THE PROPRIETY AND CONSTITUTIONALITY OF CHAIN GANGS

INTRODUCTION

The resurfacing of chain gangs in the past year recalls some of the worst abuses of racism in our country's history. For many people, the image invoked by the recurrence of chain gangs is that of "black prisoners chained together in a line, exhausted in the relentless sun, heaving picks at stubborn earth," with a white overseer, "supervising the work from horseback, bearing down with whip and dog."[1] For others, the revival of chain gangs represents a welcome end to prisoner privileges and law enforcement being soft on crime; it signifies a return to what prison should be: unpleasant and uncomfortable.[2]

This Note addresses the constitutionality and propriety of chain gangs in light of their recent reemergence. Section I explores the complex origins of chain gangs in the realm of Reconstruction and southern history. Section II describes the legal history of chain gangs in both the cruel and unusual punishment and forced labor contexts. Section III portrays chain gangs in their current form. Section IV assesses the constitutionality and policy ramifications of chain gangs and considers a different approach to the use of prison labor.

I. THE HISTORY OF CHAIN GANGS IN THE FORCED LABOR CONTEXT

A complete analysis of chain gangs requires a close examination of the circumstances, which led to their emergence shortly after the emancipation of slaves in the United States. After the Civil War, southern jails became overcrowded during a time when labor was considered to be a convict's duty to society as part of his punishment.[3] Forcing convicts to work was an

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1. *Music of Slaves, Prisoners Remains Alive in Greeley*, ROCKY MOUNTAIN NEWS, Jan. 21, 1994, at 24A.

2. *Platform Includes Making Prison Life as Harsh as Possible*, ASSOCIATED PRESS POL. SERV., Sept. 12, 1995 [hereinafter *Platform*]; Richard Lacayo, *The Real Hard Cell: Lawmakers are Stripping Inmates of their Perks*, TIME, Sept. 4, 1995, at 31.

3. Daniel T. Brailsford, Note, *The Historical Background and Present Status of the County Chain Gang in South Carolina*, 21 S.C. L. REV. 53, 55 (1968). See also the

attractive concept, because it not only provided free labor, but required unskilled labor perfectly suited to the newly freed slaves.[4] Convict laborers were put to work on chain gangs in four spheres: the convict lease system, the criminal surety system, sentencing of vagrancy law violators, and punishment for other crimes.[5]

A. Convict Lease System

The convict lease arrangement involved the leasing of convicts from state or county jails to private companies, whereby the companies (usually railroad and coal mining companies)[6] assumed the responsibility of supervising the laborers, whom they sent to work on roads. The laborers were chained together to prevent their escape.[7] Convicts served as cheap labor for the companies for a developing and industrializing south,[8] while states made a profit from the lease of the convicts.[9] This phenomenon parallels the shift in prison population from predominantly white to predominantly black,[10] and consequently, African-Americans comprised the majority of the convict-laborers.[11]

Most of the convicts had merely committed minor crimes, such as loitering or theft, but were still restrained through the use of shackles, dogs, whips, and guns.[12] The convict laborers suffered

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Thirteenth Amendment, which explicitly excludes "punishment for crime whereof the party shall have been duly convicted" from its prohibition of involuntary servitude. U.S. CONST. amend. XIII, § 1.

4. Brailsford, *supra* note 3, at 55.

5. Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitive or Competitive?* 51 U. CHI. L. REV. 1161, 1163-64 (1984); The Honorable Louis B. Meyer, *North Carolina's Fair Sentencing Act: An Ineffective Scarecrow*, 28 WAKE FOREST L. REV. 519, 523 (1993).

6. Randall G. Sheldon, *From Slave to Caste Society: Penal Changes in Tennessee, 1830-1915, in* AFRICAN AMERICAN LIFE IN THE POST-EMANCIPATION SOUTH, 1861-1900, 300, 302 (Donald G. Nieman, ed., 1994).

7. Roback, *supra* note 5, at 1170.

8. Sheldon, *supra* note 6, at 301.

9. William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis, in* 12 BLACK SOUTHERNERS AND THE LAW 1865-1900, 35, 59 (Donald G. Nieman, ed., 1994).

10. Sheldon, *supra* note 6, at 302.

11. Cohen, *supra* note 9, at 60. In Georgia, even though African-Americans accounted for only 37% of the population in 1930, they made up 83% of the prison population. *Id.* at 61. Also, in Alabama in 1932, every single person out of 1089 total workers on the chain gang was black. *Id.*

12. *Id.* at 59.

numerous brutalities while on the chain gangs, such as being housed in movable cages.[13] Moreover, the companies had no incentive to keep the convict-laborers alive through the end of their contract period, since their economic benefit was served during the convict's sentence. There was, consequently, an extremely high death rate on the chain gangs.[14]

The sentiment expressed to justify the use of the convicts at the time mirrors the justification for chain gangs utilized today: "The State should farm out such convicts even for only their subsistence, rather than compel taxpayers to support them in idleness."[15] The convict lease system was not completely abandoned until 1928 when Alabama became the last state to abolish it,[16] while most states had abandoned the practice by 1890.[17]

B. Criminal Surety System

In addition to the setup in which companies could lease convicts from the state and county jails, private citizens needing workers also utilized convict labor by paying the fines imposed upon convicts who could not afford to pay the fines themselves.[18] In turn, the private individual obliged the convict to work for him in order to reimburse him for paying the fine, "leaving the [convict] beholden to his new employer for the money advanced on his behalf and fearful that misbehavior would bring a return to jail."[19] Georgia and Alabama were the only states that

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13. *Id.* at 61.

14. Roback, *supra* note 5, at 1170. This element in the convict lease system makes it more brutal than slavery, because in contrast to slave owners who had a permanent interest in keeping their slaves alive and healthy, a convict contractor had no such incentive because the loss of one convict would be minimal to him. Brailsford, *supra* note 3, at 55.

15. Cohen, *supra* note 9, at 60 (quoting South Carolina Redeemer George D. Tillman in 1877). Compare this to Sheriff Dean Marble's comment, of Clark County, Kentucky, made in 1995: "Inmates get three squares a day, medical, dental, the whole nine yards and they don't have to do anything but commit a crime to get it. Now we're going to get something out of them." Bob Hill, *Chain Gang Idea Had Potential-and Potential to Backfire*, LOUISVILLE COURIER-J., July 29, 1995, at 3S.

16. Cohen, *supra* note 9, at 61.

17. Roback, *supra* note 5, at 1182; *see* Simmons v. Georgia Iron & Coal Co., 43 S.E. 780 (Ga. 1903) (holding convicts may not be worked on private chain gangs controlled by private individuals); *see also* Russell v. Tatum, 30 S.E. 812, 813 (Ga. 1898).

18. Cohen, *supra* note 9, at 57.

19. *Id.*

expressly sanctioned this system by making it state law, although many other states unofficially practiced the system well into the twentieth century.[20]

C. *Vagrancy Statutes*

This scheme made unemployment a crime.[21] Under this system, "Negroes provided a ready pool of involuntary labor that could be tapped whenever whites faced any sort of labor emergency."[22] In times of labor scarcity, local police would comb the streets and countryside "round[ing] up idle blacks" and charging them with vagrancy.[23] The purpose of these statutes was to ensure cheap labor for whites in times of need. For example, during cotton harvest time when white farmers needed a large work force, vagrancy violations were at their height.[24] When a city did not have the funds to support its labor force, vagrancy violators were used for such tasks as garbage collection.[25] Any person convicted of vagrancy who could not pay his fine was forced to work off that fine on a chain gang or by working for an individual who was willing to pay the fine for the convict.[26]

In 1865, a vagrant was defined as "any poor man who did not have a labor contract."[27] Under revised statutes, the definition included any person who had no visible means of support or who did not work for a living, or who was idle.[28] Thus, one such statute read, "any person wandering or strolling about in idleness, who is able to work, and has no property to support him; or any person leading an idle, immoral, profligate life, having no property to support him" is guilty of a misdemeanor.[29] These statutes remained in effect from 1865 until the 1960's in Georgia, Texas, and Virginia.[30]

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20. *Id.*
21. Roback, *supra* note 5, at 1168.
22. Cohen, *supra* note 9, at 56.
23. *Id.* at 37-38.
24. Roback, *supra* note 5, at 1168-69.
25. Cohen, *supra* note 9, at 57.
26. *Id.* at 57.
27. *Id.* at 51.
28. *Id.* at 52.
29. Roback, *supra* note 5, at 1168 (quoting Act of Sept. 22, 1903, No. 229, 1903 Ala. Acts 244).
30. Cohen, *supra* note 9, at 51-53; *see also* Griffin v. Smith, 193 S.E. 777, 778 (Ga. 1937) (striking down an ordinance making it unlawful to do anything that is

D. Punishment for Committing Crimes

Not only have chain gangs been used to house convict-laborers leased to private entities, they were also used as a means of punishment.[31] In response to overcrowding in prisons and lack of available labor, states began in the late 1860's to authorize judges to sentence offenders to work on chain gangs.[32] Chain gangs were a suitable solution to overcrowding, since the southern climate allowed prisoners to work outdoors much of the year, and the work that needed to be done did not require skilled laborers—just strong hands.[33] Not surprisingly, the number of prisoners sentenced to the chain gang depended on the relative need for laborers.[34]

Many of those who were forced to endure the barbarity of the chain gangs described the conditions in vivid detail. For instance, while working on the roads, inmates worked within the sight of armed guards at all times, but came no closer than thirty feet or risked being shot.[35] Some of the work tasks included shoveling heavy mud and dirt into the back of a truck or cutting the grass on the shoulders of the road.[36] The convicts sometimes spent more than ten or twelve hours a day breaking rocks with sledgehammers.[37] The prison conditions that the chain gang convicts endured were no less extreme: only two meals were served daily,[38] inmates had to ask permission to get out of bed at night,[39] inmates were given a change of clothing only once a week, even if they worked in the rain,[40] convicts often slept

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"disorderly" as unconstitutionally vague and indefinite to be the basis for the infliction of service on a city chain gang or other corporal punishment).

31. Greenville v. Pridmore, 160 S.E. 144, 148 (S.C. 1931); Meyer, *supra* note 5, at 523.

32. Meyer, *supra* note 5, at 523; *see also Greenville*, 160 S.E. at 148 (holding municipal authorities have the power to sentence able-bodied male convicts to hard labor upon the county chain gang).

33. Meyer, *supra* note 5, at 523 n.29.

34. *Id.* at 524.

35. Bayard Rustin, *Twenty-Two Days on a Chain Gang, in* DOWN THE LINE, THE COLLECTED WRITINGS OF BAYARD RUSTIN 26, 28 (1971).

36. *Id.* at 30.

