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Working 9 to 5: Embracing the Eighth Amendment Through an Integrated Model of Prison Labor

Amy L. Riederer

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WORKING 9 TO 5: EMBRACING THE EIGHTH AMENDMENT THROUGH AN INTEGRATED MODEL OF PRISON LABOR

I. INTRODUCTION

The numbers are disheartening: there were 2,293,157 prisoners in federal, state, and local jails and prisons in 2007.¹ States used 38.2 billion dollars for correctional expenditures in 2001.² Sixty-eight percent of state prisoners did not receive a high school diploma.³ The average recidivism rate of prisoners incarcerated for common crimes is 74.2%.⁴

At the very least, these statistics suggest that the American prison system is dysfunctional.⁵ This dysfunction is indicative of the historical friction between the goals of imprisonment—punishment and rehabilitation—and the rights the Constitution guarantees to prisoners.⁶

¹ U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Feb. 2, 2008). At the time the Author of this Note obtained this information, the most current statistics were from 2007, reported in December 2007. *Id.* The 2007 total number of incarcerated individuals increased by 1.5% from 2006. *Id.*

² U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/abstract/spe01.htm> (last visited Feb. 2, 2008). This number represents a 145% increase from 1986 expenditures. *Id.*

³ U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/abstract/ecp.htm> (last visited Feb. 2, 2008). The Department of Justice published this percentage in 2003. *Id.*

⁴ U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm> (last visited Feb. 2, 2008). This percentage is the average recidivism rate of prisoners incarcerated for the following crimes: robbery, burglary, larceny, motor vehicle theft, sale of stolen property, and possession, use, or sale of illegal weapons. *Id.* Unfortunately, the Bureau of Justice has not conducted a study of recidivism since 1994. *See id.* *See also* Interview with Joe Arpaio, Sheriff of Maricopa County, Ariz., in Phoenix, Ariz. (Nov. 19, 2007). The sheriff of the largest county in the country suggests the average recidivism rate among state and federal prisoners hovers around 60–65%. *Id.*

⁵ *See* Jonathan A. Willens, *Structure, Content, and the Exigencies of War: American Prison Law After Twenty-Five Years 1962–1987*, 37 AM. U. L. REV. 41, 48 (1988). Although prisons “hold, feed, shelter, accept, and release prisoners,” they also “beat, stab, rape, isolate, humiliate, terrify, inspect, objectify, disable, demoralize, brutalize, and discipline prisoners.” *Id.* While some of these functions are essential to prison administration, some of them obviously are not. *Id.* Willens explains why “prisons make prisoners” by stating:

Prison rules and regulations, the day-to-day operation of the institution confront the inmate with an image of himself that is grotesque and absurd. A prisoner who refuses to internalize this image, who insists upon seeing other versions of himself, is in constant danger. Institutions exist separate from us, but when we internalize their existence the nature of the separation begins to change.

Id. at 49 (quoting in part JOHN WIDEMAN, BROTHERS AND KEEPERS 183 (1984)).

⁶ *See infra* Parts II.A–D (describing how the Supreme Court has struggled to balance the level of constitutional scrutiny it imposes on actions of prison administrators).

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More specifically, four goals of imprisonment creating the tension are: punishment, retribution, rehabilitation, and reform, or some varying combination.⁷

The purpose of this Note is to methodically compile the history and case-law pertaining to prisoners' rights, including Eighth Amendment claims, and apply it to the microcosm of prison labor.⁸ This Note proposes that throughout the history of imprisonment, administrators have placed primary importance on each of the aforementioned goals depending upon the circumstances of the times.⁹ Furthermore, this Note proposes that these goals of imprisonment can coexist peacefully in the twenty-first century and they can be balanced to form an integrated model for prison labor that meets constitutional scrutiny and exceeds the Nation's expectations.¹⁰ Essentially, the Supreme Court's constitutional interpretation is a historical guide and an operational template to use and on which to expand; it is not a set of rules to circumvent.¹¹

Part II of this Note explores the history of prisoners' rights in conjunction with the Eighth, Thirteenth, and Fourteenth Amendments.¹² It includes a brief look into prisoners' rights in the new millennium and the direction the Court is taking regarding the constitutionality of prison labor.¹³ Part II concludes by describing six traditional models of prison labor and its use in prisons throughout the nation's history.¹⁴ Next, Part III focuses on the traditional models of labor introduced in Part II and analyzes the wisdom of its usage from policy and constitutionality perspectives.¹⁵ Finally, Part IV introduces the framework for a previously nonexistent model code of prison labor, integrating the constitutional standards and policy goals of the traditional models and

⁷ See *infra* Part II.D (describing some current labor programs and their goals). See also Willens, *supra* note 5, at 49 (explaining Michel Foucault's theory that prisons are "essential machines and laboratories of social discipline[]").

⁸ See *infra* Parts II-III (recounting the history and constitutionality of prisoners' rights and analyzing those guidelines as applied to prison labor).

⁹ See *infra* Part II (explaining the periodic shifts in popular thought about the goals of imprisonment).

¹⁰ See *infra* Part IV.B (outlining a proposed model code for the imposition of labor programs in prisons).

¹¹ See *infra* Part II (discussing the Supreme Court's constitutional interpretation of prisoners' rights).

¹² See *infra* Parts II.A-C (explaining the ways in which the Court has applied these amendments to prisoners and the conditions of their confinement).

¹³ See *infra* Part II.D (tying the Court's reluctance to find any conditions unconstitutional into the reemerging "hands-off" mentality).

¹⁴ See *infra* Part II.E (explaining how each model works, and describing examples of their use throughout history).

¹⁵ See *infra* Part III (discussing the benefits and detriments of six traditional models of prison labor and their possible constitutional infirmities).

moving beyond them to create the possibility for many hybrid models of prison labor.¹⁶ Above all else, Part IV proposes that every able-bodied general population prisoner should work.¹⁷

II. BACKGROUND

*Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.*¹⁸

The history of prisoners' rights in America is also a history of human emotion and necessity.¹⁹ When a person violates the societal code, Americans have demonstrated a desire for a sentencing system that focuses on punishment, retribution, rehabilitation, and reform.²⁰ The need for the most cost-effective, time-effective, and space-conserving mode of justice has frustrated many people and has played an equal part in the history of prisons and the treatment of prisoners.²¹ Throughout time there have been very different penal notions, but perfecting the balance of the aforementioned pillars has been the common goal.²² Even though the goal may be unified, the systems utilized to achieve the proper balance have changed dramatically depending on how the courts, the public, prison administrators, and academics defined it.²³

¹⁶ See *infra* Part IV (outlining briefly the operating guidelines for a variety of public and private sector programs).

¹⁷ See *infra* Part IV.B (proposing that under the categorization of prisoners, only the most violent or ill offenders would be excluded from the work programs).

¹⁸ *Price v. Johnston*, 334 U.S. 266, 285 (1948).

¹⁹ See *infra* Part II.A (discussing public attitudes toward the purpose of incarceration).

²⁰ See *infra* Part II (describing the historical shifts in the primary goal of imprisonment from retribution to rehabilitation).

²¹ See *infra* Part II.D (summarizing the Court's current reluctance to pass judgment on the wisdom of prison management, despite their historical tendency to do so).

²² See *infra* Part II (explaining that the Court has tried to balance constitutionally guaranteed rights with the need for effective prison administration).

²³ See *infra* Part II. The forces affecting prison administration include court attitudes, internal prison administration, and public perception. See *infra* Parts II.A-D (focusing on the interplay between the courts, the public, and prison administrators). The ultimate penological goal of finding the correct balance between punishment, retribution, and rehabilitation is timeless. See *infra* Parts II.A-D (recounting the shifting popularity of punishment, retribution, reform, and rehabilitation as the primary objective of imprisonment). However, different balances have been struck at specific time-periods in American history. See *infra* Part II.A-D (breaking up the history of prisoners' rights into historical eras). This Note focuses specifically on the balance as it relates to prison labor. See Parts II.E, III, and IV (explaining, analyzing, and expanding on traditional prison labor models).

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This Part delves into the history of the goals, the means used to achieve them, and the influencers of penology from the inception of the Constitution to the present.²⁴ The attitudes of the courts and the public regarding appropriate conditions of confinement for prisoners directly impacted the imposition of hard labor as a component of sentencing.²⁵ Furthermore, the continuing interpretation of the Eighth Amendment by the courts has oscillated between restraining the meaning to that intended by the Framers and expanding it to include a wider variety of punishments and conditions.²⁶ During the Nation's infancy, the attitudes of the judiciary, reflected through the holdings of the courts, were largely premised on a fear of past atrocities committed in England, coupled with a strong legacy of corporal punishment.²⁷ In fact, a sentence of hard labor was the preferential means throughout the nineteenth century to achieve the goal of punishment.²⁸ At the cusp of the twentieth century, however, prison labor fell out of favor with both the courts and the public.²⁹ Through a methodical analysis of pertinent constitutional amendments and their application throughout history, this Part summarizes the rights afforded and denied to prisoners over the last two centuries and the models used to imprison men at hard labor, which will be the focus of the remainder of the Note.³⁰

A. *The First Hundred Years*

From this Nation's inception, there was little debate about the inclusion of the Eighth Amendment to the Bill of Rights.³¹ In the outer

²⁴ See *infra* Part II notes and accompanying text (dividing the history of prisoners' rights into eras focusing on punishment, reform, equality of process, and abstinence pertaining to prison administration issues).

²⁵ See *infra* Part II.A (describing the Court's lackadaisical attitude about the treatment of prisoners in the late 1700s and early 1800s).

²⁶ See *infra* Part II.C (explaining that the Court started expanding the definition of cruel and unusual punishment in unprecedented ways, and noting that the peak of that expansion occurred in the 1960s).

²⁷ See *infra* note 32 and accompanying text (describing the events surrounding the Bloody Assize of 1685 and other sources of the traditional definition of "cruel and unusual punishment").

²⁸ See *infra* note 36 and accompanying text (quoting the Court's original attitude toward imprisonment that the decisions of jailers should not be questioned).

²⁹ See discussion *infra* Part II.B (describing late nineteenth and twentieth century attitudes promoting the idle confinement of prisoners, perhaps as a result of prison labor's connection to slavery).

³⁰ See discussion *infra* Part II (after outlining the standards the Supreme Court has identified in analyzing questions relating to prison rights, Part II outlines six traditional models of prison labor).

³¹ U.S. CONST. amend. VIII. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

ambit of the Framers' consciousness were the memories of atrocities that took place in England under the rule of King William and Queen Mary of the Stuart dynasty, such as the Bloody Assizes of 1685.³² In fact, the language of the Eighth Amendment was substantially copied from the language of the English Act of Parliament in 1688.³³ The adoption of a

See Weems v. United States, 217 U.S. 349, 368–69 (1910). Only two representatives, Mr. Smith and Mr. Livermore, opposed the adoption of the Eighth Amendment, both on the grounds that the language was too indefinite and lacked meaning. *Id.* Mr. Livermore commented:

The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we, in future, to be prevented from inflicting these punishments because they are cruel?

Id. at 369. *See also* Tessa M. Gorman, Note, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 CAL. L. REV. 441, 462 (1997) (discussing the development of the Eighth Amendment). Before the colonies became a nation, the Virginia colony incorporated a prohibition on cruel and unusual punishments in its constitution. *Id.* Furthermore, the federal government included the clause in the Northwest Ordinance of 1787. *Id.*; Yale Glazer, Note, *The Chains May Be Heavy, but They Are Not Cruel and Unusual: Examining the Constitutionality of the Reintroduced Chain Gang*, 24 HOFSTRA L. REV. 1195, 1202 (Summer 1996) (describing that Virginia's Declaration of Rights contained the exact words prohibiting cruel and unusual punishment as did the English Bill of Rights of 1689).

³² *Weems*, 217 U.S. at 371. *See* James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1009 (1997). The Bloody Assizes refers to a series of trials for treason in which those convicted were burned, disemboweled, beheaded or sentenced to other particularly gruesome forms of death. *Id.* The heads of the executed prisoners were often displayed on poles for the townspeople to see. *Id.*

³³ *In re Kemmler*, 136 U.S. 436, 446 (1890). The act, titled "An act for declaring the rights and liberties of the subject, and settling the succession of the crown" stated:

[E]xcessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects, and excessive fines have been imposed, and illegal and cruel punishments inflicted . . . excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Id. (quoting 1 St. Wm. & Mary, c. 2). *See* Robertson, *supra* note 32, at 1009. Blackstone, widely read by the delegates of the state conventions, vilified other types of barbarous punishment as well. *Id.* at 1009. Further examples of punishments intended to be prohibited include: cutting off ears or hands, branding, placing prisoners in the pillory or rack, and any other form of "lingering death." *Id.* at 1009–10.

