Ct. 1970, 1984 (1994). *See also supra* text accompanying note 97.

131. Farmer v. Brennan, 114 S. Ct. 1970, 1978 (1994).

132. *Id.* at 1979.

133. *See supra* notes 71-72 and accompanying text.

134. *See supra* notes 92-97 and accompanying text.

135. As of 1992, African Americans are incarcerated at a rate at least six times that of whites. LICHTENSTEIN, *supra* note 21, at xiv.

chain gangs.[136] Nonetheless, analogies are unavoidable and are certainly justifiable.

Chain gangs are specifically designed to humiliate and degrade prisoners. Alabama officials readily admitted that humiliation and degradation were essential components of a chain gang program,[137] and Florida Senator Crist plans to introduce legislation with the specific goal of making one's inclusion in chain gangs more shameful.[138] Degradation is increased by the placement of chain gangs along heavily traveled highways.[139]

Although the Supreme Court has not yet construed human dignity as a tangible concept, the context of chain gangs is degrading enough to warrant such an argument. The *Wilson* Court, through its use of the deliberate indifference standard, required the "deprivation of a single, identifiable human need" for the establishment of a constitutional violation.[140] In the Eighth Amendment context, human dignity should be classified as a human need, just as more tangible needs such as health care and nutrition.

The *Wilson* Court's focus on the deprivation of a single human need as opposed to "overall conditions,"[141] however, weakens the application of the Eighth Amendment to the chain gang context. The Supreme Court would likely fear giving a phrase as amorphous as "human dignity" the status of an identifiable, constitutionally protected need such as nutrition or warmth.

Trop offers general supportive language in its statement that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[142] Although the concept of having prisoners perform work is legitimate, chaining them together solely for reasons of retribution and humiliation sinks to a depth of inhumanity that the Constitution should not support. The *Trop*

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136. *See supra* text accompanying note 21.

137. *See supra* notes 39, 123-124 and accompanying text.

138. *See supra* notes 60-65 and accompanying text.

139. One prisoner described the humiliation of chain gang work along the highway: "This ain't nothing but a circus, a big old zoo. We all animals now." Leland & Smith, *supra* note 7, at 58. *See supra* note 63 and accompanying text (discussing Crist's desire to place chain gangs along major highways).

140. Wilson v. Seiter, 501 U.S. 294, 304 (1991). *See supra* notes 79-80 and accompanying text.

141. *Id.* at 305. The Court rejected Wilson's theory that "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates" could combine to create unconstitutional conditions. *Id.* at 296.

142. Trop v. Dulles, 356 U.S. 86, 100 (1958).

Court charged itself with the "duty of implementing the constitutional safeguards that protect individual rights."[143] It also stated that the provisions of the Constitution "are vital, living principles."[144] Despite the differences between the facts at issue in *Trop* and chain gangs[145] the *Trop* Court's treatment of the Constitution as a maturing document and its emphasis on protecting individual rights[146] are vital elements for a successful constitutional challenge to chain gangs.

Although *Rhodes* offers language in support of contemporary theories that prison life is supposed to be harsh and unpleasant,[147] extending this theory to encompass creative and arbitrary cruelty such as chain gangs offends human dignity. There are many prison conditions that may, consistent with the Constitution, be unpleasant due to building, funding and other limitations.[148] However, given the purpose of the Eighth Amendment as stated in *Trop*,[149] degrading and meaningless activities that have been arbitrarily invented for prisoners should be scrutinized more strictly than other prison shortcomings that are more natural or accidental.

The lawsuit brought by Alabama chain gang prisoners was creative in characterizing dignity as a "fundamental human need."[150] Potential chain gang prisoners would have an arduous task in persuading the Supreme Court to take the unprecedented step of classifying human dignity as a constitutionally protectable interest. However, the argument, although novel, is supported both by precedent[151] and modern theories of humane prisoner treatment.[152]

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143. *Id.* at 103.

144. *Id.*

145. *Trop* involved the de-nationalization of an Army deserter. *See supra* note 67 and accompanying text.

146. *Trop*, 356 U.S. at 103.

147. The situation in *Chapman* may be distinguishable from chain gangs because of its accidental nature. *See* Rhodes v. Chapman, 452 U.S. 337, 347-48 (1981). Prison overcrowding may simply be the result of an increase in the prison population and may lack the deliberative and intentional quality of chain gangs.

148. *Id.* at 349 ("[T]he Constitution does not mandate comfortable prisons.").

149. *See supra* notes 142-146 and accompanying text.

150. Complaint, *supra* note 5, at 7.

151. *See supra* notes 140-148 and accompanying text.

152. *See supra* note 54 and accompanying text (discussing modern penological theories).

Conclusion

While it may be too early to tell what effect prisoner chain gangs will have on recidivism or whether they will deter crime,[153] they undeniably serve a more immediate and simple purpose: retribution. Prison policies that cut back on prisoner recreation and education add to the retributive quality of incarceration.[154] Public sentiment is dictating development of prison policy, despite arguments that such "get tough" measures are purely symbolic and unrelated to stopping crime.[155]

If Florida or another state adopts the practice recently rejected in Alabama of chaining inmates together, or if county chain gang inmates such as those in Tennessee decide to challenge the practice, the Eighth Amendment provides the most logical battleground. The most recent Eighth Amendment precedent delves into progressive areas like risk from second-hand smoke and transsexuals' rights, and considering that the current makeup of the Court is the same as when *Farmer* was decided,[156] potential chain gang plaintiffs may be able to successfully invalidate the practice via the Eighth Amendment.

The risks inherent in chain gangs provide the strongest evidence to argue that chain gangs are unconstitutional. It is difficult to imagine a clearer indication of such risks than Abraham McCord's death in Alabama. If another lawsuit arises, prisoners could utilize this unfortunate occurrence to their benefit, meshing the harsh chain gang realities with Supreme Court precedent. The Court has already accepted risk as an objective harm for Eighth Amendment purposes. The subjective component of an Eighth Amendment challenge would present a greater difficulty. However, the vocality of government and prison officials in responding to McCord's death provides insight into the intent behind the formation of chain gangs.

Chain gangs are uniquely designed to divest prisoners of their human dignity. Arguing that human dignity is a tangible need would be monumental for the Court, but the slave-like practice of chaining people together for forced labor may be powerful enough to inspire the Court to classify human dignity as a newly protectable interest under the Eighth Amendment.

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153. *See supra* note 54 (explaining that evidence indicates that chain gangs are unlikely to deter crime).

154. *See generally* Curriden, *supra* note 123, at 74 (outlining characteristics of an Alabama chain gang stay).

155. *Id.*

156. *See supra* note 92.

The purely symbolic nature of chain gangs does not translate well into applied penal policy. Although simplistic "get tough" policies may make for effective political speech, as applied to prisoners, their effectiveness is dubious. One can only hope that treating prisoners like animals does not turn out to be a self-fulfilling prophecy.