37. Jane Hulse, *Pelliccia Tells of Chain-Gang Brutality He Fled*, L.A. TIMES, Aug. 20, 1987, at 8.

38. Rustin, *supra* note 35, at 26.

39. *Id.* at 27.

40. *Id.* at 28.

chained together, and they were given only a bucket to use for a toilet.[41]

The brutalities that the members of the chain gang suffered were egregious. For instance, the punishments imposed on chain gang convicts for infractions included the following: for a minor offense, guards sometimes forced inmates to remain standing for certain periods of time without eating, causing swelling and cramping;[42] for major offenses, inmates suffered beatings with a leather strap or solitary confinement.[43] There were also many unauthorized punishments that the inmates were forced to withstand, such as beatings by guards for complaining or using profanity, constant threats of being shot or beaten,[44] and being hung on bars for refusing to work.[45] In addition, chain gang guards were infamous for kicking, beating, and punching inmates.[46] All too often, prisoners were released with no money and re-arrested within hours for violating vagrancy laws while attempting to hitchhike back home.[47]

Certain atrocities, such as the staking treatment, sweat box, dipping barrel, and the "Georgia rack," that were committed against chain gang inmates continued well into the middle of the century in the South.[48] The staking treatment consisted of stretching an inmate across a stake with a chain and pouring molasses over his body while flies, bees and other insects were allowed to crawl all over him.[49] The sweat box treatment involved locking a prisoner into a wooden box that was neither high enough to stand nor deep enough to sit for days, while temperatures within the box exceeded one hundred degrees.[50] The dipping barrel method included sticking the prisoner into a barrel with a hose running into it and forcing the prisoner to either bail out the running water or drown.[51] Finally, the

41. Hulse, *supra* note 37.
42. Rustin, *supra* note 35, at 41.
43. *Id.*
44. *Id.* at 41, 42.
45. *Id.* at 31. One inmate was chained standing to the bars of his cell for several hours and was then expected to work the next day. *Id.*
46. *Id.* at 42.
47. *Id.* at 36.
48. *See* Commonwealth v. Baldi, 106 A.2d 777, 781-82 (Pa. 1954), (Musmanno, J., dissenting), *cert. denied*, 348 U.S. 977 (1955).
49. *Id.*
50. *Id.*
51. *Id.*

Georgia rack was a device that stretched the inmate between two hooks with a cable and a turncrank.[52] Other torturous practices included placing prisoners in stocks and beating them, rubbing their feet with corncobs and forcing them to bathe in liniment, and hanging them from a tree by the wrists with chains.[53]

II. LEGAL HISTORY OF CHAIN GANGS

The chain gangs of the past underwent sharp criticism by courts and commentators until their demise in the middle of the twentieth century. Chain gang convicts sought constitutional as well as civil remedies for their mistreatment.

A. Cruel and Unusual Punishment

To analyze the constitutionality of chain gangs, it is essential to first understand the context in which courts have considered the issue, and this jurisprudence is characterized by the doctrinal and procedural complexities of cruel and unusual punishment. Recent Supreme Court decisions have limited prisoners' rights. For example, in *Farmer v. Brennan*,[54] the Court employed a subjective test for cruel and unusual punishment, rather than an objective one, holding that prison officials "cannot be liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety."[55] Further, in *Sandin v. O'Connor*,[56] the Court elevated the standard for Due Process violations to "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."[57]

The Supreme Court, as well as other courts, have defined the scope of the Eighth Amendment to include an analysis of the following elements of a punishment: the relative proportionality to the crime, the extraordinary nature of the punishment, contemporary standards of decency, and the severity of the punishment.[58]

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52. *Id.*
53. *Id.*
54. 114 S. Ct. 1970 (1994).
55. *Id.* at 1979.
56. 115 S. Ct. 2293 (1995).
57. *Id.* at 2300.
58. Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86

The Court has reiterated that punishment which is disproportionate to an offense is cruel and unusual.[59] In determining the proportionality of a particular punishment,[60] the Court historically examined three factors: (1) the gravity of the offense compared to the harshness of the penalty, (2) comparable sentencing for other crimes in the same jurisdiction, and (3) comparable sentences for the same crime in other jurisdictions.[61] The Court examined these factors in a variety of cases while considering the proportionality of a punishment. For instance, in *Weems v. United States*, the Court recognized that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense" in holding that the crime was disproportionate to the offense.[62] Further, in *Trop v. Dulles*, the Court highlighted the importance of proportionality when it observed that "fines, imprisonment and even execution may be imposed *depending upon the enormity of the crime*."[63]

In connection to its proportionality standard, the Court has also acknowledged that a punishment must not be excessive in two regards: "the punishment must not involve the unnecessary and wanton infliction of pain," and "the punishment must not be grossly out of proportion to the severity of the crime."[64] A punishment is excessive 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

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(1958).

59. *Weems*, 217 U.S. at 349.

60. Although the Court previously examined proportionality in non-capital cases, it currently considers proportionality only in death penalty cases. Harmelin v. Michigan, 501 U.S. 957 (1991).

61. *Id.* at 962.

62. *Weems*, 217 U.S. at 367.

63. *Trop*, 356 U.S. at 100 (emphasis added). Even when, as here, the punishment does not involve "physical mistreatment," it may still deprive an individual of his Eighth Amendment rights if it is excessive. *Id.* at 101.

64. Gregg v. Georgia, 428 U.S. 153, 173 (1976); *see also* Kent v. State, 88 S.E. 913, 914 (Ga. Ct. App. 1916) (hard labor not proper sentence for misdemeanor); Screen v. State, 33 S.E. 393, 394 (Ga. 1899) (holding sentence in misdemeanor case that requires person convicted for nonpayment of fine to be put to work on chain gang exceeds the limit fixed by law); Alexander v. Walton, 107 S.E. 862, 863 (Ga. 1921) (holding individuals cannot be confined to chain gang or compelled to labor for fees due officers of court rendered subsequent to conviction and sentence). *But see* State v. Harrell, 140 S.E. 258, 261 (S.C. 1927) (sentence to chain gang for period of six months upon conviction for transporting intoxicating liquor is not unjust, unreasonable, or excessive).

severity of the crime."[65] The Court cautioned that "a penalty also must accord with 'the dignity of man,' which is the basic concept underlying the Eighth Amendment.'"[66] The test for proportionality of a punishment necessitates a comparison of the "gravity of the offense," including the injury and the defendant's culpability, with the "harshness of the penalty."[67]

However, the Court's interpretation of this protection has recently been of little assistance to non-capital cases.[68] In 1980, the Court explicitly rejected the assertion that unconstitutional disproportionality could be established by weighing (1) the gravity of the offense versus the severity of the penalty, (2) penalties imposed within the same jurisdiction for similar crimes, and (3) penalties imposed in other jurisdictions for the same offense.[69] The Court in *Solem v. Helm*[70] held that punishments that are of a "unique nature" may be unconstitutionally disproportionate. However, in the later decision of *Harmelin v. Michigan*,[71] the Court concluded that it had previously been wrong, and the "Eighth Amendment contains no proportionality guarantee."[72] After a lengthy discussion of the history of the Eighth Amendment's prohibition of cruel and unusual punishment, the Court concluded that "[w]hile there are relatively clear historical guidelines and accepted practices that enable judges to determine which *modes* of punishment are 'cruel and unusual,' *proportionality* does not lend itself to such analysis. Neither Congress nor any state legislature has ever announced the objective of crafting a penalty that is 'disproportionate.'"[73] Although in the past the Court considered the proportionality of

65. Coker v. Georgia, 433 U.S. 584, 592 (1977) (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

66. *Gregg*, 428 U.S. at 173.

67. Stanford v. Kentucky, 492 U.S. 361, 394 (1989) (Brennan, J., dissenting).

68. The Court has explicitly refused to void sentencing in a non-capital case for proportionality reasons. *See* Nix v. Whiteside, 475 U.S. 157 (1986).

69. Rummel v. Estelle, 445 U.S. 263, 281-82, 282 n.27 (1980). The Court said that challenges to the proportionality of punishments rarely succeed except in capital punishment cases. *Id.* at 274. In *Harmelin v. Michigan*, the Court said that this test is flawed because (1) there is no objective standard for gravity; (2) it is not possible to compare sentences across jurisdictions without the aid of objective standards; and (3) states are allowed to criminalize acts that they deem punishable, and the Eighth Amendment does not require that all states agree. 501 U.S. 957, 989-99 (1991).

70. 463 U.S. 277 (1983).

71. 501 U.S. 957 (1991).

72. *Id.* at 965.

73. *Id.* at 985.

the punishment under its Eighth Amendment analysis, it appears that it is no longer willing to engage in this type of review, except in the capital punishment context.[74]

The second factor that the Court scrutinizes regarding punishment is how common or customary the punishment is, because "[a]ny technique outside the bounds of these traditional penalties is constitutionally suspect."[75]

Third, the Court accords much weight to what it considers contemporary standards of decency. Thus, the Eighth Amendment has not been treated as a static concept, but rather, it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[76] In determining such standards, judges must "look to objective indicia that reflect the public attitude toward a given sanction."[77] The Court previously defined a punishment to be violative of contemporary standards of decency if it was contrary to the "principle of civilized treatment," beyond the "limits of civilized standards," or offensive to the "evolving standards of decency."[78] Even though public sentiment may appear to favor a punishment, the Court still considers whether "the sentence makes a measurable contribution to acceptable goals of punishment."[79]

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74. *Id.* at 994-96.

75. Trop v. Dulles, 356 U.S. 86, 100 (1958). The Court discussed the meaning of the word "unusual" in the Eighth Amendment: "If the word unusual is to have a meaning apart from the word 'cruel,' . . . the meaning should be the ordinary one, signifying something different from that which is generally done." *Id.* at 100 n.32.

76. *Id.* at 101.

77. Gregg v. Georgia, 428 U.S. 153, 173 (1976). In *Stanford v. Kentucky*, the Court "emphasize[d] that it is *American* conceptions of decency that are dispositive [of contemporary standards of decency], rejecting the contention . . . that the sentencing practices of other countries are relevant." 492 U.S. 361, 369 n.1 (1989). There, the petitioners sought to demonstrate that public sentiment disfavored the execution of defendants ages 16 or 17, but the Court declined the invitation to rest Constitutional law upon such uncertain foundations. *Id.* at 361. A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved. *Id.* at 377. The Court again declined to accept public opinion polls as evidence of a national consensus in *Penry v. Lynaugh*. 492 U.S. 302, 335 (1989).

78. *Trop*, 356 U.S. at 101. The cases that appear most bleak are often cases where prison officials maliciously or sadistically used force to cause harm to a prisoner. *See* Hudson v. McMillian, 503 U.S. 1 (1992). There, prison guards beat an inmate following an argument while he was handcuffed and shackled. *Id.* at 4. The Court held that excessive force used against a prisoner may violate the Eighth Amendment, even if no serious injury results. *Id.* at 10.