See also Daniel E. Hall, *When Caning Meets the Eighth Amendment: Whipping Offenders in the United States*, 4 WIDENER J. PUB. L. 403, 410 (1995). Long before the English Bill of Rights, legal documents contained the notion of proportionality in sentencing. *Id.* For example, the Bible mandated *lex talionis*, or "eye for an eye," in Leviticus. *Id.* (quoting *Leviticus* 24:19–20). *See also* Gorman, *supra* note 31, at 459–60. In addition to Biblical mandates for punishment, Greek philosophers and the Magna Carta, to name a few, discuss proper punishments for crimes. *Id.*

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prohibition on cruel and unusual punishment referred specifically to tortures such as crucifixion, the thumb-screw, disemboweling, burning at the stake, and other methods of punishment that caused death or the lingering fear of death.³⁴

The simplicity of the Amendment was clear in the minds of early justices. Therefore, few courts have interpreted the Eighth Amendment and prisoner's constitutional rights.³⁵ The first Supreme Court opinion concerning prisoners' rights in 1809 did not mention the Eighth Amendment specifically, but made clear the prevailing notion of judicial restraint regarding matters of prison administration, even at this early stage in the Republic.³⁶ Sixty-nine years later, in 1878, the Court refused to limit states and territories to the congressionally prescribed method of death by hanging for capital offenses, thus allowing states and territories latitude in preferring methods of execution without necessarily violating the Eighth Amendment.³⁷

In 1868, the inclusion of the Fourteenth Amendment to the Constitution made the Eighth Amendment applicable to the states, although in practicality it had little effect on the judiciary's interpretations because most states already had similar prohibitions on

³⁴ *In re Kemmler*, 136 U.S. at 446. See DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 46-50 (1971). Colonial New England provided for many different and sometimes innovative punishments for various crimes. *Id.* For example, while banishment, whipping, and imposition of a fine were popular, a convict may also have been sentenced to stand at the gallows with a noose around their neck for a number of hours. *Id.* at 48. Notably, convicted criminals were rarely sentenced to imprisonment as jails were used solely for those awaiting trial. *Id.*

³⁵ See *infra* note 36 (quoting the brief opinion in the first case to squarely address prison administration).

³⁶ *Ex Parte Taws*, 23 F. Cas. 725 (1809). The entirety of the opinion read as follows:

We do not think it right to interfere with the jailer in the exercise of the discretion vested in him, as to the security of his prisoners; unless it appeared that he misused it for purposes of oppression, of which there is no evidence in this case.

Id. From the affidavits, it appeared that Taws had made threats to escape, and as a consequence the jailer restricted Taws to his room and denied him access to the yard. *Id.* However, the Court eluded that if a jailer misused his authority for the purpose of oppression, the Court may interfere. *Id.* See *infra* Part II.C. This "hands off policy" would disappear and reemerge in the next two centuries. See *infra* Part II.C.

³⁷ *Wilkerson v. Utah*, 99 U.S. 130, 133 (1878). A man duly convicted of first-degree murder in the Territory of Utah was sentenced to be "publicly shot until [he was] dead" in accordance with the laws of Utah. *Id.* at 131. The first national crimes act of Congress provided for death by hanging for capital offenses. *Id.* at 133. The Court held that Congress did not intend the statute to supersede the power of the states in deciding the proper method of execution. *Id.* In keeping with the spirit of the Eighth Amendment, the Court was not concerned with other provisions of the state law at issue that called for imprisonment at hard labor during a life sentence, in lieu of a death sentence duly entered by a jury. *Id.* at 136.

cruel and unusual punishment in their own constitutions.³⁸ However, the Fourteenth Amendment did signal the Court's forthcoming—even if only temporary—desire for uniformity of punishment amongst the states by requiring a grievance procedure for prisoners in accordance with due process of law.³⁹

The constitutionality concerning the imposition of hard labor on a convicted criminal was squarely addressed and upheld in two late-1800s cases, thus reaffirming the limited scope of the phrase “cruel and unusual punishment.”⁴⁰ The Court drew a fine distinction between cases where hard labor must be part of the punishment by statute and cases where imprisonment alone was required by statute.⁴¹ A minute statutory distinction made a large difference to prisoners when the Court held that lower courts may, at their discretion, sentence a convict to serve out his punishment in a penitentiary where hard labor is incident to discipline at the institution.⁴² As a result, the distinction drawn in these cases allowed punishment through hard labor to be imposed even

³⁸ U.S. CONST. amend. XIV, § 1. Pertinent portions of Section 1 provide:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. See *In re Kemmler*, 136 U.S. at 446–47. In *Kemmler*, the Court did not explicitly apply the Eighth Amendment to the states, but instead relied on the New York Constitution of substantial similarity in upholding the state's right to find that electrocution was a more humane method of imposing death than hanging. The Court noted that the interpretation of the New York Constitution's prohibition on cruel and unusual punishment would be “equally true of the [E]ighth [A]mendment, in its application to [C]ongress.” *Id.* See also Gorman, *supra* note 31, at 464. The Court rejected the argument that “novel” punishment is the same as “unusual” punishment. *Id.*

³⁹ See *infra* Part II.C (discussing the Court's increasingly uniform treatment of federal and state prisoners). See also *Morrissey v. Brewer*, 408 U.S. 471 (1972) (holding that prisoners are guaranteed similar Due Process rights as citizens accused of a crime).

⁴⁰ *Ex parte Karstendick*, 93 U.S. 396, 399 (1877) (stating that when imprisonment at hard labor is prescribed by statute as part of a punishment, the court is without discretion; however, if it is not prescribed by statute, the court has discretion to sentence the criminal to an institution that uses hard labor as a method of discipline); *In re Mills*, 135 U.S. 263, 266 (1890) (noting that punishments for a term greater than one year may be served at an institution that employs hard labor if the statute does not prescribe otherwise).

⁴¹ *Ex parte Karstendick*, 93 U.S. at 399. The Court has discretion to impose imprisonment at hard labor when the statute is silent on the issue. *Id.*

⁴² *United States v. Pridgeon*, 153 U.S. 48, 60–61 (1894). The Court relied on the former opinions to uphold the sentence of a convicted horse-stealer, which provided for imprisonment of five years in an Ohio state penitentiary that employed “hard labor” in the usual course of discipline. *Id.* at 50, 61.

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if not prescribed by statute.⁴³ In the Court's fervency for punishment, it even extended the constitutional imposition of hard labor to many consecutive sentences that, when aggregated, led to shockingly severe punishments for multiple petty crimes.⁴⁴

By the close of the nineteenth century the Court had expressly approved of confinement at hard labor in a number of circumstances, leaving a wide range of acceptable punishments to lower courts to meet the varying circumstances of each case.⁴⁵ The penological goals were changing, however, and the conditions were set for the implementation of the big house.

⁴³ See *id.*; *Ex parte* Karstendick, 93 U.S. at 399. But see *Ex parte* Wilson, 114 U.S. 417, 428–29 (1885), which cites Sir William Blackstone's commentary that infamous punishments include confinement to hard labor and further delineates that infamous punishments are not limited to those that are cruel and unusual. *Id.* (citing 4 Bl. Comm. 377). Therefore, imprisonment at hard labor, an infamous punishment, violates the Constitution. *Id.* at 429. Perhaps foreshadowing later decisions, *Wilson* implies that changes in public opinion over the ages may also change what punishments shall be considered infamous. *Id.* at 427.

⁴⁴ *O'Neil v. Vermont*, 144 U.S. 323, 331–35 (1892). In *O'Neil*, the Court dismissed the writ of error because the question posed did not even raise a federal question. *Id.* at 335. The imposition of a sentence of 19,914 days confinement at hard labor for 457 offenses of selling intoxicating liquor—three days for each dollar of the unpaid fine originally imposed—was not deemed cruel and unusual because the “unreasonableness is only in the number of offenses which the respondent has committed.” *Id.* at 325, 331.

⁴⁵ *Pridgeon*, 153 U.S. at 61. See ROTHMAN, *supra* note 34, at 237. Imprisonment in the first half of the 1800s meant institutionalization in asylums. *Id.* Asylums sought to treat prisoners as patients, and imprisonment as medicine. *Id.* at 133. Rothman describes the organization and goals of the asylum:

Create a different kind of environment, which methodically corrected the deficiencies of the community, and a cure for insanity was at hand. This, in essence, was the foundation of the asylum solution and the program that came to be known as moral treatment. The institution would arrange and administer a disciplined routine that would curb uncontrolled impulses without cruelty or unnecessary punishment. It would re-create fixity and stability to compensate for the irregularities of the society. Thus, it would rehabilitate the casualties of the system.

Id. By the second half of the century, however, the asylum was failing and institutionalization “decline[d] from rehabilitation to custodianship[.]” *Id.* at 239. See also FRANCIS T. CULLEN & KAREN E. GILBERT, REAFFIRMING REHABILITATION 67 (1982). After the Civil War, a new penology developed, motivated to fix the problems of the asylum. *Id.* The main problem with the asylum, as they saw it, was that prisoners were sentenced to a fixed term, resulting in a lack of motivation to reform. *Id.* To remedy this, the new penology advocated indeterminate sentencing. *Id.* Prisoners sentenced to an indeterminate time in a penitentiary would supposedly have greater motivation to “reform” because positive actions would decrease their sentence. *Id.* Indeterminate sentencing remains a cornerstone of the penal system today. *Id.*

B. *The Fall of Prisoner Labor*

Though some academics advocated a new type of prison they called the Reformatory, the public, more confident by the Court's confirmation of the constitutionality of tough treatment like hard labor and various modes of execution, preferred mass institutions to satisfy a growing public desire for punishment.⁴⁶ Penologists, who saw criminal deviance as a social contagion, sought to cure it through a diet of solitude, labor, and contemplation; however, it is unclear whether they viewed it as punishment, rehabilitation, or both.⁴⁷

The labor portion of the penologists' cure took the form of both public and private hiring of prisoners through a system of peonage.⁴⁸

⁴⁶ Robertson, *supra* note 32, at 1012. The public increasingly viewed criminal deviance as a "familial defect" and a "failure of upbringing." *Id.* at 1011. In an effort to regain social control after the chaos of the Civil War, the most notorious of prisons, including Auburn Prison in New York and Pennsylvania's Eastern and Western Penitentiaries, were built. *Id.* See Stephen P. Garvey, *Freeing Prisoner's Labor*, 50 STAN. L. REV. 339, 350 (1998). (noting that Pennsylvania's "'silent[] system" kept inmates confined in separate cells, working in silence for the dual purpose of containing the contagion of deviance and instilling discipline to keep "evil thoughts" at bay); Jonathan A. Willens, *Structure, Content and the Exigencies of War: American Prison Law After Twenty-Five Years*, 37 AM. U. L. REV. 41, 70 (1987). Unexpectedly, this silent system, developed by the Quakers, drove prisoners insane. *Id.* In contrast, while Auburn prisoners also worked in silence, they worked collectively. *Id.* To maintain order, however, wardens were often violent, and the violence required to make the Auburn model work led many to deem the model a failure in terms of its ability to reform prisoners. *Id.*

⁴⁷ Robertson, *supra* note 32, at 1012. Robertson discusses the shift in popularity from corporal punishment to imprisonment in warehouse prisons that "squander human potential. [] . . . offer[ing] an existence, not a life. . . . storing and recycling offenders." *Id.* at 1005-07. He concludes that warehousing is a violation of the Eighth Amendment. *Id.* at 1007. See also SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME 179 (1998); LOUIS N. ROBINSON, *PENOLOGY IN THE UNITED STATES* 159 (1921). The Elmira Reformatory of post-civil war is typical of the structure of the reformatory movement. CHRISTIANSON, *supra*, at 179. At Elmira, all inmates entered on the same level and were reevaluated every six months for progress. *Id.* As they progressed, inmates moved through three levels, each with increased privileges. *Id.* An inmate progressed by making satisfactory "grades" on a number of activities and learning experiences designed to take the inmate from prisoner to productive member of society. *Id.* However, one scholar examining the system deemed one-half of inmates "incurable," attributing their lack of progress to heredity. *Id.*

⁴⁸ Garvey, *supra* note 46, at 344-45. Two systems called the "state-use" system and the "contract" system were particularly prevalent. *Id.* The state-use system allowed the sale of prison-made goods to state markets and the imposition of "public-works" projects staffed by prisoners, and is still used today. *Id.* The contract system allowed the sale of prisoners' labor to private firms while maintaining state control over custody, care, and discipline. *Id.* at 345. See ROBINSON, *supra* note 47, at 158-59. Private parties were unable to compete with contractors' low prices. *Id.*; see also BLAKE MCKELVEY, *AMERICAN PRISONS* 94 (1974) (The Univ. of Chicago 1938). The growing movement of organized labor strongly opposed the contract system: by the 1880s, the National Labor Party, the Knights of Labor, and the Federation of Organized Trades and Labor, had anti-contract clauses as part of their

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Although peonage systems were enormously popular, the Court defined “peonage” in 1905 as indebtedness and denounced it as servitude in violation of the Thirteenth Amendment.⁴⁹ The Court reinforced the declaration of the Thirteenth Amendment in several cases and, while maintaining that convicted criminals can be subjected to involuntary servitude as a condition of confinement, suggested that the practice of hiring out convicts to private parties may amount to involuntary servitude.⁵⁰ Until this time, prisons utilized the practice widely to provide the mutual benefits of cheap labor to private industry and additional funds to penitentiaries.⁵¹

platform. *Id.* See George E. Sexton, Franklin C. Farrow & Barbara J. Auerbach, *The Private Sector and Prison Industries*, in RESEARCH IN BRIEF (Nat’l Inst. Of Justice, Washington, D.C.), Aug. 1985 at 1 for further information about the popularity of anti-contract clauses.