79. *Stanford*, 492 U.S. at 403 (Brennan, J. dissenting). "The Eighth Amendment

The fourth element of punishment that the Court has considered under the Eighth Amendment is the severity of the punishment; that is, whether it is considered "cruel." The Court addressed this component in *Weems v. United States*.[80] There, it held cadena punishment (prisoners chained at the ankle and wrist and forced to complete difficult and painful labor) as cruel and unusual punishment and, thus, unconstitutional.[81] The Court considered such a system "coercive cruelty" and warned that "[c]ruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister."[82]

Justice Marshall, in his concurring opinion in *Furman v. Georgia*,[83] said that "there are certain punishments which inherently involve so much physical pain and suffering that civilized people cannot tolerate them."[84] Additionally, "a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose," but "where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it."[85] Although hard labor is not in itself cruel or unusual punishment,[86] it has been held unlawful to put a prisoner in restraints except to prevent an escape.[87]

B. Constitutional Remedies for Chain Gang Convicts

The state is entitled to the labor of those convicted, even though his or her service is compulsory and uncompensated,[88] because the Thirteenth Amendment permits involuntary

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demands more than that a challenged punishment be acceptable to contemporary society." Furman v. Georgia, 408 U.S. 238, 331 (1972). Thus, an excessive penalty is barred by the Eighth Amendment "even though popular sentiment may favor it." *Gregg*, 428 U.S. at 240 (Marshall, J. dissenting) (quoting Stewart, Powell, & Stevens, J.J.)).

80. 217 U.S. 349 (1910).

81. *Id.* at 364. In *Harmelin v. Michigan*, the Court said that: "it is hard to view *Weems* as announcing a constitutional requirement of proportionality, given that it did not produce a decision implementing such a requirement, either here or in the lower federal courts, for six decades." 501 U.S. 957, 992 (1991).

82. *Weems*, 217 at 373.

83. 408 U.S. 238 (1972).

84. *Id.* at 330.

85. *Id.* at 331.

86. McLamore v. State, 186 S.E.2d 250 (S.C.), *cert. denied*, 409 U.S. 934 (1972).

87. Fulford v. King, 692 F.2d 11 (5th Cir. 1982).

88. *See* McLaughlin v. Royster, 346 F. Supp. 297, 311 (E.D. Va. 1972).

servitude as "a punishment for crime whereof the party shall have been duly convicted."[89] Although courts have generally restricted prisoners' rights under the Thirteenth Amendment, several courts have preserved prisoners' Eighth Amendment rights regarding chain gangs.[90] For instance, courts have held that imposition of prisoners' rights does not encompass the right to be free from physical labor.[91] Thus, courts have consistently upheld practices forcing prisoners to perform physical labor,[92] although compelling prisoners to perform labor that is beyond their strength, endangers his or her health, or is unduly painful is unconstitutional.[93]

In some instances, courts have renounced the use of chain gangs and extended constitutional protection to their convicts.[94] Under certain aggravated circumstances, courts have held forced inmate labor to be cruel and unusual punishment.[95] In these cases, the courts emphasized the unconstitutionality of the *treatment* of the prisoners rather than the institution itself.[96]

In *In re Middlebrooks*,[97] prisoners on a chain gang worked more than twelve hours a day, with only a half-hour break for lunch in winter and an hour in summer.[98] Double shackles were used, as well as stocks and sweat boxes on the prisoners.[99]

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89. U.S. CONST. amend. XIII. This Note does not address those convicts forced to work on chain gangs before they have been convicted. *See* Cooper v. Morin, 398 N.Y.S.2d 36, 68 (1977) (unconvicted prisoners or pretrial detainees may not be compelled to work while in custody without violating the 13th Amendment).

90. *In re* Middlebrooks, 88 F. Supp. 943 (S.D. Cal. 1950), *rev'd on other grounds*, 188 F.2d 308 (9th Cir.), *cert. denied*, 342 U.S. 862 (1951); Johnson v. Dye, 175 F.2d 250 (3d Cir.), *rev'd on other grounds*, 338 U.S. 864 (1949); Harper v. Wall, 85 F. Supp. 783 (D.N.J. 1949).

91. Patterson v. Oberhauser, 331 F. Supp. 220, 221 (C.D. Ca. 1971); *McLaughlin*, 346 F. Supp. at 311; Black v. Ciccone, 324 F. Supp. 129, 133 (W.D. Mo. 1970).

92. *See Patterson*, 331 F. Supp. at 221; *McLaughlin*, 346 F. Supp. at 311; *Black*, 324 F. Supp. at 133.

93. *See* Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977); Talley v. Stephens, 247 F. Supp. 683, 687 (E.D. Ark. 1965); *Black*, 324 F. Supp. at 133.

94. *Harper*, 85 F. Supp. at 785-87; *Johnson*, 175 F.2d at 255.

95. *See generally In re* Middlebrooks, 88 F. Supp. at 943; *Harper*, 85 F. Supp. at 787; *Johnson*, 175 F.2d at 255.

96. *See generally In re* Middlebrooks, 88 F. Supp. at 943; *Harper*, 85 F. Supp. at 787; *Johnson*, 175 F.2d at 256.

97. 88 F. Supp. at 943.

98. *Id.* at 946.

99. *Id.* The process of placing a prisoner in stocks consisted of seating him on the edge of a two-by-four, placing his wrists and ankles through the holes, causing his body to lean at a 45 degree angle. Another two-by-four was pressed over his knees, causing the prisoner to be unable to walk upon release. *Id.* Sweat boxes were small

Shackles were placed on the prisoners at night, and all prisoners in one room were chained together at the waist.[100] The court found that the assignment to and the work on the chain gang constituted cruel and unusual punishment, and that the punishment inflicted by the State of Georgia on the prisoners vis a vis the chain gang deprived the prisoners of their due process of law.[101]

In *Harper v. Wall*,[102] the prisoners of an Alabama chain gang were required to work on the county roads, and if they lagged in their duties they were beaten.[103] There, a demonstration was performed on the defendant, whereby dogs were set upon him in an effort to show what would happen if a prisoner attempted to escape.[104] He was beaten with sticks and straps and was denied medical attention when he complained that he was too ill to work.[105] The court held that the county labor camp system and the "indignities inflicted on colored men in the State of Alabama" constituted cruel and unusual punishment.[106]

In *Johnson v. Dye*,[107] a habeas corpus proceeding, evidence established that the petitioner, who had been sentenced to a chain gang for murder, was subjected to cruel and unusual punishment in violation of the Due Process clause of the Fourteenth Amendment.[108] Although the court did not describe the cruel and inhuman punishment imposed upon the defendant, it stated that "[w]e shall not set out in this opinion the revolting barbarities which Johnson . . . stated were habitually perpetrated as standard chain gang practice. . . . It is enough to state that leg-irons and most frequent beatings were among the 'minor' constant cruelties."[109] The court found that the petitioner was entitled to release from the custody of the sheriff.[110] *Weems* made clear that if a punishment deemed unconstitutional was

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buildings, without light or heat, where prisoners were placed, without clothes, for seven days. *Id.*

100. *Id.* at 947.
101. *Id.* at 948, 951-52.
102. 85 F. Supp. 783 (D.N.J. 1949).
103. *Id.* at 785.
104. *Id.*
105. *Id.*
106. *Id.* at 787.
107. 175 F.2d 250 (3d Cir. 1949).
108. *Id.* at 255.
109. *Id.* at 256 n.12.
110. *Id.* at 255.

specifically authorized by statute, that statute would be invalid, and, unless a state law provided an alternative means of punishment, the prisoner would be released.[111] However, the *Johnson* court indicated that if a prisoner's complaint is directed toward the manner in which his sentence has been carried out by prison officials, as opposed to the statute itself, the remedy would be to free the prisoner.[112]

Dissenting from the denial of certiorari in *McLamore v. State*,[113] Justice Douglas expressed concern that the definition of cruel and unusual punishment is not well defined and that, since the Eighth Amendment must draw its meaning from evolving standards, the question of whether chain gangs fit into the current conception of penology is an important issue for the Court to consider.[114] He cautioned that there are no statutory standards for determining where each prisoner goes, so the decision to send one convict to the chain gang lies completely within the discretion of the decisionmaker, resulting in potentially arbitrary treatment.[115]

In other cases, courts have rejected claims that chain gangs violated prisoners' constitutional rights.[116] For instance, in *McLamore v. State*,[117] the defendant asserted that the prison camp to which he was sentenced was unconstitutional, since it did not have any facilities for organized, academic, recreational, social, or vocational programs available at the correctional institution.[118] The court disagreed, stating that there is no constitutional duty imposed on the government to rehabilitate prisoners, and the fact that not every prisoner is sentenced to the same facility does not give rise to a cause of action.[119]

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111. Weems v. United States, 217 U.S. 349, 382 (1910). In this situation, the prisoner is not released because the punishment is cruel and unusual per se, but rather because the statute under which the prisoner was punished is unconstitutional. *Id.*

112. *Johnson*, 175 F.2d at 256.

113. 409 U.S. 934 (1971).

114. *Id.* at 935.

115. *Id.* at 936.

116. State v. Mincher, 90 S.E. 429 (N.C. 1916); McLamore v. State, 186 S.E.2d 250 (S.C. 1972).

117. *McLamore*, 186 S.E.2d at 250.

118. *Id.* at 252-53.

119. *Id.* at 255.

Corporal punishment of chain gang members who refused to work was sanctioned in *State v. Mincher*.[120] In *Mincher*, the court reasoned that some type of poignant punishment was necessary to compel convicts to work, because allowing prisoners to refuse to work "destroys entirely the efficacy of a sentence to hard labor upon the roads."[121]

The court, in *Commonwealth v. Baldi*,[122] denied a writ of habeas corpus alleging that an escapee of a Georgia correctional facility had been subjected to cruel and unusual punishment, because (1) it did not have the authority to interfere with another state's extradition proceedings and (2) contrary to the petitioner's claims, it did not believe that he would be subjected to the same barbaric treatment if returned to Georgia since there were laws in place forbidding such treatment (namely a state constitutional amendment banning the practice of whipping inmates and generally abusing them, Georgia statutes that forbade the use of corporal punishment on prisoners, and testimony from a correctional official that the entire system had changed in Georgia).[123] Justice Musmanno delivered a fiery dissent, observing that this type of brutality clearly still existed in Georgia, notwithstanding the fact that it was against the law (for instance, picks were used from 1947 through 1951, even though they were officially prohibited in 1946).[124] Justice Musmanno asserted that:

> The clanking of chains on a person's body is an ominous and incongruous sound in a country that was born amid the music of a Liberty Bell. It was because of the brutality visited upon mankind down through the centuries by monarchs and their hirelings that the patriot fathers of this Republic interdicted in the Constitution of the United States all forms of cruel and unusual punishment.[125]

The complainant in *Commonwealth v. Baldi* was shackled with chains on both feet, with a fifteen pound ball attached to one ankle, and suffered injuries to both flesh and bone.[126] He

120. 90 S.E. 429 (N.C. 1916).
121. *Id.* at 431.
122. 106 A.2d 777 (Pa. 1954).
123. *Id.* at 778.
124. *Id.* at 789 (Musmanno, J., dissenting).
125. *Id.* at 781.
126. *Id.*

exposed scars resulting from repeated beatings with sticks, hoses, and blackjacks.[127]

In other cases, courts did not even reach the issue of the constitutionality of chain gangs.[128] However, in Georgia, chain gang convicts may have an unusual, if not unique, constitutional claim under the Georgia Constitution's prohibition of abuse.[129] Not only does the state Constitution of Georgia disallow cruel and unusual punishment, it also includes the clause, "nor shall any person be abused in being arrested, while under arrest, or in prison."[130] This "abuse clause" has been invoked in a few chain gang cases in Georgia since its adoption in 1868.[131]

The Georgia Supreme Court, in *Westbrook v. State*,[132] observed that while a chain gang convict is under a duty to submit to the rules governing his sentencing, "he is not bound to submit to unauthorized acts of violence perpetrated or attempted against his person."[133] The court took the abuse clause even further in *Loeb v. Jennings*[134] by holding that any jailer who inflicts "willful inhumanity" on any prisoner under his care would be removed from office.[135]

C. *Civil Remedies for Chain Gang Convicts*

The treatment of civil claims by defendants injured while serving on chain gangs further illustrates the involuntary nature of their labor. For instance, a convict who was forced to repair streets with chains on his ankles and shackles on his feet

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127. *Id.*

128. *Chaney v. State*, 78 S.E.2d 820 (Ga. Ct. App. 1953). There, the court held that, contrary to the defendant's claim that chain gangs were abolished by a 1938 Georgia Act, the Act merely provided that the term chain gang be abandoned in favor of "public work camp." *Id.* at 821; *see* 1937-38 Ga. Laws, ex. sess. 352. The practice of using shackles, manacles, picks, leg irons, and chains was not prohibited by law until 1946. 1946 Ga. Laws 46, 50.

129. Dorothy T. Beasley, *The Georgia Bill of Rights: Dead or Alive?* 34 EMORY L.J. 341, 381-82 (1985).

130. GA. CONST. art. I, § 1, ¶ 17 (1983). Georgia courts usually relate this provision to punishment imposed by courts rather than the complaints of prisoners after sentencing. *See* Beasley, *supra* note 129, at 381.

131. Beasley, *supra* note 129, at 404-06.

132. 66 S.E. 788 (Ga. 1909).

133. *Id.* at 792.

134. 67 S.E. 101 (Ga. 1910).

135. *Id.* at 105. However, the *Loeb* court found that sentencing a convict to public works on the streets, chain gangs in essence, did not amount to cruel and unusual punishment in violation of the Georgia Constitution. *Id.* at 104.

permanently lost the use of one of his legs, but a Mississippi court denied recovery and found the defendant-county immune from the suit, because the prisoner's work was viewed as incidental to his custody, and thus, served a governmental function.[136] Furthermore, a Georgia court denied recovery under the state workers' compensation law to a convict injured while working on a chain gang, since he was not, technically, an "employee" of the county.[137] These cases clearly demonstrate that although convicts were forced to perform labor for the state as part of their punishment, they were not afforded the same protections as other workers for the state or county.

D. The Demise of Chain Gangs

The demise of the chain gangs occurred around the middle of the century for several reasons.[138] First, organized labor began to voice its opposition to competition with virtual slave labor.[139] Second, the chain gangs became notorious for brutal and inhumane treatment, and modern society became aware of it through public scandals and investigations throughout the South.[140] Third, although chain gangs were stigmatized by racial discrimination for decades, once white inmates were sent to the chain gangs and faced the same conditions, public support for chain gangs dwindled.[141] Finally, the economic value of the system declined as more guards were needed to oversee the chain-gangers at work.[142]

III. THE CURRENT STATUS OF CHAIN GANGS

Decades after chain gangs were abolished in this country, chain gangs have re-emerged as a punitive device.[143]

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136. Warren v. Booneville, 118 So. 290, 293 (Miss. 1928).

137. Georgia Ry. & Power Co. v. Middlebrooks, 128 S.E. 777, 779 (Ga. Ct. App. 1925); *see also* Lawson v. Travelers Ins. Co., 139 S.E. 96, 96-97 (Ga. Ct. App. 1927) (holding a convict injured while serving a sentence on a county chain gang is not an employee of the county and is not entitled to compensation as such).

138. Brailsford, *supra* note 3, at 56.

139. *Id.*

140. *Id.* at 57-58.

141. *Id.* at 56.

142. *See id.*

143. The return of chain gangs can be attributed to one politician, Governor Fob James of Alabama, who suggested they be reinstituted while speaking on a radio talk show during his campaign in 1994. Since then, Arizona, Florida, Indiana, Kentucky,

A. *Legal Status*

Two states retained laws on their books pertaining to chain gangs, even though the practice of using chain gangs was not in effect. For instance, a Nevada statute gives city councils the power to form a chain gang for persons convicted of city ordinance violations and to safeguard against convicts escaping,[144] and, a South Carolina statute authorizes the transfer of any person who has been sentenced to the state penitentiary to the chain gang of the county in which he was convicted upon the request of the county official in charge of the chain gang and with the consent of the department of corrections,[145] even though there is no alternate provision in his sentence for service upon the chain gang.[146] In addition, this may be done without the prisoner's consent.[147]

The South Carolina Attorney General issued an opinion in 1971, which predicted that "in view of the recent Court decisions regarding cruel and unusual punishment, [shackling county chain gang prisoners] may become unconstitutional . . . and it is strongly urged that shackling be used only as a last resort."[148]

Nevada, Michigan, and Wisconsin have either reinstituted them or have introduced bills to that effect. Most, if not all, of the officials in these states who proposed their return have cited Alabama as their model. Many other states that have not reinstituted chain gangs have nevertheless joined in the "get-tough-on-crime" crusade by cracking down on prisoners privileges. For instance, in Georgia, road crews work under armed guards even though chains are not used, and inmates are not allowed to smoke or use other tobacco products. Rhonda Cook, *Back to Hard Labor*, ATLANTA J. & CONST., Aug. 20, 1995, at D4. Furthermore, visitation is restricted for problem inmates, and inmates are deprived of air conditioning. In Louisiana, road crews also work under armed guards, though no chains are used. Smoking is restricted to prison yards and television rooms, and cable television was removed. In Mississippi, the word "convict" is written on the back of prisoners' uniforms, and televisions sets and weight equipment are removed. There, too, inmates are required to pay for their own nonemergency medical costs. In North Carolina, road work is assigned as a requirement, although no chains are used. No electrical appliances are permitted in prisoners' cells, and pay phones are installed in the prison yards only. In South Carolina, violent offenders are forced to wear leg irons while working in the prison garden, and they work under an armed guard. Weight lifting equipment was removed there, also. In Tennessee, both males and females work on the roads. No public television is provided, although inmates are allowed their own. In Virginia, inmates must pay part of the cost of their medical visits, and inmates are required to perform road work. *Id.*

144. NEV. REV. STAT. § 266.590 (1995).
145. S.C. CODE ANN. § 24-3-150 (Law. Co-op. Supp. 1996).
146. 47 Op. Att'y Gen. 52 (1971).
147. *Id.* at 146.
148. *Id.*

B. *Legal Challenges*

Despite the official legality of chain gangs in many states, chain gangs have, nevertheless, been the target of recent controversy.[149] Amidst the current debate over the propriety of chain gangs, several legal challenges to chain gangs have been waged.[150] First, an inmate in an Alabama penitentiary brought suit against the governor of Alabama, claiming damages for mental anguish and pain and suffering caused by working on the chain gangs.[151] Second, the Southern Poverty Law Center in Alabama filed suit in federal district court charging that chain gangs constitute cruel and unusual punishment.[152] Third, Amnesty International contacted federal authorities in the United States to investigate chain gangs, claiming that the use of leg irons is outlawed under United Nations rules for prisoner treatment and may violate international treaties ratified by the United States.[153] Fourth, the Indiana Civil Liberties Union has threatened to file a suit preventing the county from forcing inmates, who have not been convicted, from being forced to work on a chain gang, arguing that it violates the presumption of innocence.[154] Furthermore, general suspicion of prisoner abuse has burgeoned recently.[155] Ostensibly, chain gangs in their current form do not automatically pass constitutional scrutiny.

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149. Alan Sverdlik, *Chain Gangs: Crime Deterrent or Brutality?* ATLANTA J. & CONST., May 4, 1995, at D4; *Convict Sues Alabama Over Chain-Gang Work*, ORLANDO SENTINEL, May 9, 1995, at A5 [hereinafter *Convict Sues*]; *Rocky Times Ahead for Chain Gangs*, CHI. TRIB., July 30, 1995, at 17 [hereinafter *Rocky Times*].

150. Sverdlik, *supra* note 149; *Convict Sues, supra* note 149.

151. *Convict Sues, supra* note 149.

152. *Rocky Times, supra* note 149. Apparently, this suit was effective, since Alabama cancelled its use of chain gangs, after becoming the first state to reinstitute them, as part of a settlement agreement reached in this lawsuit. *Alabama Ends Chain Gangs After Legal Challenge*, JET, July 8, 1996, at 5.

153. *Chain Gangs Condemned by Amnesty International*, NEWARK STAR-LEDGER, May 6, 1995.