⁴⁹ *Clyatt v. United States*, 197 U.S. 207, 215-16 (1905). *Clyatt* was convicted of unlawfully and knowingly returning persons to a condition of peonage by forcibly returning them to his firm to pay off their debt. *Id.* at 214. The Court did not flinch at his sentence of four years’ confinement at hard labor, and strongly condemned the practice of peonage as a violation of the prohibition on servitude, whether voluntary or involuntary. *Id.* See generally U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment declares:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Id.

⁵⁰ *Clyatt*, 197 U.S. at 218-19. In addition to *Clyatt*, the Court found unconstitutional conditions of peonage in *Bailey v. Alabama*, 219 U.S. 219, 245 (1911), and *United States v. Reynolds*, 235 U.S. 133, 150 (1914). *Reynolds* was similar to *Clyatt* in that the Court condemned the condition of private peonage. *Reynolds*, 235 U.S. at 146-47. In *Reynolds*, a private person was allowed to confess judgment for another and post surety for him in return for a term of labor to pay off the debt. *Id.* at 139-40. If, however, the laborer refused to work before the debt was paid off, he was returned to jail, where he could again be confessed to judgment by another and placed in the same manner of indebtedness, likely for a larger amount of money. *Id.* The Court rejected the theory of voluntary contract and stated that “the convict is thus kept chained to an everturning [sic] wheel of servitude” in constant fear of being re-imprisoned. *Id.* at 146-47. The Court compared the nineteen months of servitude under the system of surety with the maximum of four months at hard labor that would be imposed by the state and found the disparagement disgusting. *Id.* at 147-48.

In contrast, *Bailey* involved a law that made it a crime to break a ‘contract’ to work to repay a debt, punishable by imposing a fine double the damage of the lender in conjunction with a period of imprisonment at hard labor. *Bailey*, 219 U.S. at 228. The Court held that the law amounted to involuntary servitude and stated, “[t]he state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.” *Id.* at 244.

⁵¹ LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 157 (1993). The oldest system in America, with its roots in English prison farms, is the “leasing system”. *Id.* See ROBINSON, *supra* note 47, at 156-57. Under the lease system, a private entity pays the government a sum of money in return for possession of a prisoner; thus, the lease system puts prisoners entirely in the control of private parties. *Id.* The lessee owns all

By 1900, however, privatized prison labor was becoming unpopular in America primarily for economic reasons.⁵² Firms that did not contract with prisons were unable to compete with those that did.⁵³ Although admittedly less important to most Americans, escalating data of prisoner brutality alarmed a vocal portion of the public.⁵⁴ Additionally, legislators and academics took signals from the Court when it intimated the possible unconstitutionality of contracting prisoners for labor.⁵⁵ The continuing backlash of the slave era coupled with ideas of a new morality ushered out a fiscally responsible and economically beneficial alternative to continuous confinement to a cell.⁵⁶

C. *Carving Out the Rights of Prisoners*

1. *Weems v. United States*⁵⁷

The seminal case that attempted to define cruel and unusual punishment is *Weems v. United States*.⁵⁸ The Court struck down the law

goods and services the prisoner produces and is also responsible for the prisoner's basic needs. *Id.* at 158; see *Bailey*, 219 U.S. at 245 (1911) (holding that a law making it a crime to break a contract to work to repay debt is tantamount to involuntary servitude). See also CHRISTIANSON, *supra* note 47, at 181. The system was very popular in the early days of the Union, but fell out of favor when the Supreme Court linked the practice to slavery. *Id.*

⁵² See *infra* note 53 (describing the public concern that prison-manufactured goods would put free labor manufacturers out of business).

⁵³ ROBINSON, *supra* note 47, at 172-74. The Commissioner of Labor's statement in 1905 clarifies why free labor industries fought to eliminate prison labor: "In several industries, as stove hollow ware, saddletrees, and certain kinds of whips and whiplashes, the prison-made goods have entirely or practically driven the products of free labor from the market." *Id.* at 172 (quoting *Twentieth Annual Report of the Commissioner of Labor* at 49 (Washington, 1905)). See Sexton, *supra* note 48, at 6. In fact, during the depression, Congress passed laws prohibiting prison-made goods from being transported interstate in an effort to destroy competition with free labor. *Id.* at 6. See also BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, *Prison Industry Enhancement Certification Program (PIECP)*, <http://www.ojp.usdoj.gov/BJA/grant/piecp.html> (last visited Feb. 2, 2008) (discussing the qualifications for becoming certified to transport prison-made goods interstate).

⁵⁴ Garvey, *supra* note 46, at 358, 363. One particularly damning story involved a man who was convicted of a relatively minor crime of vagrancy and leased to a company to strip turpentine for ninety days. *Id.* at 363. Unable to keep pace in the hip-deep mud, he was beaten to death. *Id.* at 364. See *infra* Part II.E (providing examples of prisoner brutality under the lease system).

⁵⁵ See *infra* Part II.E (describing that the leasing system and similar systems of surety have strong ties to involuntary servitude).

⁵⁶ See *supra* notes 50-53 (explaining the factors leading to the decline of prison labor). But see FRIEDMAN, *supra* note 51, at 159. Despite the decline of prison labor, prison populations continued to increase. *Id.* Friedman notes that, "[i]mprisonment was and remained the basic way to punish men and women convicted of serious crimes." *Id.*

⁵⁷ 217 U.S. 349 (1910).

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outlining Weems's fifteen-year sentence on the grounds that it violated the Eighth Amendment.⁵⁹ In 1910, for the first time, the words "cruel and unusual" were extended beyond methods of corporal punishment to include a prohibition on sentences that were "so disproportionate" to the offense.⁶⁰ Furthermore, the Court employed the principle of a living Constitution to work elasticity into an otherwise rigid Amendment.⁶¹ At the same time, the Court stressed the importance of judicial restraint in deferring to the legislature to adopt penal laws that are congruous with the gravity of the crime.⁶² In *Weems*, the Court managed to

⁵⁸ *Id.* *Weems* actually involved the Philippine Penal Code; the Philippines were a territory of the United States at the time. *Id.* at 357. The complaint alleged that Weems embezzled from the government by entering wages as paid out to employees when the wages were not actually paid. *Id.* at 357-58. The imprisonment was to be served at a penal institution where he would work to benefit the state. *Id.* at 364. The imprisonment was termed *cadena temporal*, the third highest in severity. *Id.* at 364. The absolute highest penalty was of course death, and the second highest was *cadena perpetua*, or life imprisonment. *Id.* Furthermore, under the classification of his sentence, he was required to wear chains at the ankles and wrists and perform hard and painful labor, and was further prohibited from outside contact. *Id.*

In addition to the penalty while imprisoned, Weems was further condemned to a perpetual limitation of his liberty by requirements that authorities have constant notice of his domicile and employment. *Id.* The Court, in particularly passionate language, described the severity of Weems's loss of liberty:

He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him, and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.

Id. at 366. Interestingly, the Court's only mention of labor in regards to the law was that "painful labor" must be more than "hard labor," though it did not know exactly what that meant. *Id.*

⁵⁹ *Id.* at 382. Weems was an officer of the Bureau of the Coast Guard and was convicted of falsifying public documents with the intent to defraud the United States government and sentenced to fifteen years of imprisonment. *Id.* at 357. The Court held the law unconstitutional, though it recognized that the punishment has "no fellow in American legislation" and comes from a "government of a different form[.]" *Id.* at 377.

⁶⁰ *Id.* at 368. The Court did recognize the novelty of the Philippine Code in providing for an elastic sentencing system of minimum, medium, and maximum sentences, which is used almost universally among the states today. *Id.* at 365.

⁶¹ *Id.* at 373. The Court's new paradigm is evidenced by phrases such as "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth." *Id.*

⁶² *Id.* at 379. The Court explained this restraint as a "subordination of the judiciary to the legislature":

However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be

simultaneously reaffirm the notion of deference to legislators and prison administrators regarding sentencing and imprisonment while vastly expanding the meaning of cruel and unusual punishment to include the notion of proportionality in sentencing.⁶³

Expectedly, the expansion of the Eighth Amendment led to a flood of applications for writs of habeas corpus because, for the first time, the Supreme Court gave prisoners viable claims.⁶⁴ Despite growing procedural difficulties with the inundation of writs, the Court upheld the importance of prisoners' access to the courts.⁶⁵ As the once popular idea of prisoners as social contagion waned, a new era began that extended unprecedented rights to prisoners.

interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist, and punish the crimes of men according to their forms and frequency. We do not intend in this opinion to express anything that contravenes those propositions.

Id.

⁶³ *Id.* at 373. The pleadings contained no allegations of unconstitutionality based on the Eighth Amendment and the Court dispensed with that potentially fatal problem and instead decided the case on exactly those grounds, to which Justice White dissented. *Id.* at 383. He argued that the majority incorrectly decided the case because

[n]either at the trial in the court of first instance nor in the supreme court of the Philippine Islands was any question raised concerning the repugnancy of the statute defining the crime and fixing its punishment to the provision of the Philippine Bill of Rights, forbidding cruel and unusual punishment.

Id. (White, J., dissenting).

⁶⁴ *Price v. Johnston*, 334 U.S. 266, 301 (1948) (Frankfurter, J., dissenting). As an example, in the decade spanning 1937 to 1947, six prisoners at Alcatraz filed sixty-eight petitions, and in a five year period in the District of Columbia, one prisoner filed fifty petitions. *Id.* at 301 n. 4. See BLACK'S LAW DICTIONARY 728 (8th ed. 2004). "[H]abeas corpus" literally translates from Latin to "that you have the body." *Id.* A writ of habeas corpus is often used to challenge the legality of one's imprisonment by bringing that person before a court. *Id.*

⁶⁵ Compare *Johnson v. Avery*, 393 U.S. 482, 484-90 (1969) (holding that prison regulations barring inmates from helping other inmates form habeas corpus claims are unconstitutional regardless of the impact on prison discipline), with *Price*, 334 U.S. at 269-94 (holding that the proper court may issue a writ of habeas corpus requiring the presence of a prisoner whenever it deems it necessary in the interests of justice). In particular, *Price* involved a prisoner whose claim was rejected, after requesting a writ four times, because he failed to state a cognizable claim leaving the lower court no power to compel *Price* to come before the court. *Price*, 334 U.S. at 270, 276. The Supreme Court held that it could compel the prisoner to come before the court and appointed a member of the bar of the Supreme Court to be his counsel. *Id.* at 278.

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2. *Trop v. Dulles*⁶⁶

The second landmark case involving the Eighth Amendment was *Trop v. Dulles*.⁶⁷ Under a law that forfeited the citizenship of convicted wartime deserters, the Court considered whether denationalization by an act of Congress could constitute cruel and unusual punishment.⁶⁸ The Court struck down the law and announced a groundbreaking expansion of Eighth Amendment rights.⁶⁹ Under the new “evolving standards of decency” test, with the guidance of a United Nations’ survey, the Court invalidated the law as violating the prohibition on cruel and unusual punishment.⁷⁰

3. The Height of the Prisoner Rights Movement

In 1972, the Court decided three cases regarding Fourteenth Amendment due process rights of prisoners.⁷¹ The first case delineated

⁶⁶ 356 U.S. 86 (1958).

⁶⁷ *Id.* *Trop* concerned a congressional statute, purportedly based on Congress’s war powers, which penalized military desertion during a time of war with forfeiture of the person’s citizenship. *Id.* at 87–89. The petitioner was indeed a deserter, though he had been gone just a day and had turned himself in to an officer. *Id.* at 87. He was court-martialed and sentenced to three years at hard labor. *Id.* at 88. Upon applying for a passport some years later, he was denied on the grounds that he lost citizenship by way of being convicted of wartime desertion. *Id.*

⁶⁸ *Id.* at 101. The fundamental problem with the law was that it rendered a person stateless, and therefore subject to the laws of wherever he happened to be. *Id.* See Glazer, *supra* note 31, at 1205 (examining the Court’s use of the “evolving standards of decency” analysis and its relationship to the issue of proportionality); Gorman, *supra* note 31, at 467 (focusing on the Court’s analysis of the “psychological effects of forced denationalization”); Robertson, *supra* note 32, at 1050 (arguing that the Warren Court, with an Aristotelian premise, posited that “a person’s communal status can effect his ‘very existence.’” (quoting MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 11 (1982)).