154. Scott Wade, *ICLU Set to Enter Chain-Gang Controversy*, LOUISVILLE COURIER-J., Aug. 2, 1995, at 1B.

155. For instance, Sheriff Arpaio of Maricopa County, Arizona, and his prison officials, were under federal investigation for an alleged pattern of abuse and civil rights violations in his jails and make-shift tent accommodations to absorb overcrowding. *Sheriff's Get-Tough Measures Spark Federal Inquiry, Lawsuits*, DALLAS MORNING NEWS, Sept. 16, 1995, at 33A [hereinafter *Get Tough*]. The complaints allege, among other things, that jailers routinely beat inmates, deprived them of food, and made them use overflowing portable toilets. *Id.* Other jailers are being investigated for allegedly slamming an inmate's head against a wall for swearing at a guard. *Id.*

C. *The Face of Chain Gangs in the 1990's*

The chain gangs of today bear a striking resemblance to the punishment abolished decades ago, absent the flagrant beatings and overt racism, although some argue that today's chain gangs are still brutal and carry strong racial overtones.[156]

Today's chain gangs, in many states, are still required to perform labor intensive, unskilled tasks on public roads for twelve hours a day.[157] For instance, before they were cancelled, Alabama chain gang inmates worked twelve hours a day[158] picking up trash on highways,[159] clearing ditches, cutting weeds on the sides of highways,[160] cutting grass by hand, and pulling weeds.[161] In Arizona, chain gang convicts work forty hours a week and are paid only ten cents an hour to perform such tasks as weed control, cleaning up litter, cutting flagstone, cutting railroad ties,[162] and other jobs along the highways, such as hoeing weeds and raking dirt in Arizona temperatures frequently approaching one-hundred degrees.[163] Inmates are allowed to break for ten minutes an hour.[164] In Nevada, chain gang inmates spend their days cleaning up parks and painting public buildings.[165]

Around the country, chain gangs are conspicuously dressed. In Mississippi, the chain-gangers are dressed in old-fashioned striped uniforms.[166] Alabama members of a chain gang wore

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156. Rev. Wendell Anthony, *There's a Reason Why Chain Gangs Were Abolished: They Didn't Work*, DETROIT NEWS, June 22, 1995, at S10; Eric Harrison, *The Chain Gang is Resurrected in Alabama*, L.A. TIMES, May 3, 1995, at 5; *Alabama Governor Rejects Plan to End Chain Gangs*, ATLANTA J. & CONST., May 31, 1995, at B5 [hereinafter *Alabama Governor*]; *Phoenix Councilman Objects to Chain Gangs*, ARIZ. REPUBLIC, June 1, 1995, at B2 [hereinafter *Phoenix Councilman*]; *Get-Tough*, *supra* note 155.

157. Mark Curriden, *Hard Time*, 81 A.B.A. J. 72, 74 (1995).

158. *Rocky Times*, *supra* note 149.

159. Harrison, *supra* note 156, at 5.

160. William Booth, *The Return of the Chain Gangs*, WASH. POST, May 4, 1995, at A1.

161. Sverdlik, *supra* note 149.

162. William F. Rawson, *Arizona Revives Chain Gangs ACLU Rights Group Blast "Stupid Move,"* DENV. POST, May 14, 1995, at C6.

163. Miriam Davidson, *Chain Gang debate Clangs Inmates: Work is Humiliating*, ARIZ. REPUBLIC, June 18, 1995, at B1.

164. *Id.*

165. Sandra Chereb, *AP Wire Report*, LAS VEGAS REV.-J., Sept. 4, 1995, at 3B.

166. *Link to the Past: Alabama Bringing Back Chain Gangs After 30 Years, State Reviving Shackles to Act as a Deterrent*, THE ARIZ. REPUBLIC, Mar. 26, 1995, at A27 [hereinafter *Link*]. Proponents claim that this type of dress is designed to humiliate

white prison coats with the words "chain gang" written on the back.[167] Arizona inmates wear jeans, hats, long sleeve shirts with orange stripes, and the letters "ADC."[168] In Nevada, the inmates who previously attempted to escape are dressed in yellow, while those considered security risks are clothed in red.[169] In Florida, chain-gangers wear a uniform with a white stripe running down their pant legs to identify them as prisoners and a hat for protection from the sun.[170]

Currently, chain gang participants seem to be carefully screened, although there is still no choice on the part of the inmates whether they will be deployed to a chain gang or not.[171] In Arizona, the chain gangs are comprised of repeat offenders, "men who have lost respect for the law and overcome their fear of a life behind bars," but only those with non-violent histories.[172] These include inmates at higher security levels that have not been allowed to work before.[173] If an inmate breaks a rule, he is given the choice of serving on a chain gang for thirty days or living in a hotbox for twenty-three and one-half hours.[174] In Alabama, only medium-security prisoners that have been to prison at least twice before were placed on chain gangs.[175] In Indiana, only nonviolent inmates who have been convicted of a crime or who volunteer will be assigned to chain gang duty.[176] In Nevada, work crews formerly comprised of those inmates who

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the prisoners. *Id.*

167. *Chain Gangs are Back: Alabama Cons Grumble, Clean Highways*, THE ARIZ. REPUBLIC, May 4, 1995, at A13 [hereinafter *Chain Gangs*].

168. Davidson, *supra* note 163.

169. Chereb, *supra* note 159.

170. *Missing Link: Chain Gang Prisoners to Go Separate Ways*, ORLANDO SENTINEL, Sept. 19, 1995, at D3 [hereinafter *Missing Link*].

171. Scott Wade, *Floyd Follows Clark on Inmate Chain Gangs*, LOUISVILLE COURIER-J., Aug. 1, 1995, at 1A; Wade, *supra* note 154.

172. *Link, supra* note 166. In Arizona, death row inmates are placed on chain gangs, but they remain at all times within the prison compound. *An Arizona Inmate Sues to Halt Chain Gangs*, DALLAS MORNING NEWS, Mar. 16, 1996, at A40.

173. Rawson, *supra* note 162.

174. Brett Barrouquere, *LA Jails May Miss Chain Gang Revival*, NEW ORLEANS TIMES, Sept. 3, 1995, at B6. A hotbox is a small, windowless room. *Id.*

175. *Chain Gangs, supra* note 167. Depending on their behavior, inmates are sentenced to at least 30, 60, or 90 days on the chain gang. *Id.*

176. Todd Murphy, *Chain Gang Makes Debut on Cutting Edge*, LOUISVILLE COURIER-J., Sept. 7, 1995, at 1B. It is interesting to note that the prison chief of Indiana removed 34 inmates from the county jail system that is implementing the chain gangs in order to prevent these state prisoners from being placed on the chain gangs. *Id.*

had earned the trust of the prison officials now consist of those inmates who had previously tried to escape or were otherwise classified as nontrustworthy.[177]

Prison officials still undertake measures to manacle chain-gangers at all times.[178] In Alabama, there is a forty-to-one ratio of prisoners to guards.[179] Each gang is made up of five inmates chained together in groups of forty.[180] The leg irons and shackles used today are reportedly lighter than those used at the turn of the century,[181] weighing slightly more than three pounds.[182] However, the chain-gangers are still guarded by shotgun-carrying guards who have orders to shoot anyone trying to escape.[183] It has even been suggested that hitching posts be set up for inmates who refuse to work.[184] In Arizona, inmates are not actually chained together, although they wear heavy shackles on their legs and are supervised by armed guards on horseback[185] and in pickup trucks.[186] Inmates who refuse to work have had their privileges revoked and have been shackled standing before the rest of the inmates.[187] In Florida, each prisoner is shackled individually with a chain connecting his ankles together,[188] and approximately twenty prisoners are chained together.[189] Each group is supervised by three guards, two armed and one unarmed.[190] Kentucky officials put leather

177. Chereb, *supra* note 165. Inmates assigned to chain gangs will be those who require a higher level of security, such as the repeat offenders or those whose crimes involved force. *Id.*

178. Link, *supra* note 166.

179. *Id.* This relatively low ratio of guards to prisoners was instigated in an effort to save the state money on prison officials. *Id.*

180. *Chain Gangs, supra* note 167.

181. *Id.* (depicting such movies as "I Escaped from a Chain Gang," and "Cool Hand Luke").

182. Booth, *supra* note 160. The shackles are actually oversized handcuffs, connected by thin chains. Officials insist that the use of the chains and shackles will save lives since they prevent escape. *Id.*

183. *Id.*

184. *Alabama Governor, supra* note 156.

185. Rawson, *supra* note 162.

186. Davidson, *supra* note 163.

187. *Id.* Arizona inmates claimed that one prisoner was even sprayed with mace and dragged outside after refusing to work. *Id.*

188. Inmates' legs will be strapped by a leather restraint or a metal restraint with a piece of canvas under his legs to prevent chafing. *Missing Link, supra* note 170.

189. *Do Chain Gangs Right: A Plan By Florida Corrections Secretary Harry Singletary to Shackle Prisoners Individually is Sound Because It Would Ensure More Productivity*, ORLANDO SENTINEL, July 3, 1995, at A14 [hereinafter *More Productivity*]; *see also Missing Link, supra* note 170.

190. One guard is equipped with a shotgun, the other with a 9mm pistol. *Missing*

bands on inmates' ankles and attach chains, and chain gangs are guarded by officers who do not carry shotguns.[191] In Nevada, the chains gang crews are bound by twenty foot long chains with leg cuffs that are five feet apart and are supervised by a guard on horseback and an inmate supervisor.[192]

In contrast to the chain gangs of yesterday, the racial makeup of today's chain gangs is relatively balanced.[193] Further, unlike the exclusively male chain gangs of yesterday, at least one state has successfully introduced women to chain gangs.[194]

The living conditions of chain gang prisoners differ from other inmates. In Alabama, all inmates who have been sent to the chain gang will be housed together in the same wing of the prison in what has been called the "harshest environment in Alabama's prison system."[195] They are denied television, shopping at the prison commissary, having visitors, and are not offered classes.[196] During the one to three months that inmates are assigned to chain gangs, they are not allowed to smoke or watch television.[197]

A variety of reasons have justified the revival of chain gangs. Most proponents want to make prison conditions so unbearable that the prisoners will not want to return to prison,[198] while opponents of chain gangs argue that the real gain is realized by

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Link, supra note 170.

191. Wade, *supra* note 171.

192. Chereb, *supra* note 165.

193. Booth, *supra* note 160. The racial composition of the chain gangs is reportedly proportional to the racial composition of inmates in the Alabama prison system. Colin Bessonette, *Q&A on the News*, ATLANTA, J. & CONST., Sept. 22, 1995, at A2. The racial composition might be relatively balanced, but comments such as "Hey you, hand, you don't hear me? I said move it, boy," is reminiscent of our not so distant racist past. Booth, *supra* note 160.

194. *Tough Sheriff Puts Women on Chain Gang*, L.A. TIMES, Sept. 20, 1996, at A19. Arizona was the second state to attempt to put women on chain gangs, but it was the first such state do so successfully. *Id.* After the Alabama prison commissioner, who headed the effort to bring back chain gangs, suggested that women be placed on chain gangs, the governor forced him to resign. Curtis Wilkie, *Weak Links Threaten Chain Gangs*, BOSTON GLOBE, May 18, 1996, at 1.

195. *Link, supra* note 166. Prisoners housed in this wing will not be allowed radio, televisions, or visitation. *Id.*

196. Cook, *supra* note 143.

197. *Rocky Times, supra* note 149.