⁶⁹ *Trop*, 356 U.S. at 101. The court declared that “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* It is interesting to note that under the Court’s evolving standards of decency test, the death penalty was almost off-handedly confirmed as a constitutional punishment because it was widely accepted. *Id.*

⁷⁰ *Id.* at 101, 103. The survey revealed that only Turkey and the Philippines punished deserters by denationalization. *Id.* As a sub-issue, the Court questioned the statute on the grounds that it was purely penal—which the Court defined as having no purpose other than punishment—and thus subjected it to heightened scrutiny. *Id.* at 96–97. “Nonpenal” laws “impose[] a disability, not to punish, but to accomplish some other legitimate governmental purpose.” *Id.* at 96. It seems, however, that denationalization could be imposed as a non-penal measure to further the government’s legitimate interest in maintaining loyal citizens. See *id.*

⁷¹ See *Haines v. Kerner*, 404 U.S. 519 (1972) (punishments for disorderly conduct in the prison can lead to valid due process claims); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole violators are entitled to certain procedural due process rights before parole is

the crux of the due process argument for prisoners: most “allegations . . . however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence.”⁷² *Haines v. Kerner* went so far as to hold that even inmates who hit other inmates with shovels had rights.⁷³ Two companion cases regarding parole followed in the same year and in both cases the Court not only held that possible parole violators are entitled to a hearing pending final revocation, it stated six forms of process guaranteed to every individual, explained in the context of a parole revocation.⁷⁴ It was a judicially sound principle that the Fourteenth Amendment guaranteed these rights to men accused of committing a crime, but the extension of these rights to men convicted of a crime was also groundbreaking.⁷⁵ *Morrissey v. Brewer* was not decided

revoked); *Cruz v. Beto*, 405 U.S. 319, 321–23 (1972) (finding that a Buddhist state prisoner’s claim that his faith inhibited his chances of eligibility for parole because of discrimination within the penal system stated a claim upon which relief could be granted). See generally *supra* note 38 and accompanying text (quoting the Fourteenth Amendment and its application of the Eighth Amendment to the states).

⁷² *Haines*, 404 U.S. at 520–21. Haines was placed in solitary confinement as a disciplinary measure after striking an inmate on the head with a shovel. *Id.* at 520. While in solitary confinement, Haines claimed he suffered injury by having to sleep on the cell floor with only blankets to alleviate the pain from a previous injury. *Id.* The Court held his complaint stated a claim that required an evidentiary hearing. *Id.* at 521.

⁷³ See *supra* note 72 (detailing the facts of *Haines*).

⁷⁴ *Morrissey*, 408 U.S. at 472. In *Morrissey*, the Court held that every individual, even a convict, is entitled to six rights of Due Process. *Id.* at 488–89. First, the parolee must have written notice of the claimed violation. *Id.* at 489. Second, the parolee must have access to the evidence against him. *Id.* Third, the parolee must have the opportunity to be heard and to present evidence and witnesses in his favor. *Id.* Fourth, the parolee has the right to cross-examine the State’s witnesses unless there is good cause to disallow it. *Id.* Fifth, the hearing must be neutral and detached, but not necessarily comprised of lawyers or judicial officers. *Id.* Finally, the parolee is entitled to a written statement such as an opinion relating the evidence the fact-finders relied on in revoking parole. *Id.*

In both cases, the petitioners argued that they were denied a hearing prior to revocation of parole. *Id.* at 472. *Morrissey* was convicted of drawing false checks and was paroled. *Id.* He was arrested seven months later for violating the terms of his parole by buying a car under an assumed name and making other false statements. *Id.* at 473. After spending a week in jail, his parole was revoked. *Id.* at 472–73. *Booher*, the petitioner in the unnamed case, committed similar violations of parole and was similarly held until his parole was revoked. *Id.* at 473.

⁷⁵ See generally U.S. CONST. amend. VI. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. Willens, *supra* note 46, at 65. In addition to the courts expanding the power of a prisoner, prison officials were also experimenting with granting prisoners more power. *Id.*

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with a thumb on the public pulse of the 1970s, but in an effort to move the country forward, perhaps beyond its readiness; the provisions allowing such expansive post-conviction rights to prisoners prompted some people to warn of the proverbial “slippery slope.”⁷⁶

Perhaps as a backlash to the broad notice and hearing rights afforded to prisoners, the Court scaled back some due process protections in subsequent cases.⁷⁷ For example, the Court stressed the need for a balance between the needs and objectives of the prison institution and the general rights guaranteed to prisoners.⁷⁸ However, in step with *Trop v. Dulles*, the nature of prison disciplinary hearings in the future could change due to changed circumstances.⁷⁹ The “hands off”

For example, at the Washington State Penitentiary in Walla Walla, officials gave prisoners the power to elect a committee to make recommendations to the administration. *Id.* The experiment was at least partially successful; while the prison courtyard had once been a restricted security area, it was opened during the experiment, with newly planted grass, and prisoners “often walked across the yard carrying briefcases or escorting guests.” *Id.*

⁷⁶ *Morrissey*, 408 U.S. at 488–89, 493 (Douglas, J., dissenting) (warning of the possibility or even inevitability that prisoners will end up running the prison). With the increasing popularity of supervised release in the 1970s and its integral part in contemporary criminal justice, Justice Douglas, ultimately correct, warned that these enhanced protections for incarcerated persons represent an “outworn cliché” and are problematic when presented with “present-day realities.” *Id.* at 493 n.3 (quoting F. COHEN, *THE LEGAL CHALLENGE TO CORRECTIONS: IMPLICATIONS FOR MANPOWER AND TRAINING* 32 (Joint Commission on Correctional Manpower and Training 1969)).

⁷⁷ See *infra* notes 78–81 and accompanying text (the Court takes a more flexible approach toward Due Process rights and prison administration).

⁷⁸ *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). In *Wolff*, the Court returned some deference to prison administrators that had been previously enjoyed before the initial assertion of the Court into such matters. See *id.* The district court found that the Nebraska penal and correctional complex employed the following procedural safeguards:

- (1) a preliminary conference with the Chief Corrections Supervisor and the charging party, where the prisoner is informed of the misconduct charge and engages in preliminary discussion on its merits; (2) the preparation of a conduct report and a hearing held before the Adjustment Committee, the disciplinary body of the prison, where the report is read to the inmate; and (3) the opportunity at the hearing to ask questions of the charging party.

Id. at 558–59. Accordingly, the Court held that, in the case of a disciplinary proceeding, a prisoner is not entitled to retained or appointed counsel. *Id.* at 569. The argument against counsel is basically that lawyering begets lawyering and this is contrary to the “predictive and discretionary” nature of a hearing. *Id.* (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 787–88 (1973)). The focus should be on the rehabilitative purpose of the discipline, and given an adversarial climate, the hearing body may be disinclined to tolerate “marginal[ly] deviant behavior.” *Id.* at 570 (quoting *Gagnon*, 411 U.S. at 787–88)).

⁷⁹ *Id.* See also Willens, *supra* note 46, at 126. The nature of prison disciplinary proceedings did change when the Court held that disciplinary boards did not have to make a record of its reasons for denying a prisoner’s request to have witnesses at the hearing. *Id.* Willens noted that “[t]he right to call favorable witnesses has therefore become

doctrine was becoming increasingly popular as the Court gradually eroded the due process rights previously extended to prisoners.⁸⁰ In opposition to earlier holdings, the Court refrained from interfering with prison administrators and signaled a return to the deferential treatment on matters concerning the order and discipline of a prison.⁸¹

4. The Return of Deference

The conditions of confinement in prisons have been challenged often, but such challenges have not recently been adjudged constitutional. In perhaps the most obvious signal that the increase of protections afforded prisoners was at an end, *Estelle v. Gamble*⁸² introduced the deliberate indifference standard—the most deferential standard since the turn of the twentieth century.⁸³ Essentially, the Eighth

meaningless except in those cases when a prisoner is able to get his case before a judge.” *Id.* at 126–27.

⁸⁰ See *Montayne v. Haymes* 427 U.S. 236 (1976). In *Montayne*, prison officials seized a document that was signed by eighty-six other inmates that a prisoner was circulating claiming he was denied legal assistance by way of removal from the law library. *Id.* at 237–38. Several days later, Montayne was transferred to a maximum-security prison, but he suffered no loss of privileges or good time. *Id.* at 238. Surprisingly, the Court found no hearing requirement because a prisoner has no right to remain in a particular facility. *Id.* at 243. The Court may have been influenced in finding no liberty interest by evidence that the prisoner had worked as a law clerk at the library but was relieved because of his constant disregard for the rules. See *id.* at 238. See also *Olim v. Wakinekona*, 461 U.S. 238, 240–51 (1983) (finding that even long distance transfers do not implicate a liberty interest unless granted one by state statute); *Meachum v. Fano*, 427 U.S. 215, 216–29 (1976) (holding that the transfer of a prisoner from a medium to a maximum security prison did not implicate a “liberty interest” and thus did not require a hearing to comport with Due Process).

⁸¹ See *Montayne*, 427 U.S. 236. In *Montayne*, the Court found for a second time that there was no necessity for a hearing at all before or after a prisoner is transferred to another prison facility, as long as the confinement is lawful and within the prisoner’s sentence. *Id.* at 243. Cf. *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 139, 147 (1977) (Marshall, J., dissenting) (Marshall views the return of the “hands off” doctrine as a step backward caused by a fear of the formation of a union for prison reform and hopes the return of the doctrine will be temporary) (quoting Fox, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L.C. & P.S. 162 (1972)).

⁸² 429 U.S. 97 (1976).

⁸³ *Id.* at 104. A claim of deliberate indifference to a prisoner’s illness or injury states a cause of action under section 1983 of the Civil Rights Act. *Id.*; 42 U.S.C. § 1983. The Civil Rights Act provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983.

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Amendment is violated when prison officials demonstrate “deliberate indifference” to a prisoner’s *serious* medical needs resulting in the “unnecessary and wanton infliction of pain.”⁸⁴

The “deliberate indifference” standard proved to be a very difficult hurdle for prisoners to overcome, and few claims have survived under it.⁸⁵ In a 1994 case regarding workplace conditions, a boar attacked a prisoner while working at a prison-run hog farm.⁸⁶ The prisoner claimed

⁸⁴ *Estelle*, 429 U.S. at 104. Estelle was injured while working as a prisoner when a bail of cotton fell on him. *Id.* at 99. He was subsequently seen on seventeen occasions, prescribed various pain medications, and returned to work between each visit, until he refused to work and was eventually hospitalized for irregular cardiac rhythms. *Id.* at 100–101, 107. He alleged in his complaint that the bail of cotton was six hundred pounds and the treatment he received after the injury constituted cruel and unusual punishment within the meaning of the Eighth Amendment. *Id.* at 99 n.3. The Court held that Estelle did not state a claim under section 1983 because negligent treatment by his doctor did not constitute “deliberate indifference.” *Id.* at 104–06. It is notable that the second requirement of “unnecessary and wanton infliction of pain” was borrowed from *Gregg v. Georgia*. *Id.* at 104 (citing *Gregg v. Georgia*, 428 U.S. 153, 18283 (1976) (ending the nationwide moratorium on the death penalty)). See also *Snipes v. Detella*, 95 F.3d 586, 588–93 (7th Cir. 1996) (removing a toenail without anesthetic does not constitute cruel and unusual punishment because even gross negligence does not equate to deliberate indifference and medical judgments should be accorded substantial deference).

⁸⁵ See generally *Estelle*, 429 U.S. at 104, 98–108. For an illustration of the difficulty in overcoming the “wanton infliction of unnecessary pain” requirement, consider that the Court ruled in *Louisiana ex rel. Francis v. Resweber* that a mechanical malfunction that thwarted the first attempt to electrocute a prisoner, requiring a second electrocution, was not unconstitutional because the first attempt was “an innocent misadventure.” *Id.* at 105 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947)). See also *Whitley v. Albers*, 475 U.S. 312, 323–24 (1985). In *Whitley*, a prisoner who was shot during the quelling of a riot did not have an Eighth Amendment claim because the purpose of the shot was a good-faith effort to restore discipline to the prison. *Id.* at 323–24. This case has since been restricted to emergency situations such as the prison riot at issue. *Id.* at 320. Furthermore, the Court noted that a verbal warning before firing would be desirable, even in an emergency. *Id.* at 324. Compare *id.* at 314–28, with *Hudson v. McMillian*, 503 U.S. 1, 4–12 (1992) (O’Connor, J.) (holding that excessive force against an inmate does not necessarily have to manifest itself as serious injury to be prohibited). See also *Warren v. Missouri*, 995 F.2d 130, 130–31 (8th Cir. 1993). *Warren* stands for the proposition that a prisoner does not have an Eighth Amendment claim when he is injured as a result of negligent working conditions in a prison workshop. *Id.* at 131. Warren was struck in the wrist by a board that “kicked back” from a saw he was operating in a furniture workshop. *Id.* at 130. The Court held that the prison officials were entitled to qualified immunity because Warren could not show deliberate indifference, but at best negligence. *Id.* at 130–31.