198. Harrison, *supra* note 156. Critics of this so-called campaign strategy argue that politicians are conspicuously failing to address the underlying causes of crime in their rhetoric. Iris Kelso, *Tough-on-Crime Rhetoric Scary*, NEW ORLEANS TIMES, Sept. 17, 1995, at B7. Moreover, critics espouse the belief that the prison system as it is keeps "manufacturing conditions that create criminals." *Id.*

politicians who are waging a "get tough on crime attitude"[199] and using prisoners as "political chess pieces."[200]

D. Similar Alternatives to Prison Incarceration

Politicians want to give the appearance of "authoritative discipline" that hopefully will deter future criminals.[201] It is safe to say that the main goal of chain gangs is not to rehabilitate its participants, but to force offenders to pay for their crimes by doing hard time.[202] At the moment, it is impossible to determine whether such an approach really acts as a deterrent or, instead creates increasingly dangerous criminals, as has been suggested.[203]

Perhaps lawmakers, determined to make criminals pay for their crimes, can learn a lesson from sentencing alternatives that treat special types of law-breakers with extraordinary measures. There are currently two alternative approaches in sentencing

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199. One NAACP official charged that politicians are "attempting to create a Willie Horton political climate in Arizona in an effort to elect . . . Phil Gramm president," and that such types will attack critics of chain gangs as being soft on crime. Norm Parish, *Proposal for Chain Gang Decried 'Very Inhumane Thing,' NAACP Says*, ARIZ. REPUBLIC, May 10, 1995, at B1.

200. *Chain Gangs*, *supra* note 167. Politicians perhaps may be getting that message from the public. For instance, one public opinion poll assessed the current public support of chain gangs to be 70% of the state of Alabama's residents. Harrison, *supra* note 156. In Arizona, chain gangs were approved by 65%. Lacayo, *supra* note 2, at 31. In Georgia, 67% of those surveyed thought that chain gangs were appropriate. *Associated Press Political Survey*, Feb. 14, 1996, 1996 WL 5367220. One writer expressed the popular sentiment that: "It is good politics to show how tough you can be on the hoods in the hoods." Davidson, *supra* note 163. In fact, it must be effective politicking because Senator Phil Gramm talked of putting Sheriff Joe Arpaio, one of the pioneers of the new chain gang system, in charge of the federal prison system. Lacayo, *supra* note 2. One opponent described such politicians as "play[ing] to public fears by advocating tough sentencing rules that cost money without cutting crime." Mark Fritz, *'90s Prison Reforms Backfire*, ARIZ. REPUBLIC, Aug. 18, 1995, at A22. One opponent termed the reintroduction of chain gangs by politicians as "Alabama's current genius of bumpkin publicity." Andy Miller, *Like It or Not: James Has Alabama in Spotlight*, ATLANTA J. & CONST., Sept. 7, 1995, at C5. One candidate for Kentucky Attorney General has promised to seek ways to make "prison life as harsh as possible," including no perks for prisoners and an effort to make chain gang workers go to bed "dog tired every night." *Platform*, *supra* note 2.

201. Davidson, *supra* note 163. A Nevada sheriff believes that "it's time for us to put a little bit of punishment level back into the system. . . . We're re-establishing the punishment aspect of breaking the rules." Chereb, *supra* note 165.

202. Curridan, *supra* note 157, at 73.

203. Scott Wade, *Forced Labor Gets Second, Close Look*, LOUISVILLE COURIER-J, July 30, 1995, at 1A; Curridan, *supra* note 157, at 75; Fritz, *supra* note 200.

prison offenders, which appear to be very effective as deterrents and at reducing recidivism rates, because they focus on behavior modification rather than retribution.[204] These two alternatives are juvenile boot camps and drug courts.

1. Juvenile Boot Camps

Juvenile boot camps are a popular alternative to prison sentences for juvenile offenders, because they offer a "constructive approach to offender rehabilitation."[205] Boot camps are designed for juvenile first-time offenders and are intended to provide strict discipline, hard work, and physical exercise while instilling "self-discipline, self-responsibility, self-respect, self-esteem, self-motivation, and a solid work ethic."[206]

The goals of boot camps include rehabilitation, recidivism reduction, and drug education, as well as providing young offenders the mechanisms and the motivation to change their lives.[207] In essence, it provides young offenders with one last chance to change their criminal way of life.[208] The advantages of such a system include more counseling and education than prison, a safer environment than prison for young offenders, improvement of the health of its participants through meals and rigorous exercise, and more cost effectiveness than prisons due to the shortness of the program.[209] Such a program is not without disadvantages: inadequate funding, inadequate space for participants in the face of pressure to maintain full programs, and a lack of subsequent supervision following release.[210]

Proponents of boot camps emphasize that the "rude awakening" of incarceration removes the old attitudes of the offenders, and in effect, breaks them down and builds them back up.[211] More importantly, the program teaches youths how to

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204. Carol Ann Nix, *Boot Camp/Shock Incarceration: An Alternative to Prison for Young, Non-Violent Offenders in the United States*, 28 APR PROSECUTOR 15, 15 (1994); Fred Setterberg, *Drug Court: Oakland Tries a Carrot-and-Stick Approach to Keeping First-Time Drug Offenders Out of Jail*, 14 CAL. LAWYER 59, 59 (1994).

205. Nix, *supra*, note 204, at 16. Boot camps originated in Georgia in the early 1980's, and are now utilized in 27 states. *Id.*

206. *Id.*

207. *Id.* at 16, 18.

208. *Id.*

209. *Id.* at 18.

210. *Id.*

211. *Id.* at 20.

become productive citizens by forcing the offenders to work with one another as a team.[212] "It helps them become mentally and physically strong enough to live in the community without breaking the law."[213] Opponents of boot camps argue that they may illegally discriminate on the basis of gender, that there is the potential for abuse of participants, that military training may be ineffective as a rehabilitator, and that there is a lack of due process protections.[214]

The distinguishing characteristic of juvenile boot camp is the emphasis on rehabilitation. The rehabilitative components of the program include enforcement of formal rules, problem solving, an anti-criminal paradigm, and the building of quality interpersonal relationships that reinforce that the staff and other participants truly care about these young people.[215] The program is very much geared toward prevention of recidivism, because it seeks to modify behavior rather than merely castigating bad behavior.[216]

2. *Drug Courts*

Drug courts, like juvenile boot camps, are designed for elementary behavior modification.[217] Drug courts blend discipline and encouragement in order to coerce addicts into permanently changing their lives.[218] Not only does it compel participants to change their lives, it provides them with the necessary treatment to surmount their addiction.[219] Drug courts operate by screening first-time drug offenders according to their drug habits, requiring them to sign a contract that is enforced by the judge and probation officer, and erasing their felony conviction once they graduate from the program.[220] Under the contracts, the offender is awarded points for the tasks he or she completes, such as showing up for probation appointments,

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212. *Id.*
213. *Id.* at 21.
214. *Id.* at 18.
215. *Id.* at 21.
216. *Id.* Although recidivism statistics are inconclusive, juvenile challenge programs in general have been found to significantly lower recidivism rates among juvenile offenders. *Id.* at 16. In Georgia, the recidivism rate for boot camp participants was found to be 12.75% lower than for inmates of the prison system. *Id.* at 21.
217. Setterberg, *supra* note 204, at 60.
218. *Id.*
219. *Id.*
220. *Id.*

attending a twelve step counseling program, passing periodic urine tests, acquiring a high school equivalency diploma or getting a job.[221]

The judge assumes the role of "confessor, task master, cheerleader, and mentor" rather than demoralizing and dehumanizing the offender.[222] Because drug addicts frequently suffer relapses, the judge must be stern in his or her role and at times, may have to admonish the offender and even threaten him or her with jail time.[223] Because the relationship between the judge and offender may last more than a year, the judge must continually "exhort, threaten, encourage, and congratulate" him or her.[224]

The program is not only cost effective but it reduces recidivism.[225] It costs much less than prison sentencing, and the recidivism rate in one court's jurisdiction was reduced by forty-six percent.[226] Considering the increasing numbers of drug offenses today, drug courts appear to be the "last, best chance for controlling addiction and flattening the crime rate."[227]

While chain gangs, juvenile boot camps, and drug courts all use techniques intended to coerce an offender to change his or her life, chain gangs lack one essential quality necessary for compelling the individual to modify his or her behavior: the tools with which to do it. That is, chain-gangers are not only isolated geographically from the few rehabilitative elements in prisons, but many states actually forbid chain gang inmates from partaking in any of the courses conventionally designed to rehabilitate the prisoners. Without these tools, how can chain gang inmates be expected to re-enter society as productive citizens?

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221. *Id.*
222. *Id.* at 61.
223. *Id.*
224. *Id.*
225. *Id.* at 62.
226. *Id.* Over a two year period, drug courts saved over $2 million in jail costs. *Id.* Drug courts are currently in operation in 18 cities nationwide. *Id.* at 60. About 1200 offenders each year enter the program. *Id.*
227. *Id.* at 61.

IV. ANALYSIS

This section analyzes the constitutionality of chain gangs today under the Eighth Amendment and considers the utility and morality of the concept.

A. *The Constitutionality of Chain Gangs*

Following the test for cruel and unusual punishment, delineated in such cases as *Weems, Trop, Gregg, Furman, and Harmelin*,[228] chain gangs would likely survive constitutional attack today.

1. *Proportionality*

Following the Supreme Court's proportionality analysis in *Harmelin v. Michigan*,[229] chain gangs do appear to pass constitutional muster, despite the evident disproportionality in some cases, because the Court no longer considers the proportionality of non-capital punishments.[230] Were a court to conduct a proportionality inquiry, chain gang disputants could allege that since most offenders who are placed on chain gangs have not committed violent crimes, the severity of the punishment outweighs the gravity of the offense.[231] Furthermore, as some politicians have made clear, chain gangs were not reinstated for rehabilitative purposes, but rather to inflict a harsher form of punishment on prisoners than had been used in the recent past.[232] Because chain gangs serve no rehabilitative purpose and there is no empirical evidence supporting the notion that they deter crime, they may certainly be seen as unnecessary and perhaps as the wanton infliction of pain. Unless a court agrees to evaluate the disproportionality claims, however, these assertions are inapposite.

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228. *See supra* Part II.A.-B.
229. 501 U.S. 957 (1991).
230. *Id.* at 994.
231. *Link, supra* note 166; *Chain Gangs, supra* note 167; Murphy, *supra* note 176. Because chain gangs are operated on a county by county basis, sentencing for the same crimes in the same jurisdiction may be in sharp contrast. Considering that chain gangs are still extreme forms of punishment and are utilized in a very small minority of states (presently five), this unequal sentencing for the same crimes contrasts with sentencing in other jurisdictions.
232. Harrison, *supra* note 174; Kelso, *supra* note 198; Parish, *supra* note 199.