⁸⁶ *Lee v. Sikes*, 870 F. Supp. 1096, 1098 (S.D. Ga. 1994). Lee pled guilty to three counts of burglary and was sentenced to five years at Coastal Correctional Institution in Georgia, but was reassigned to Rogers Correctional facility. *Id.* After testing, Lee was assigned to work, cleaning and feeding hogs. *Id.* While in a breeding barn, a hog attacked Lee, causing a ten to twelve centimeter laceration on his right knee, and other injuries to his shoulders, neck, and head. *Id.* Lee claimed he had properly secured the hog in its pen prior to the attack. *Id.* Although Lee received emergency medical treatment, he alleged that he did not receive

that this attack constituted deliberate and wanton indifference because he was not provided the proper facilities, training, equipment, or medical care; as with most cases, the Court found his complaint insufficient to warrant an Eighth or Fourteenth Amendment claim.⁸⁷

There is no doubt that at points in American history, the treatment of prisoners has been inhumane, no matter what the public opinion was at the time.⁸⁸ For example, the conditions in an Arkansas penitentiary were so abhorrent, in fact, that the district court called it “a dark and evil world completely alien to the free world[]” and held that Arkansas’ punishment for minor misconduct, relegating prisoners to “punitive isolation”, constituted cruel, unusual, and unpredictable punishment.⁸⁹

proper “follow up” care, and was still undergoing treatment when he was released on parole. *Id.*

⁸⁷ *Id.* at 1098. In an attestation to the changing of times, two cases were deemed to at least raise an Eighth Amendment issue that would never have been contemplated by the Framers. *Id.* See generally *Farmer v. Brennan*, 511 U.S. 825, 828–51 (1994) (holding that a transsexual prisoner may have an Eighth Amendment claim if prisoner officials knew of the substantial risk of serious bodily harm to the transsexual prisoner and were deliberately indifferent); *Helling v. McKinney*, 509 U.S. 25, 28–37 (1993) (holding that exposure to second-hand smoke in prisons may constitute deliberate indifference).

⁸⁸ See *Hutto v. Finney*, 437 U.S. 678, 681–82 (1979). *Hutto* is the quintessential example of prison conditions gone awry. *Id.* The conditions cannot be described in more vivid terms than the Court employs:

Cummins Farm, the institution at the center of this litigation, required its 1,000 inmates to work in the fields 10 hours a day, six days a week, using mule-drawn tools and tending crops by hand. The inmates were sometimes required to run to and from the fields, with a guard in an automobile or on horseback driving them on. They worked in all sorts of weather, so long as the temperature was above freezing, sometimes in unsuitably light clothing or without shoes.

The inmates slept together in large, 100-man barracks and some convicts, known as “creepers,” would slip from their beds to crawl along the floor, stalking their sleeping enemies. In one 18-month period, there were 17 stabbings, all but 1 occurring in the barracks. Homosexual rape was so common and uncontrolled that some potential victims dared not sleep; instead they would leave their beds and spend the night clinging to the bars nearest the guards’ station.

Inmates were lashed with a wooden-handled leather strap five feet long and four inches wide. Although it was not official policy to do so, some inmates were apparently whipped for minor offenses until their skin was bloody and bruised.

The ‘Tucker telephone,’ a hand-cranked device, was used to administer electrical shocks to various sensitive parts of an inmate’s body.

Id. at 682 nn.3–5 (internal citations omitted).

⁸⁹ *Id.* at 681–82 (quoting *Holt v. Sarver*, 309 F.Supp. 362, 381 (E.D. Ark. 1970)). In *Holt*, respondent prison administrators were honest about the conditions of their prison, but argued that the conditions were constitutional:

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However, conditions such as those described above in *Hutto v. Finney* were the exception rather than the norm and, in general, prisoners' complaints of conditions of confinement have not been successful.⁹⁰ Specifically, the Court has held that even restrictive and harsh prison conditions are part of the penalty offenders pay for their offenses, and the Court will not disturb those conditions absent a showing of "wanton and unnecessary infliction of pain."⁹¹ Bluntly stated, the Constitution does not mandate comfortable prisons.⁹²

Prison conditions are likely to withstand Eighth Amendment claims if the following list of things is not grossly inadequate: food, air ventilation, noise, space, and learning resources.⁹³ Even pretrial detainees—that is, people presumed innocent—who are severely restricted in confinement have failed in their claims premised on Eighth Amendment violations.⁹⁴ In fact, a prisoner's desire to live comfortably

Respondents do not contend that they are operating a "good" prison or a "modern" prison. With commendable candor they concede that many of the conditions existing at the Penitentiary are bad. However, they deny that they are operating an unconstitutional prison or are engaging in unconstitutional practices. They say that they are doing the best they can with extremely limited funds and personnel.

Holt, 309 F.Supp. at 365.

⁹⁰ See, e.g., *Warren*, 995 F.2d at 131 (describing a prisoner's serious injuries that did not constitute an Eighth Amendment claim). See *supra* notes 88-89 (discussing *Hutto*). See also *infra* notes 93, 95 and accompanying text (citing examples of cases where prison conditions were deemed constitutional).

⁹¹ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The Southern Ohio Correctional Facility ("SOCF") was by all accounts of the time a state-of-the-art maximum security facility. *Id.* at 341. Built in the early 1970s, it contained over 1600 cells, "gymnasiums, workshops, school rooms, 'dayrooms,' two chapels, a hospital ward, commissary, barbershop, and library." *Id.* at 340. The cells were well-equipped and opened onto dayrooms that were open during daytime hours. *Id.* All cell doors would open for ten minutes every hour to allow prisoners to move to different locations throughout the prison. *Id.* An increase in Ohio's prison population led to overcrowding in SOCF and administrators decided to "double-cell[]" 1,400 inmates, meaning two inmates shared a cell designed for one person, 75% of whom had free movement outside their cells throughout the day. *Id.* at 341-42. Two inmates brought suit, claiming that housing two inmates in a single cell constituted cruel and unusual punishment and violated the Eighth Amendment. *Id.* at 339.

⁹² *Id.* at 349.

⁹³ See *id.* at 342. The Court in *Rhodes* found the facility adequate in all respects, regardless of several problems. *Id.* SOCF had seen an increase in violence, though proportionate to its rate of growth. *Id.* at 343. Furthermore, although the prison population was 38% above capacity, SOCF had not hired more psychiatrists and social workers. *Id.* Inmates complained of reduction in work hours because jobs had to be split between more people. *Id.* Perhaps most importantly, several studies indicated that each inmate in a prison should have fifty to fifty-five square feet of living space, and the cells with two inmates fell short of that number. *Id.* at 348.

⁹⁴ See *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243-45 (1983). In *City of Revere*, a police officer shot and wounded defendant Kivlin. *Id.* at 240. Though the police took

and without restriction during confinement does not automatically make such restrictions “punishment” at all.⁹⁵ Essentially, the Court uses rational basis scrutiny and will uphold a prison condition if it is “reasonably related to a legitimate governmental objective.”⁹⁶ Indeed, a condition or restriction must be completely arbitrary and purposeless to fail rational basis scrutiny.⁹⁷ Courts have upheld a number of restrictive conditions using rational basis scrutiny, including “double ceiling,”⁹⁸ prohibitions on certain paper mail and food packages,⁹⁹ the regular

Kivlin to the hospital for medical treatment, when the hospital tendered a bill to the city of Revere, the police refused to pay it. *Id.* at 240–41. Kivlin, left with a bill for over thirteen thousand dollars, sued the city claiming it violated his Eighth and Fourteenth Amendment rights. *Id.* at 242. On appeal, the Supreme Court held that the police did not violate Kivlin’s rights:

Whatever the standard may be, Revere fulfilled its constitutional obligation by seeing that Kivlin was taken promptly to a hospital that provided the treatment necessary for his injury. And as long as the governmental entity ensures that the medical care needed is in fact provided, the Constitution does not dictate how the cost of that care should be allocated as between the entity and the provider of the care.

That is a matter of state law.

Id. at 245. This Note does not delve into the topic of whether pretrial detainees should constitutionally be subject to the Eighth and Thirteenth Amendments because they have not yet been convicted of a crime.

⁹⁵ *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). The facility in *Bell* was similar to that of *Rhodes*, but it was intended to be a temporary housing condition. *Id.* at 524; see *Wilson v. Seiter*, 501 U.S. 294, 300 (1991). The Court quoted a Seventh Circuit case in seeming frustration at the large amount of insufficient claims:

The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century [I]f [a] guard accidentally stepped on [a] prisoner’s toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.

Wilson, 501 U.S. at 300 (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985)).

⁹⁶ *Bell*, 441 U.S. at 539. Subject to that test, the conditions are not considered punishment at all. *Id.*

⁹⁷ *Id.* The Court, being consistent with other decisions, was careful to point out that the decision must be made objectively and cannot be based simply based on how the Court thinks a prison should be run. *Id.*; see *Willens*, *supra* note 46, at 113–15. The Court’s rational basis analysis in *Bell v. Wolfish* was indicative of the new corporate management model becoming popular with the courts and prison administrators. *Id.* at 113. The corporate management model treated prisons from the “science of management,” entirely disregarding the old notion of prisons as medicine. *Id.* Not only does the model define prison as a corporation “whose product is the ‘custody of prisoners[.]’” it rejects the previously held idea that prisons have goals at all. *Id.* at 115. Most importantly, the corporate management model rejects rehabilitation as a goal of imprisonment. *Id.* at 114.

⁹⁸ See *supra* note 91 for the definition of “double ceiling” (“double ceiling” is the practice of housing two inmates in a cell that is designed for one).

⁹⁹ See generally *Bell*, 441 U.S. at 523–63 (prohibiting prisoner’s receipt of hardcover books not directly from the publisher is not a violation of First Amendment rights); *Jones v. N.C.*

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practice of prison “shakedown” inspections, and even body-cavity searches of inmates after contact visits.¹⁰⁰ Some restrictions on prisoners are based on a theory that prisoners have no expectation of privacy at all.¹⁰¹ Above all, to succeed in a suit challenging conditions of confinement, the prisoner must show that the prison official responsible for the prisoner’s well-being acted with a sufficiently culpable state of mind when imposing the condition.¹⁰² Rather than look to the effect on the prisoner in determining whether “wantonness” existed, the analysis

Prisoners’ Labor Union, Inc., 433 U.S. 119, 121-36 (1977) (holding that group activity could pose friction in prisons and government must only meet rational basis scrutiny for curtailment of First Amendment associational rights as prisons are not public fora); *Proconier v. Martinez*, 416 U.S. 396, 398-422 (1974) (holding that censorship of certain mail correspondence poses only incidental restriction on free speech rights and is valid if it furthers substantial government interests in security and order).

¹⁰⁰ See generally *Bell*, 441 U.S. at 537, 555. This case differs from most cases regarding prisoner rights because it involves the treatment of detainees not yet convicted of any crime. *Id.* at 523. Nevertheless, the Court follows the mandate that prisoners do not have a right to live comfortably and the Government has an overriding interest in maintaining order and discipline. *Id.* at 537, 540.

¹⁰¹ *Hudson v. Palmer*, 468 U.S. 517, 522-23 (1984). Palmer was reprimanded and had to reimburse the state for the cost of a pillowcase he ripped. *Id.* at 519-20. The pillowcase was found in a garbage can during a routine “shakedown.” *Id.* at 519. Palmer brought suit, claiming that the search violated his right not to be deprived of property without due process of law, and that prison official Hudson intentionally destroyed some of Palmer’s belongings to harass him. *Id.* The Court held that the Fourth Amendment, as it regards searches and seizures, is not applicable to prison cells and therefore prisoners had no privacy interest. *Id.* at 526. In fact, random searches are essential in the “constant fight against the proliferation of knives and guns, illicit drugs, and other contraband.” *Id.* at 528. The Court in *Hudson* justified even harsh conditions of confinement by explaining “what” prisoners are:

Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Id. at 526.

¹⁰² *Wilson*, 501 U.S. at 298. Wilson was incarcerated at Hocking Correctional Facility in Ohio. *Id.* at 296. His complaint alleged that the conditions of his confinement violated his Eighth Amendment rights. *Id.* The Court noted some of his complaints, including “overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates.” *Id.* Wilson sought declaratory relief, injunctive relief, and \$900,000 in compensatory and punitive damages. *Id.* Building on the objective component of *Rhodes*, *supra* notes 86-88, the Court required itself to also consider the subjective requirement of scienter on the part of the official. *Id.*

focuses on the constraints facing the official.¹⁰³ The Court repeatedly uses terms such as “serious deprivation” and “malicious cruelty” to describe deliberate indifference as conduct wholly apart from mere negligence.¹⁰⁴

In the twenty-first century, the Court’s application of the Eighth Amendment has centered on death penalty cases, and the Court’s most recent application of the Eighth Amendment came in 2008 when it invalidated a Louisiana rape statute that authorized the death penalty for the rape of a child under twelve years old.¹⁰⁵ The Court held that the statute violated the Eighth Amendment and contemporary standards of decency.¹⁰⁶ On the issue of capital punishment, commentators

¹⁰³ *Id.* at 303. Essentially, the Court will view “deliberate indifference” on a sliding scale, depending on the circumstances that the official faced. *Id.*

¹⁰⁴ *Id.* at 305. However, separate conditions not constituting deliberate indifference when viewed alone may violate the Eighth Amendment if taken in the aggregate, and this aggregation is permitted by petitioners. *Id.* at 304. The principle is severely limited to conditions that have a “mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.” *Id.*

¹⁰⁵ See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (holding that imposition of the death penalty for raping a child is disproportional and against the country’s consensus); *Roper v. Simmons*, 543 U.S. 551 (2005) (the execution of individuals under the age of eighteen when they committed a crime violates the Eighth Amendment), *abrogating* *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded individuals constitutes cruel and unusual punishment). See also LA. REV. STAT. ANN. § 14:42 (2008). Section 14:42 governs rape generally, but has additional provisions for child rape:

(2) However, if the victim was under the age of thirteen years, as provided by Paragraph A(4) of this Section:(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury.

LA. REV. STAT. ANN. at § 14:42(D)(2)(a) (changing the aggravating age from twelve to thirteen after the crime was committed but before the decision was issued).

¹⁰⁶ *Kennedy v. Louisiana*, 128 S. Ct. at 2646; LA. REV. STAT. ANN. § 14:42. *Kennedy*, the most recent case addressing proportionality of sentencing, held it to be unconstitutional to execute an individual convicted of rape. *Kennedy*, 128 S. Ct. at 2646. In *Kennedy*, a man was convicted of raping his eight-year-old stepdaughter under section 14:42 of the Louisiana Code. *Id.* at 2645–46; LA. REV. STAT. ANN. § 14:42. The petitioner (defendant below) violently raped his stepdaughter, resulting in lacerations of her cervix and complete tearing of her perineum. *Kennedy*, 128 S. Ct. at 2646. Although the girl originally corroborated the step-father’s story that two boys had dragged her into the front lawn and raped her, she later admitted that the petitioner raped her in her bed and then drugged her because of the profuse bleeding. *Id.* at 2647. The jury convicted him under the statute and unanimously recommended the death penalty. *Id.* at 2648. The Louisiana Supreme Court upheld the decision because “the rape of a child is unique in terms of the harm it inflicts upon the victim and our society.” *Id.* at 2648 (citing *State v. Kennedy*, 957 So. 2d 757 (La. 2007)).

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immediately criticized the case for its analysis that no federal law authorized the death penalty for rape because the Uniform Code of Military Justice had in fact allowed this type of punishment for rape until 2007.¹⁰⁷ On the other hand, the fact that the Court implicitly upheld the

The Supreme Court reversed, holding that the imposition of the death penalty for the crime of rape is in opposition to contemporary standards of decency and the consensus of the nation. *Id.* at 2662. The Court applied the “evolving standards of decency” test put forth in *Trop v. Dulles*, and relied on the interpretation of the test in *Furman v. Georgia* that stated: “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment.” *Id.* at 2649 (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972); *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

Furthermore, the Court rejected the respondent’s argument that the Court’s decision in *Coker v. Georgia* invalidated capital punishment for all crimes of rape, confining the holding *Coker* to apply to adult rape only. *Id.* at 2654–55; *Coker v. Georgia*, 433 U.S. 584 (1977). In *Coker*, the defendant was serving sentences for murder, rape and other heinous crimes when he escaped from prison. 433 U.S. at 587. He entered Mr. and Mrs. Carver’s house through an unlocked door and threatened them with a “board,” while tying up Mr. Carver. *Id.* *Coker* then raped Mrs. Carver, threatening her with a knife he took from the kitchen. *Id.* Subsequently, *Coker* took Mr. Carver’s money and car keys, and fled with Mrs. Carver. *Id.* When police apprehended him, they found Mrs. *Coker* unharmed. *Id.* The jury, being allowed to consider prior capital felony convictions as aggravating circumstances, sentenced *Coker* to death. *Id.* at 590. Although, the Supreme Court was historically charged with the duty of being blind to public opinion in upholding the law, the Court in *Coker* deferred almost completely to public and legislative attitudes, and the response of juries in determining the proportionality of a particular sentence. *Id.* This decision is not surprising, however, given the acceptance of the test of “evolving standards of decency.” *Id.* The Court found that Georgia was the only jurisdiction in the United States that authorized a death sentence for rape. *Id.* at 595. Even under outdated laws, only sixteen states classified rape as a capital offense, and of the sixteen, only Georgia, North Carolina, and Louisiana provided for the death penalty for that offense. *Id.* at 594. In holding that imposing the death penalty for the crime of rape violated the Eighth Amendment, the Court shed light on how it will make an objective determination of the proportionality of a sentence to a crime. *Id.* at 592.

Although the Court in *Kennedy* definitively stated that *Coker* did not address child rape, it undertook a similar analysis by looking at the trends of legislatures and public attitudes regarding the death penalty and child rape. *Kennedy*, 128 S. Ct. at 2652. After finding that child rape is a capital offense in only six states, it concluded that “[t]he incongruity between the crime of child rape and the harshness of the death penalty poses risks of overpunishment and counsels against a constitutional ruling that the death penalty can be expanded to include this offense.” *Id.* at 2662.

¹⁰⁷ *Id.* at 2652; 10 U.S.C. § 920 (2006) (Uniform Code of Military Justice Art. 120). The Court briefly mentioned the Federal Death Penalty Act of 1994 that expanded the number of capital crimes but did not include child rape among the list. *Kennedy*, 128 S.Ct. at 2652. However, the Uniform Code of Military Justice’s rape statute is indeed federal law, and is conspicuously absent from the Court’s opinion, and the petitioner and respondents’ briefs. *See generally id.* at 2641. Until 2006, Article 120 of the Uniform Code of Military Justice specifically allowed the death penalty for raping a child, meaning that the Court’s statement that federal law did not allow the punishment is invalid because at the time the defendant was convicted it did. 10 U.S.C. § 920 (2000); National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, Div. A., Tit. V, § 552(b) (Jan. 6. 2006) (effective Oct. 1, 2007).

alternative punishment under the Louisiana statute—life imprisonment at hard labor without possibility of parole—has not been controversial.¹⁰⁸

The history of the Court's analysis of prisoners' rights is directly correlated with labor in prisons.¹⁰⁹ The early days of the Republic adhered to the original meaning of the Eighth Amendment, premised on the memories of atrocities committed in England.¹¹⁰ As the nation's population grew, an increase in crimes, and therefore prisoners, led to a change in prison administration that ultimately caused the Court to protect prisoners in an unprecedented way.¹¹¹ The pendulum inevitably started to swing back by the 1980s, as the Court was bombarded with habeas corpus requests, which caused it to again scale back its interference with prison administrators.¹¹² As a result, hard labor returned to prisons in force in the mid-1990s and spawned a new wave of debate about its consequences on prison administration and on the Constitution.¹¹³

D. Prisoners, Labor, and the Meaning of Confinement: 1995 to Present

In 1995, Congress responded to the unmanageable rise in prison litigation, foreshadowed by Justice Douglas, by passing the Prison Litigation Reformation Act ("PLRA").¹¹⁴ Perhaps it was the lack of a

¹⁰⁸ See generally *Kennedy*, 128 S. Ct. at 2641. The Court only invalidated that portion of the Louisiana statute that provided for imposition of the death penalty—at the state's request and the jury's decision. *Id.* Their lack of discussion regarding the alternative punishment of life imprisonment at hard labor is an implicit affirmation of the constitutionality of the penalty. *Id.*

¹⁰⁹ See *supra* Part II (for a history of the Court's changing analysis of the constitutional rights of prisoners).

¹¹⁰ See *supra* note 32 and accompanying text (for a brief history of the Bloody Assize of 1685).

¹¹¹ See *supra* Part II.C.3 (for a discussion of the Court's increased protection of prisoners).

¹¹² See *supra* Part II.C.4 (for a discussion of the Court's decreasing involvement in prison affairs and thus prisoners' rights). See also Rod Miller, George E. Sexton & Victor J. Jacobson, *Making Jails Productive*, RESEARCH IN BRIEF (Nat'l Inst. of Justice, Washington, D.C.), Oct. 1991, at 1. [hereinafter Miller]. Despite the Court's official stance, in 1981, then Chief Justice Warren E. Burger delivered a speech at the University of Nebraska titled, "More warehouses or factories with fences?" in which he encouraged correctional institutions to teach prisoners job skills instead of just warehousing them. Miller, *supra*, at 1 n.1.

¹¹³ See *infra* Part II.D (discussing the resurgence of hard labor, including the reintroduction of chain gangs in the 1990s).

¹¹⁴ Prison Litigation Reformation Act of 1995, 42 U.S.C. §1997e (2000). The PLRA was actually a second attempt to impose administrative exhaustion requirements. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). Previous legislation enacted in 1980 allowed courts, at their discretion, to stay a case while a prisoner exhausted only the plainest of administrative remedies. *Id.* Pertinent portions of section 1997e include:

(a) Applicability of administrative remedies

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cohesive public attitude, or the growing number of states contemplating and implementing forced labor as a facet of imprisonment that caused the Supreme Court to remain largely silent on the issue.¹¹⁵ In the years

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

.....

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

.....

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

42 U.S.C. §1997e.

¹¹⁵ John David Morley, *Back on the Chain Gang*, TIMES U.K., Aug. 5, 1995, at Features. On May 3, 1995, Limestone Correctional Facility in Alabama became the first prison in over thirty years to put convicts back on chain gangs. *Id.* Prisoners sentenced to chain gangs are mostly repeat offenders or parole violators and have had other privileges stripped, such as permission to watch television, have visitors, or make purchases at the prison store. *Id.* See Adam Cohen, *Dispatches*, TIME MAGAZINE, May 15, 1995, available at <http://www.time.com/time/magazine/article/0,9171,982949,00.html> (last visited Feb. 2, 2008) (describing the sight of men in bright white uniforms, chained together); Miller, *supra* note 112, at 1.

Between the height of the Depression and 1984, Congress imposed heavy restrictions on the interaction of the private sector and prisons regarding labor, relying on interstate commerce powers. Miller, *supra* note 112, at 1. However, in 1984 the Justice Assistance Act started a pilot program for reinvestigating the use of prison labor in the private sector. *Id.* See also Bureau of Justice Assistance, Prison Industry Enhancement Certification Program, <http://www.ojp.usdoj.gov/BJA/grant/piecp.html> (last visited Feb. 2, 2008) [hereinafter PIECP]. The Bureau of Justice Assistance administers a certification program in which jurisdictions, on behalf of correctional institutions, apply for the right to interact with the private sector. *Id.* Currently, the Bureau has issued forty-one of fifty available certificates. *Id.*; Marilyn C. Moses & Cindy J. Smith, *Factories Behind Fences: Do Prison 'Real Work' Programs Work?*, NIJ JOURNAL NO. 257 (Nat'l Inst. of Justice, Washington, D.C.), June 2007, at 32, available at <http://www.ojp.usdoj.gov/nij/journals/257/real-work-programs.html>. <http://www.ncjrs.gov/pdffiles1/nij/jr000257h.pdf> (last visited Oct. 18, 2008). The re-arrest, conviction, and incarceration rates for PIECP workers are lower than "other-than-work" programs. See Moses, *supra*, at 1.32.

directly following the news that Alabama had reinstated the chain gang, law review journals across the country were rampant with Articles, Notes, and Comments on both sides of the debate about the constitutionality of hard labor, in particular, chain gangs.¹¹⁶ Since the new millennium, however, cries from both sides have subsided, despite increasing acceptance of chain gangs and other types of forced labor.¹¹⁷

For example, Congress retained the Shock Incarceration Program in September of 2007, allowing the Federal Bureau of Prisons to place inmates in conditions of strict discipline and hard labor for a period not to exceed the remainder of their prison term.¹¹⁸ On a smaller scale,

¹¹⁶ See, e.g., Lisa Kelly, *Chain Gangs, Boogeymen and Other Real Prisons of the Imagination*, 5 RACE & ETHNIC ANC. L.J. 1 (1999) (telling a colorful story about the trials and hardships of prisoners on a chain gang); Lynn M. Burley, Note, *History Repeats Itself in the Resurrection of Prisoner Chain Gangs: Alabama's Experience Raises Eighth Amendment Concerns*, 15 LAW & INEQ. 127 (1997) (arguing that chain gangs pose an unreasonable risk to prisoners and are unconstitutional under the Eighth Amendment); Stephanie Evans, Note, *Making More Effective Use of Our Prisons Through Regimented Labor*, 27 PEPP. L. REV. 521 (2000) (arguing that reduced amenities for prisoners would serve to either rehabilitate prisoners or make life in prison more undesirable than life outside, thus decreasing recidivism); Glazer, *supra* note 31 (discussing the impact of the no-frills movement on prison management); Gorman, *supra* note 31 (linking the historical use of chain gangs with slavery and concluding that modern chain gangs amount to slavery); Sander Jacobowitz, Note, *Rattling Chains and Smashing Rocks: Testing the Boudaries [sic] of the Eighth Amendment*, 28 RUTGERS L.J. 519 (1997) (analyzing the constitutionality of chain gangs based on the Supreme Court's previous decisions regarding cruel and unusual punishment); Nancy A. Ozimek, Note, *Reinstitution of the Chain Gang: A Historical and Constitutional Analysis*, 6 B.U. PUB. INT. L.J. 753 (1997) (arguing that the chain gang's historical roots in the oppression of African-Americans makes it an unwise and possibly unconstitutional policy); Wendy Imatani Peloso, Note, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishment Clause*, 70 S. CAL. L. REV. 1459 (1997) (arguing that chain gangs are per se unconstitutional under the Eighth Amendment); Emily S. Sanford, Note, *The Propriety and Constitutionality of Chain Gangs*, 13 GA. ST. U. L. REV. 1155 (1997) (arguing that chain gangs violate the Eighth Amendment prohibition on cruel and unusual punishment and disgrace notions of human dignity).