2. *Contemporary Standards of Decency*

If public opinion polls are to be considered objective indicia of the public's attitude toward chain gangs and prison privileges, the public appears to have embraced this sanction. Under a contemporary "standards of decency" approach, chain gangs do not appear to be perceived as cruel and unusual punishment.[233] Unless the argument is made that prison officials are acting maliciously or sadistically, the seemingly widespread public support for chain gangs is sufficiently compelling to justify the evolving standards of decency criterion of the Eighth Amendment.[234]

B. *The Utility and Morality of Chain Gangs*

Even if chain gangs are constitutional, they may be objectionable for psychological and utilitarian reasons. There is widespread disagreement concerning the effects of chain gangs; this conflict is especially acute surrounding the issues of whether chain gangs are effective deterrents and whether they benefit prisoners.[235]

Proponents of chain gangs argue that there are several positive effects of chain gangs. First, it is cost-effective because many convicts can be supervised at one time by a few guards.[236] Second, because it reduces the amount of idle time in prison, it cuts down on prison violence, and at least one prison warden has noticed that prisoner work habits and behavior have improved since re-implementing chain gangs.[237] Proponents also argue that, contrary to popular belief, prisoners do not dread road duty, but rather welcome the opportunity to get outside of the jail walls and see the outside world.[238]

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233. Lacayo, *supra* note 2 (65% of those polled supported chain gangs); Harrison, *supra* note 156 (70% of Alabama residents support chain gangs); Curriden, *supra* note 157 (82% of Americans think prison is too comfortable).

234. *See* Hudson v. McMillian, 503 U.S. 1 (1992) (prison officials used excessive force and harmed prisoner).

235. *See generally* Cook, *supra* note 143.

236. Harrison, *supra* note 156.

237. In fact, in one Alabama prison that tested a pilot chain gang program before reinstituting it across the state, assaults decreased by one-third. One prison official reported that younger prisoners who did not work on the chain gang stole from each other less frequently and committed fewer assaults because they did not want to be placed on the chain gang. Booth, *supra* note 160.

238. *Link, supra* note 166. The same proponents admit, however, that with the

One goal of chain gangs is to increase the level of punishment for prisoners and to convince prisoners in a short period of time that prison is not the place for them.[239] The goal is to show prisoners that they can succeed outside of prison if they adjust their attitudes: "The idea is not to teach [prisoners] a profession, . . . but to make prison life so unappealing that they would not want to return behind the walls."[240]

Another proposed goal is crime deterrence,[241] accomplished by instilling a fear of prison in offenders[242] and in potential offenders who might see chain gangs and "be put off by the sight."[243]

Proponents of chain gangs maintain that chain gangs are a response to the public's "outrage over soft [prison] conditions."[244] Some believe that the current prison system buttresses a sense of entitlement in prisoners,[245] and that chain gangs are therefore designed to discontinue the "coddling" of prisoners.[246] One commentator explained, "Why should it be better in jail than it is on the outside?"[247]

Proponents also contend that there is plenty of work to be done outside the prison walls,[248] that most prisoners already work in both the federal and state systems,[249] and that inmates "who [have] nothing but time on their hands" should be sent out.[250] Chain gang prisoners are perceived as doing something productive with their time.[251] Proponents argue that chains and guards are necessary in order to prevent escapes.[252]

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introduction of chains and shackles to road duty, that sentiment is likely to change. *Id.*

239. Jeff Woods, *ACLU Slams Sundquist, Chain Gangs*, NASHVILLE BANNER, Oct. 19, 1995, at A1.

240. *Id.*

241. *Alabama Governor*, *supra* note 156.

242. Cook, *supra* note 143.

243. Davidson, *supra* note 163.

244. LaCayo, *supra* note 2.

245. Cook, *supra* note 143.

246. *Failure Chain Inmates Breaking Rocks is a Poor Excuse for a Crime Policy*, PITT. POST-GAZETTE, Sep. 5, 1995, at A10 [hereinafter *Failure*].

247. *Get-Tough*, *supra* note 155.

248. Hill, *supra* note 15.

249. LaCayo, *supra* note 2.

250. Hill, *supra* note 15.

251. Murphy, *supra* note 176.

252. Booth, *supra* note 160.

At the other end of the spectrum, opponents argue that chain gangs are being re-introduced by "politicians looking for politically expedient ways to appear tough on crime"[253] and that it is a "deliberate debasement and dehumanization of prisoners to win votes."[254]

Opponents further argue that although crime is rampant, chain gangs do not help to solve this problem,[255] but rather demean and dehumanize prisoners.[256] Contrary to arguments that seeing chain gangs on the roads will deter future criminals, it may have little effect on crime rates and recidivism if the sight becomes commonplace.[257]

Opponents further contend that not only do chain gangs fail to deter crime,[258] they are also counterproductive to rehabilitating prisoners[259] because they do not bestow any marketable skills on inmates for use after release.[260]

The reemergence of chain gangs conjures stereotypes of "old-time Southern prisons . . . [and] images of police dogs, cattle prods and racist sheriffs."[261] Opponents maintain that chain gangs cause humiliation and resentment in inmates, causing worse criminals to emerge from prison.[262] Inmates liken it to "being in stocks in the town square."[263] It is argued that inmates are treated like animals on chain gangs, and whereas sitting in a jail cell is "hard on the mind, body, and spirit, a chain gang is degrading."[264] So the argument goes: chain gangs will make prisoners resentful and may cause them to "seek retribution against . . . [their] oppressors" once released.[265]

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253. Woods, *supra* note 239.
254. *Id.*
255. *Id.*; Anthony, *supra* note 156.
256. Cook, *supra* note 143.
257. *Failure*, *supra* note 246.
258. Hill, *supra* note 15 ("I can't see 12 hours of chain gangs along a highway as a deterrent to anything except traffic."); *see also* Anthony, *supra* note 156; Woods, *supra* note 239.
259. *Alabama Governor*, *supra* note 156.
260. Woods, *supra* note 239 ("[R]ock breaking is clearly not a skill prisoners need when they return to society.").
261. *No Chain Gangs Give Prisoners Useful Jobs, Not Make-Work*, MEMPHIS COM. APPEAL, Oct. 22, 1995, at B8 [hereinafter *No Chain Gangs*].
262. Harrison, *supra* note 156.
263. Davidson, *supra* note 163.
264. *Link*, *supra* note 166.
265. Rawson, *supra* note 162.

Some insist that chain gangs are actually more expensive than other prison work programs[266] and that "taxpayers' money [is] better spent on education, vocational training, and drug treatment."[267] Furthermore, prisoners on chain gangs may be less productive than prisoners who are not chained together.[268] Some submit that prisoners should be put to work while in jail, but complain that chains and shackles are "an unnecessary hassle."[269] Finally, opponents of chain gangs assert that it makes little sense to force minor offenders to work on chain gangs while violent offenders stay inside doing nothing.[270]

1. *Evaluation: Efficacy and Productivity*

Proponents argue that chain gangs are both effective and productive.[271] These notions may be flawed for several reasons. First, "[f]aith in the economic feasibility of the chain gang developed at a time when convicts were literally being worked to death."[272] Now, however, with emphasis on prisoner health care, chain-gangers are allowed to repeatedly seek medical attention.[273] As a result, chain gangs might ultimately cost more because of increased health care costs. Moreover, many convicts chained together results in inefficient working conditions.[274] For example, inmates whose legs are bound with an eighteen-inch chain are prone to trip and fall,[275] and chains on prisoners' legs may hinder their productivity.[276]

Contrary to proponents' efficacy arguments, forcing inmates to work in chains is not necessarily beneficial to them, but rather can be very destructive. Making prisoners work is only beneficial to the participating inmates and to society as long as two conditions are met: (1) if the work equips the individual with the

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266. *No Chain Gangs, supra* note 261.
267. Davidson, *supra* note 163.
268. *Missing Link, supra* note 170.
269. *Readers' Forum: Serious Problems With Chain Gangs*, LOUISVILLE COURIER-J., Oct. 2, 1995, at 10A [hereinafter *Readers' Forum*]; Murphy, *supra* note 176.
270. Wade, *supra* note 203.
271. *See supra* Part IV.B.
272. Brailsford, *supra* note 3, at 60.
273. *Id.*
274. *Link, supra* note 166; Rustin, *supra* note 35, at 44 ("[W]e were jammed in so tightly . . . that work was dangerous, slow, and inefficient.").
275. Davidson, *supra* note 163.
276. *More Productivity, supra* note 189. In Alabama, it took a full day for a chain gang crew to cut grass along a one-mile strip. *Id.*

necessary skills and work ethic to cope in the outside workforce, and (2) if the work instills self-esteem and self-reliance in the individual.[277]

Today's chain gang programs do neither for several reasons. First, chain gang work usually involves menial work, such as breaking rocks. Such work is not genuinely productive to society, nor does it instill pride in one's labor. Second, inmates who work on chain gangs are completely isolated from the experiences of the free market labor system, both geographically and psychologically.[278] They are forced to work solely for the benefit of the state, and they are prevented from working in any close proximity to those who labor in the market.[279] Third, chain gang inmates are not allowed to participate in any of the educational or vocational training programs offered to other inmates.[280] This is particularly unfortunate because in most counties, chain gang workers are minimum security inmates,[281] and those inmates are arguably the ones who have the greatest chance of being rehabilitated.[282] Finally, chain gang inmates work for little or no wages, which, depending on the desired goal of inmate labor, could further isolate them from the real world.[283]

If putting prisoners to work is viewed as a way to rehabilitate them and reduce recidivism, that work can be used as a means to convey marketable skills and training to prisoners.[284] To prepare inmates for life after prison, inmates could be paid for their work, and this money could be used to offset prison operating costs (prisoners could pay for room and board) as well as to reduce the welfare burden (prisoners could help support

277. Brailsford, *supra* note 3, at 61-62. Some argue that it is also necessary to give the prisoner some choice of work to perform. *Id.* at 62.
278. *Id.* at 62-63.
279. *Id.* at 62.
280. *Id.* at 63.
281. *Chain Gangs*, supra note 167; Murphy, *supra* note 176.
282. Brailsford, *supra* note 3, at 65.
283. Rawson, *supra* note 162. Forcing a convict to work for free denies him the dignity of his labor and denies him an incentive to obtain better work. Brailsford, *supra* note 3, at 63-64.
284. Josephine R. Potuto, *The Modern Prison: Let's Make It a Factory for Change*, 18 U. TOLEDO L. REV. 51, 56 (1986).

their families).[285] This would also provide an incentive for prisoners to work, thus reducing idle time in prison.[286]

On the other hand, if putting prisoners to work is seen solely as a means to punish, "the more menial, repetitive, dull or physically difficult the work, the more effective the punishment," thus making wages an impertinent device.[287]

Work programs at prisons have been successful for years, in terms of cooperation of the prisoners and work production, without the use of chains and shackles.[288] Why introduce such degrading devices that only hinder productivity rather than augment any current goal of prison work? If the goal of prison is "returning prisoner[s] to society, physically fit to work, with good work habits, and . . . with a marketable skill," the idea of "busy work" defeats the purpose.[289]

In the final analysis, chain gangs have negative effects on prisoners and society because they have no rehabilitative influence on the inmates[290] and because they fail to achieve the goals of deterrence and retribution in a positive manner.[291] Either the more violent offenders should be made to serve on the chain gangs rather than the "non-threatening, non-violent"[292] offenders, or prison work programs should continue without the use of chains and armed guards.[293]

2. *Evaluation: Psychological Effects*

Though most would probably agree with chain gang proponents that prison should be unpleasant so that inmates will

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285. *Id.* at 62; *see also* Marco R. della Cava, *Prisoners' Work Draws Praise, Ire*, USA TODAY, Oct. 18, 1995, at 2D (prisoners get minimum wage for their work with which they "pay for their meals, room and board, taxes, child support, and contribute to victims' funds").

286. Potuto, *supra* note 284, at 55; *see also* della Cava, *supra* note 285 ("[T]he work kills time.").

287. Potuto, *supra* note 284, at 55.

288. *Readers' Forum*, *supra* note 269.

289. *Id.*

290. According to one criminologist, there is no evidence that humiliating prisoners deters future crime. However, there is evidence to the contrary. Christopher Johns, *Chain Gangs Hide Failure in Criminal-Justice System*, ARIZ. REPUBLIC, May 21, 1995, at E3.

291. *Id.* One observer has said: "I can't see twelve hours of chain gangs along a highway as a deterrent to anything except traffic." Hill, *supra* note 15.

292. *Readers' Forum*, *supra* note 269.

293. *Id.*

not want to return, chain gangs may still be morally inappropriate because of their detrimental effect on the inmates' psyches.[294] Opponents claim that chain gangs are barbaric, cruel, degrading, humiliating and uncivilized, that prisoners are being treated like animals or slaves and used as political pawns by politicians, and that inmates will become angry and frustrated as a result.[295] When implemented, tough prison policies "tend to dispense with the notion of rehabilitation and turn prisons into hard-time warehouses of convicts . . . probably [having] little effect on crime rates or recidivism."[296]

Chain gangs engender humiliation, exhaustion, and resentment in their convicts, because physical labor coupled with lack of therapy or education might produce a "heightened resentment and a desire for revenge" rather than a rehabilitated prisoner.[297] Furthermore, the effects of an authoritarian system without rehabilitation can be dehumanizing, resulting in the destruction of a convict's self esteem, resourcefulness, and creativity.[298] Chain gangs tend to foster an attitude that "life is cheap,"[299] not to mention the fact that inmates are dehumanized as result of being chained up and viewed by the public like "animals in the zoo."[300] Chain gangs may also

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294. Rustin, *supra* note 35, at 40-43.

295. Anthony, *supra* note 156; Harrison, *supra* note 156; Rawson, *supra* note 162; Davidson, *supra* note 163.

296. *Failure, supra* note 246.

297. Rustin, *supra* note 35, at 34. Some opponents add that the harm created by this harsh punishment effects not just the prisoner, but also his family. Johns, *supra* note 290.

298. Upon offering a suggestion of how to make the work more efficient, a guard replied to the prisoner, "Don't try to think. Do what I tell ya to do. . . . I'm paid to think; you're here to work." Rustin, *supra* note 35, at 43. One opponent said, "the chain on the leg had shifted to a chain on the mind." Davidson, *supra* note 163. "Humiliating a person drives him away from society and its rules," rather than preparing him to go back out into society as a productive citizen. Wade, *supra* note 203.

299. Rustin, *supra* note 35, at 39.

300. *Id.* A spokesperson for the American Civil Liberties Union commented on the current effects of chain gangs: "You are telling him he is an animal." *Link, supra note* 166. One prisoner emphasized that although sitting in a prison cell is "hard on the mind, body and spirit . . . chain gangs are degrading." *Id.* In fact, one former chain-ganger, the author of the book *Cool Hand Luke*, described fleeing felons as "rabbits," and said that a guard would be fired for not shooting an escapee. Curtis Krueger, *'Cool Hand Luke' Writer Links Chain Gangs with Past Series, Tampa Bay Politics*, ST. PETERSBURG TIMES, May 14, 1995, at 1B. Another opponent feels that the use of chain gangs sends the message to the public that "a man who makes a mistake and gets caught will no longer be treated like a man, he will be treated like

sustain a feeling of unproductivity within the convict, since the "work is never done,"[301] especially when the state creates busy work for the inmates.[302]

Some opponents argue that parading prisoners outside in front of the public causes humiliation and fosters a sense of being an object or animal on public display and should be discouraged especially when there is work to be done inside the prison.[303] Moreover, it does not make much sense to humiliate lesser offenders in public while the dangerous criminals remain inside.[304]

Due to the nature of their confinement, chain gang prisoners may also become institutionalized.[305] Many of those who leave the chain gang will return, "because a prisoner who is returned to society demoralized is rather certain to revert to crime."[306] As one former chain gang inmate described, inmates who are treated like objects internalize the feelings and adopt the "same attitudes they themselves decry in the officials," creating a vicious circle.[307] Such prisoners hate themselves as much as the guards and internalize the beliefs that the guards display about them,[308] working under constant tension while guards are holding guns.[309] Some predict that the prisoners are likely to become even more resentful after being forced to work on a chain gang and will seek retribution against their oppressors after release.[310] Moreover, working side by side, chained together, constitutes dangerous and inefficient conditions and creates tension between the inmates.[311]

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an animal, he will be chained." *Phoenix Councilman, supra* note 156.

301. Rustin, *supra* note 35, at 42.

302. Alabama imports rocks to sites for the inmates to break into small pellets; "The only goal of the program is to increase the level of punishment for prisoners, since state officials say they have no use for the crushed rock." *Rocky Times, supra* note 149.

303. Rawson, *supra* note 162.

304. Wade, *supra* note 202.

305. Brailsford, *supra* note 3, at 67.

306. *Id.*

307. Rustin, *supra* note 35, at 40. One opponent has predicted that the practice will make the chain-gangers resentful, causing the plan to backfire on prison officials. Harrison, *supra* note 168.

308. Rustin, *supra* note 35, at 44.

309. *Id.* at 43.

310. Rawson, *supra* note 162.

311. Rustin, *supra* note 35, at 44. Competition arises among the inmates when a few appear to be working harder than the others. One commentator believes that

3. *The Potential for Disparate Treatment of Minorities*

Opponents also fear that chain gangs will reinforce racist attitudes, because "mostly black prisoners [would be] on display."[312] Today's revival of chain gangs is to some observers "a retrograde step in human rights."[313] In general, minorities contend that they are not treated as well as nonminorities by the court system.[314]

One reason for this disparate treatment might be an absence of African-Americans in the administration of the judicial process and a tendency of white decisionmakers to identify more with whites than non-whites.[315] Another reason might be that minority participation in the criminal justice system is deliberately limited by, for example, prosecutors who employ strategies for choosing as few minorities as possible to serve on juries.[316]

In any event, racial bias exists in the criminal justice system[317] as evidenced by (1) higher conviction rates of minorities than nonminorities,[318] (2) the effect of the race of the victim in sentencing of capital crimes,[319] and (3) mistaken

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currently, chain gangs are taking away "what little is left of their dignity, . . . and [are] creating a leaner, meaner criminal." Wade, *supra* note 203.

312. Harrison, *supra* note 156.

313. Anthony, *supra* note 156.

314. Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989) (citing one national study, which showed that a large group of minorities—49% of African-Americans, 34% of Hispanics—believe that they do not receive equal treatment in the criminal justice system). *Id.* at 1559 n.1.

315. Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 708 (1989).

316. *See* Amadeo v. Zant, 486 U.S. 214, 217 (1988) (Georgia district attorney secretly directed jury commissioners to underrepresent black citizens on jury rolls); *see also* Edwards v. Scroggy, 849 F.2d 204, 207 (5th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989) (district attorney admitted to using strategies to choose as few minority jurors as possible through the use of preemptory strikes).

317. Some justices have noticed bias in the criminal justice system, such as Justice Marshall in his concurring opinion in Batson v. Kentucky, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) (noting the prevalence of unconscious racism affecting black defendants in capital crime sentencing), and Justice Brennan in his dissent in Turner v. Murray, 476 U.S. 28, 42 (1986) (Brennan, J., dissenting) ("Does the Court really believe that racial biases are turned on and off in the course of one criminal prosecution?"). *See generally* Sherri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).

318. Johnson, *supra* note 317, at 1032 (citing Sherri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1625-28 (1985)).

319. *Id.* (citing McClesky v. Kemp, 481 U.S. 279, 285-86 (1987)). Professor David Baldus had conducted research, establishing that black defendants accused of

identification of defendants in crimes involving a white victim and a non-white defendant.[320]

The propensity of the criminal justice system to disfavor minorities is evident: "when decision makers in the court system are empathetic or indifferent in racially determined ways, they express attitudes that leave blacks vulnerable, within and without the court system, to judgments based upon cognitive drifts that favor their denigration."[321] Given the racial composition of chain gangs in the past and present, coupled with the prevalence of racial bias in the criminal justice system, policymakers should be especially cautious to avoid using questionable justifications for the appropriateness of chain gangs.

CONCLUSION

Although chain gangs appear to have won the approval of many Americans because they represent a tough stand against crime, a close look reveals that the re-emergence of chain gangs presents challenging constitutional and policy-related issues. However, despite past and present challenges to chain gangs, constitutional claims attacking the institution are not likely to prevail.

Even if chain gangs are constitutional, their reappearance raises public policy concerns. Although prison work programs should be maintained because they are generally favorable to rehabilitation and deterrence goals, chain gangs deviate from these goals and appear to be counterproductive. Moreover, chain gangs threaten to exacerbate existing disparate treatment of minority offenders. Alternative sentencing paradigms are more suitable, because they appear to punish criminals while also rehabilitating them. In order to reform convicts, measures need to be taken to equip them with the skills needed to succeed in the outside world rather than forcing them to serve on chain gangs.

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murdering white victims were far more likely to be sentenced to death than white perpetrators of black victims. *Id.* This research was the basis for the Supreme Court's analysis in *McClesky* of the alleged violations of equal protection and cruel and unusual punishment in Georgia capital sentencing cases. *Id.*

320. *Id.*

321. Davis, *supra* note 314, at 1576.