¹¹⁷ See Dora Schriro, *Correcting Corrections: Missouri's Parallel Universe*, SENTENCING & CORRECTIONS (Nat'l Inst. of Justice, Washington, D.C.), May 2008, at 1. In 1993, Missouri implemented its "Buns Out of Bed" initiative, requiring all general population inmates to work and to attend school and psychological treatment on a full-time basis, five days a week. *Id.* See also Susan Turner & Joan Petersilia, *Work Release: Recidivism and Corrections Costs in Washington State*, RESEARCH IN BRIEF (Nat'l Inst. of Justice, Washington, D.C.), Dec. 1996, at 1, available at <http://www.ncjrs.gov/pdffiles/163706.pdf> (stating that although forty-three states have work release programs, fewer than three percent of inmates are participants in these programs).

¹¹⁸ 18 U.S.C. § 4046 (2007). The statute states in its entirety:

- (a) The Bureau of Prisons may place in a shock incarceration program any person who is sentenced to a term of imprisonment of more than 12, but not more than 30, months, if such person consents to that placement.

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Sheriff Joe Arpaio of Maricopa County, Arizona (the largest county in the country), has frequently made national headlines by being a visible and vocal proponent of forced labor; almost a decade ago he became the first sheriff to employ female chain gangs.¹¹⁹

(b) For such initial portion of the term of imprisonment as the Bureau of Prisons may determine, not to exceed 6 months, an inmate in the shock incarceration program shall be required to –

(1) adhere to a highly regimented schedule that provides the strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and

(2) participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.

(c) An inmate who in the judgment of the Director of the Bureau of Prisons has successfully completed the required period of shock incarceration shall remain in the custody of the Bureau for such period (not to exceed the remainder of the prison term otherwise required by law to be served by that inmate), and under such conditions, as the Bureau deems appropriate.

Id.; see also Doris Layton MacKenzie, James W. Shaw & Voncile B. Gowdy, *An Evaluation of Shock Incarceration in Louisiana*, NATIONAL INSTITUTE OF JUSTICE 1 (June 1993) [hereinafter MacKenzie] (explaining the goals and implementation of Louisiana's shock incarceration program, and its successes and shortcomings).

¹¹⁹ CNN.com, *Arizona Criminals find jail too In-'Tents'*, July 27, 1999, <http://www.cnn.com/US/9907/27/tough.sheriff/> (last visited Oct. 18, 2008). "Sheriff Joe," as he is commonly called, is known for making prisoners wear pink jumpsuits, eat cold meals, and stay in tents in the sweltering heat of summer, all in the name of punishment. *Id.* He even tried to take away prisoners' rights to cable but was thwarted by a federal statute guaranteeing that right and instead opted to allow prisoners to watch only such channels as The Weather Channel. *Id.*; see Interview with Joe Arpaio, Sheriff of Maricopa County, in Phoenix, Ariz. (Nov. 19, 2007) (detailing some of the programs he has instituted, the methods of punishment, and their purpose). When asked about rehabilitation, Sheriff Arpaio stated:

I believe, ah, I believe that those convicted like they are right now, including Mike Tyson, uh, that that's why he's in pink underwear and striped uniforms and two meals a day at fifteen cents a meal, fifteen to eighteen cents, ah, that they should be punished. I use the word punishment, but we do have rehabilitation, we do have education, we have the only high school under a sheriff, we have a jail for juveniles, we have a drug prevention [inaudible] I could go on and on, religion, everything. So when they call me the meanest, toughest, sheriff in the universe they never talk about our rehabilitation [inaudible]. Still you should never live better in jail than you do on the outside and that's why they eat the slop – it's not slop, it's alright, it's got 2500 calories – that's why they do that. That's why they don't have the, ah, the movies, took those away, that's why all the tv goes except the weather channel, and the coffee and the salt and the ketchup, and the pink underwear and the chain gangs and the hot tents, 148 degrees in the summertime. I could go on and on and on and on with the theory is you should not like it because maybe they'll hate it so much they won't come back.

A landmark event occurred in 2007 when the number of prison inmates exceeded three million.¹²⁰ In an increasing effort to recoup the costs of housing these inmates, or at least exact retribution on them, most states have instituted some form of labor program, and a growing number of states have included hard labor as a component of their programs.¹²¹ Furthermore, some states are experimenting with new models of prison labor programs, drawing on historical models.¹²² The

Interview with Joe Arpaio, Sheriff of Maricopa County, in Phoenix, Ariz. (Nov. 19, 2007) (Mike Tyson was in the Maricopa County Jail at the time of the interview).

¹²⁰ See *Behind Bars* (Discovery Channel television broadcast Oct. 8, 2007).

¹²¹ See *American Chain Gang* (Cinema Libre Distribution 2005) (documentary) (cataloguing labor policies in several states); *supra* note 49 and accompanying text (detailing the Supreme Court's invalidation of peonage as a valid labor model); *infra* Part II.E (describing the contract model and its uses throughout history). Because the Supreme Court defined peonage as slavery, forced labor in prisons took the form of one of several variations on the contract model. See *supra* note 49 and accompanying text; *infra* Part II.E. First, the piece-price model is very similar to the contract model, except that the government retains more control over the production process. See *infra* Part II.E. See also ROBINSON, *supra* note 47, at 160. Whereas in the contract system, the contractor pays the government a sum for the use of labor and the resulting product, in the piece-price system, the contractor does not pay for the labor, but pays one fee per unit of output. *Id.* The private party contractor may still send quality inspectors to the prison to ensure a good product, but the government warden is the foreman of production. *Id.* Second, under a public-account system, all private control is removed from the manufacturing process. *Id.* at 161. The prison administrator essentially becomes the entrepreneur; he is responsible for commercial process all the way from choosing what product to manufacture to choosing how to effectively market the finished product. *Id.* A successful public-account system requires a prison administrator who is also very business-savvy to function properly. *Id.* Third, the state-use model is a uniquely innovative system wherein the entire market is self-contained within the prison. *Id.* at 163. The prison is the gatherer, producer, laborer and consumer of goods. *Id.* The most important aspect of the state-use model is its near removal of prison labor from competition with the free labor market. *Id.* Finally, the public-works-and-ways model is a special form of the state-use model in that it only uses prison labor to improve "the durable possessions of the state." *Id.* at 167. Thus, projects such as cutting brush along highways are not contracted out or performed by a special department of state employees but are instead performed by prisoners. *Id.*; *infra* Part II.E. The public-works-and-ways model is growing in popularity among states today. See *infra* Part II.E.

¹²² Sexton, *supra* note 48, at 3. Three examples of states that are experimenting with hybrid programs suggest that a widely implemented set of programs nationwide could solve Twenty-First century prison problems. *Id.* First, in Arizona, Best Western International hired women from Arizona's correctional institution to take reservations for Best Western Hotels. *Id.* With Best Western's headquarters nearby, the use of prisoners who were willing to work weekends and holidays was a positive solution for the prison, the prisoners, and Best Western. *Id.* Second, Wahlers Company and Arizona Correction Industries ("ARCOR") started a joint venture in a furniture plant. *Id.* ARCOR built the plant and supplied prisoners to work in it, while Wahlers supplied the equipment, and both entities share in the profits. *Id.* The office furniture the plant produces is sold in the open market and is also used by the state. *Id.* Third, a Minnesota state prison contracts with Control Data Corporation ("CDC") for the assembly of disk drives and other computer products. *Id.* Prison employees supervise production and prisoner labor for the

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history of prisoners' rights in America reveals vacillations between a conservative ideology of punishment, epitomized by the phrase getting "tough on crime," and a liberal ideology of reformation and rehabilitation.¹²³ Both ideologies have the goal of reducing crime and in particular, recidivism, and although they seek to counter idleness in different ways, both ideologies hold that idleness in a prisoner is an unacceptable trait.¹²⁴ Historically, neither ideology has been successful.¹²⁵ The shift in ideological tides can be seen in the overarching category of prison conditions generally, and it is also evidenced through the prevalence and style of the subcategory of labor systems in prisons.¹²⁶

E. *Six Existing Models of Prison Labor*

The foregoing history aids a scholar in understanding the picture of prison administration in order to study the comparatively small area of prison labor because the judicial standards as applied to other areas of prison administration are translated into prison labor policies.¹²⁷ Of six historical models, the lease system most closely parallels the free market

benefit of the prison and CDC, their sole customer. *Id.* To increase productivity and thus profit, CDC provided the plant layout, training, and continuing technical assistance to the prison. *Id.*

¹²³ CULLEN & GILBERT, *supra* note 45, at 89. Cullen and Gilbert credit Conservatives with making rehabilitation a goal of prisons a "hard sell[.]" but do not completely absolve Liberals either:

Conservatives have frequently been suspicious of efforts aimed at regenerating offenders, fearing that they will furnish an excuse to release the wicked back into society where they once again will prey on the defenseless. Though objections have been raised less often by more liberal elements, disenchantment with the prospect of molding a criminal justice system around the rehabilitative ideal has long sprinkled the writings and speeches of those on the left.

Id. See Sanford, *supra* note 116, at 1170 (noting that politicians hope to deter criminals by giving the appearance of authoritative discipline).

¹²⁴ See, e.g., *supra* note 46. See also Robertson, *supra* note 32, at 1011. The Auburn and Philadelphia prison models sought to battle idleness by making prisoners work. *Id.* The Philadelphia model stressed silent and solitary work, while the Auburn model stressed silent and collective work. *Id.* at 1011 n.30.

¹²⁵ See discussion *supra* Part II (discussing the apparent failure of historical prison labor models); see also, e.g., *supra* note 46, *infra* note 137. The Auburn and Philadelphia authoritarian models failed, however; Philadelphia's silent system drove inmates insane, and the violent supervision under the Auburn system discredited any notions of prisoner reform. See *supra* note 46, *infra* note 137.

¹²⁶ See *infra* Parts II.D-E (for a discussion of different historical prison labor models and several contemporary experiments).

¹²⁷ See *infra* Part III for an analysis of the constitutionality of prison labor models using Eighth Amendment standards from other areas of prisoners' rights jurisprudence.

because it is essentially a contract between two parties for an exchange of goods.¹²⁸ When viewed as an exchange of chattels, it is easy to understand why the Supreme Court intimated that the system amounted to the reintroduction of slavery.¹²⁹

The conservative ideology of punishment through hard labor dominates the lease system.¹³⁰ Under the lease system, the government lends its convicts to private parties for a fee, and the private parties control every aspect of the convicts' lives.¹³¹ Historically, however, this labor model produced infinitely more criminal deviance than it cured.¹³² When viewed as a crude metaphor, a dog that is constantly kicked by its master becomes hardened and unpredictable, and will eventually lash out with vengeance and blood-thirst. In sum, a prisoner that is treated like an animal will eventually become violent toward the society that

¹²⁸ See ROBINSON, *supra* note 47, at 156 (defining the lease system); see also FRIEDMAN, *supra* note 51 (describing the lease system).

¹²⁹ See *United States v. Reynolds*, 235 U.S. 133, 150 (1914) (holding that systems of surety are equivalent to private peonage and violate the Thirteenth Amendment); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (holding that the state may impose involuntary servitude as a punishment for a crime, but may not punish one as a criminal if he breaks a contract to work for another private party); *Clyatt v. United States*, 197 U.S. 215 (1905) (returning a person to a condition of servitude unlawfully and knowingly justifies a sentence of four years at hard labor). See also Gorman, *supra* note 31, at 452–58 and Ozimek, *supra* note 116, at 758–64 (suggesting that increasing conviction of African Americans is fueled by a desire to “re-enslave them”).

¹³⁰ ROTHMAN, *supra* note 34, at 103. Conservative criminologists believed that idleness was closely linked to criminal deviance. *Id.* As Rothman states, “[p]roponents of a penitentiary training believed that the tougher the course, the more favorable the results.” *Id.* See Robertson, *supra* note 32, at 1012 (explaining the popular belief that criminality was a familial defect and social contagion).

¹³¹ CHRISTIANSON, *supra* note 47, at 181. Christianson describes the system as follows: “[t]he state abdicated responsibility for the prisoners’ welfare, leaving it to private contractors whose primary or exclusive objective was making a profit.” *Id.* See Garvey, *supra* note 46, at 356. While the contract system dominated the North, the lease system was favored in the booming post-Civil War economy. *Id.* at 355. Although the system was not formally one of slavery, lessees were overwhelmingly black men performing work that white freemen were unwilling to do. *Id.* at 356; Sanford, *supra* note 116, at 1157. In addition to government leasing, a related practice of criminal surety emerged. Sanford, *supra* note 116, at 1157. Under the criminal surety system, private citizens would pay the fines of convicts in return for their labor. *Id.* If the convict refused to labor to the satisfaction of the citizen, however, he could be returned to imprisonment. *Id.* See also *Reynolds*, 235 U.S. at 150 (holding that systems of surety are unconstitutional).

¹³² See Schriro, *supra* note 117, at 1 (for a discussion of recidivism and prison brutality); Turner, *supra* note 117, at 1 (PIECP members have lower recidivism rates than other prisoners); Garvey, *supra* note 46, at 357. Convicts’ living and working conditions were so abhorrent, in fact, that at its worst, convict mortality rates reached 40%, annually. Garvey, *supra* note 46, at 357.

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imprisoned him.¹³³ Because of the lease system's failure to reform, the number of prison brutality incidents at the hands of lessees, and the system's disruption of competition in the truly free labor market, the use of the lease system largely ended by 1921 with only three states retaining the system in its pure form at that time.¹³⁴

Although the lease system fell out of fashion, the contract system remained popular into the early 1900s.¹³⁵ Typically, the government supplied the facilities and machines for the product, while the contractor was only responsible for the raw materials.¹³⁶ Many prisons that employed the contract model did so in an effort to reduce costs through privatization.¹³⁷ The model's success was ultimately its demise, where it

¹³³ See ROBINSON, *supra* note 47, at 157. This Note does not suggest that prisoners are animals; however, any living creature that is kept in a cage long enough may exhibit the qualities of an abused animal. *Id.*; Robertson, *supra* note 32, at 1020 ("[T]he danger of assault by predatory inmates represents an ongoing challenge to one's manhood because the inmate society equates 'toughness' with masculinity."); Willens, *supra* note 46, at 137 (arguing that the current system advocates a "them and us" mentality, and that society would benefit if that mentality was changed to one that saw prisoners as our family members).

¹³⁴ See ROBINSON, *supra* note 47, at 157; Garvey, *supra* note 46, at 363. George W. Cable published *The Silent South* in 1885 that shocked the nation with its story of a man who lasted only two months under the system. Garvey, *supra* note 46, at 363. The man was convicted of vagrancy and sentenced to ninety days in country jail, but was soon leased to a lumber company where he was assigned to strip turpentine from the swamps. *Id.* When he could not keep up with the fifteen-hour workdays, he was beaten to death. *Id.* at 364. See also ROBINSON, *supra* note 47, at 155-77. Tales of similar brutality ended the system in most states; only Alabama, Florida, and North Carolina still used the prison lease model in 1921. ROBINSON, *supra* note 47, at 157. North Carolina was the last state to abolish the lease system, and did not do so until 1933. *Id.*; CHRISTIANSON, *supra* note 47, at 187; Garvey, *supra* note 46, at 364. The system took the longest to die out in the South, as even in 1885, two-thirds of prisoners were still leased out. CHRISTIANSON, *supra* note 47, at 187.

¹³⁵ See Garvey, *supra* note 46, at 344-45; *supra* note 48 and accompanying text (defining the contract system). See also CHRISTIANSON, *supra* note 47, at 187. For example, an 1885 survey showed that New England had 17% of prisoners working in a contract system, the Middle Atlantic had 41% in a contract system, the South had 15%, and the West had 42% of its prisoners engaged in contract labor. *Id.* See also Garvey, *supra* note 46, at 358-59. The fall of the contract model was due mainly to opposition from organized free labor. *Id.* The early argument opposing convict labor was that it degraded the "dignity of free labor." *Id.* at 359. After a short time, however, the more honest argument against prison labor was that it was an economic threat to the free labor market. *Id.*

¹³⁶ See ROBINSON, *supra* note 47, at 158. This is a large shift from the lease system, in that in the contract system the government houses, feeds, clothes, and protects the prisoners. *Id.*

¹³⁷ Garvey, *supra* note 46, at 352. As a response to the failure of public-account systems used in Cherry Hill and Auburn prisons, Massachusetts, New York, Connecticut, and Indiana—to name a few—started a contract system of labor. *Id.* By 1867, the contract model was the dominant labor model, and goals of profit slowly overtook goals of reform. *Id.*

competed so effectively with free labor manufacturers that they successfully lobbied for its extinction.¹³⁸

The piece-price model and the public-account model would be plotted next along the continuum of increased government control over prison labor.¹³⁹ Under the piece-price model, private contractors supplied the prison with the materials to make a certain product; the prisoners then manufactured the product under the direction of administrators; and the private contractor purchased the final product for sale on the open market.¹⁴⁰ The system is aptly named because, whereas in the lease system the private party pays a price per person, in the piece-price system the private party pays a price per piece.¹⁴¹ The public-account system is similar to the piece-price system in that private parties purchased a finished product manufactured within the prison.¹⁴² However, the public-account system removes all private interests from the manufacturing process—the only role of the private party is as purchaser or consumer, and the private party does not supply the prison with the materials to make the products it purchases.¹⁴³ There are few specific historical examples of these systems because their conception coincided with the Great Depression, which led the government to abolish all prison labor that competed with free labor.¹⁴⁴

¹³⁸ Garvey, *supra* note 46, at 352. The breaking point for the contract model came with the nationwide depression in the 1890s, when laws restricted the sale of prison-made goods to the state. *Id.* at 362.

¹³⁹ See ROBINSON, *supra* note 47, at 159–60 (defining the piece-price model and the public-account model).

¹⁴⁰ Garvey, *supra* note 46, at 349. Philadelphia's "Walnut Street Jail," opened in 1790 and in reality an early penitentiary, utilized this model. *Id.* By the early 1800s, however, the system was falling out of favor because prison overcrowding led to an inefficient production system and the production system never yielded a profit. *Id.*

¹⁴¹ ROBINSON, *supra* note 47, at 160. The piece-price system has not been widely utilized. *Id.*; see CHRISTIANSON, *supra* note 47, at 187. In 1885, not more than 8% of prisoners worked in a piece-price system in any region nationwide. CHRISTIANSON, *supra* note 47, at 187.

¹⁴² ROBINSON, *supra* note 47, at 160; CHRISTIANSON, *supra* note 47, at 187 (providing a brief description of the public-account system).

¹⁴³ ROBINSON, *supra* note 47, at 160; CHRISTIANSON, *supra* note 47, at 187. Essentially, the public-account (or state-account, as it is also called) system calls for the state to go into business for itself, selling the products it makes on the open market. CHRISTIANSON, *supra* note 47, at 187.

¹⁴⁴ Garvey, *supra* note 46, at 366–67. In response to the Great Depression, the government enacted the Hawes-Cooper Act and the Ashurst-Sumners Act. *Id.* The Hawes-Cooper Act allowed states to prohibit other states' prison-made goods from entering their state and thus flooding their market. *Id.* Several years later, the Ashurst-Sumners Act made transporting prison goods interstate a federal crime regardless of state law. *Id.*; see CHRISTIANSON, *supra* note 47, at 187. Prior to the Great Depression however, states utilized the system to produce such products as whips and saddlery hardware. CHRISTIANSON, *supra* note 47, at 187. For example, in 1885, 22% of prisoners in New England worked in a public-account system, as compared with 21% in the Middle Atlantic, 18% in the West, and

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Prison institutions responded to harsh restrictions on free market sales by almost universally adopting the state-use model.¹⁴⁵ The state-use model creates a closed market in that prisons manufacture, market, and sell their products exclusively to the state in which they are located.¹⁴⁶ Although hopes for the system were high, it was deemed a failure for several reasons and largely resulted in prisoner idleness—the very condition labor programs sought to avoid.¹⁴⁷ Despite heavy criticism, state-use systems are still popular in some states today.¹⁴⁸

just 2% in the South. *Id.*; see MCKELVEY, *supra* note 48, at 220. Perhaps as a result of the system's moderate success, the United States Industrial Commission in 1900 and the United States Commissioner of Labor on prison industry in 1905 "frown[ed]" on the practice and favored the closed market state-use system instead. MCKELVEY, *supra* note 48, at 220.

¹⁴⁵ Garvey, *supra* note 46, at 367. Whereas immediately before the Hawes-Cooper Act 16% of prisoners worked under a contract system, 42% under state-use systems, and 23% under public works systems, by 1940, "almost all prisoners worked for the state." *Id.*

¹⁴⁶ ROBINSON, *supra* note 47, at 162-63. In general, state divisions must buy from the prison if it can fill the request. *Id.* at 162. See Garvey, *supra* note 46, at 364-65; Ozimek, *supra* note 116, at 756-57. In the state-use system, "the state represents the demand side of the market[.]" and "[o]n the supply side, each individual inmate acts as a firm . . ." Ozimek, *supra* note 116, at 756. Ozimek contended that the system is inefficient because an inmate will only exert effort if the benefit derived is greater than the cost. *Id.* at 757; Garvey, *supra* note 46, at 365. The system manifested itself differently in the North than in the South. Garvey, *supra* note 46, at 356. In the North, prisoners worked within the prison manufacturing goods in prison shops. *Id.* In contrast, Southern prisoners worked on prison farms and chain gangs. *Id.*

¹⁴⁷ Garvey, *supra* note 46, at 368. After the Hawes-Cooper Act and the Ashurst-Sumners Act were enacted, only 23% of state prisoners were working. *Id.* One reason for the system's failure is that prison officials were not trained for and did not desire to undertake the business management aspect of their new positions. *Id.* Furthermore, although state agencies were bound by contract to purchase prison goods first, they often did not until they were forced. *Id.*; see ROBINSON, *supra* note 47, at 164. Robinson asserts that the state-use system would be most effective where prisoners were employed in "growing vegetables or in making clothing for themselves or in repairing or constructing buildings forming a part of the institution in which they are confined." ROBINSON, *supra* note 47, at 164. Robinson's suggestion for the state-use system is essentially the application of the public-works-and-ways model, a subset of the state-use model. *Id.* at 168.

¹⁴⁸ Garvey, *supra* note 46, at 371. See Indiana Department of Correction News, *Offenders and Staff at Westville Correctional Facility Build New Wooden Conference Table for Governor's Office*, <http://www.in.gov/indcorrection/news/07172007NewGovernorTable.html><http://www.in.gov/indoc/news/07172007NewGovernorTable.pdf> (last visited Oct. 18, 2008) [hereinafter INDOC]. For example, Indiana employed this model in producing a table for the Governor's Office in 2007. *Id.* An Indiana prison had a wood-working class for qualifying inmates, and the governor's office commissioned the class to create a new table for the entryway to the office. *Id.* All of the men in the class contributed to the project under the watchful eye of the prison instructor, and the result was stunning to both the governor and the public. *Id.* With \$300 for raw materials and free labor, the prison produced a solid wood table, inlaid with the insignia of the state. *Id.* Furthermore, the counties of the state were hand-placed on the table using only species of trees that are found in Indiana. *Id.*

The final model, the public-works-and-ways model, is really a branch of the state-use system.¹⁴⁹ Under this system, prisoners labor for the benefit of the state only on public projects, primarily by building roads.¹⁵⁰ This system has been used mainly in the South, and though it was disfavored during the Great Depression, it has regained popularity in the last twenty years.¹⁵¹

Comprehending the evolution of prisoners' rights and the use of forced labor in prisons requires contemplating the history of the Republic, the Constitution, public opinion, and judicial opinion.¹⁵² It is in this context that this Note will discuss the constitutionality, wisdom, and appropriateness of prison labor in the twenty-first century.¹⁵³

III. ANALYSIS OF JUDICIAL STANDARDS AS APPLIED TO PRISON LABOR AND THE WISDOM OF TRADITIONAL LABOR MODELS

*Society has gone to extreme lengths to mystify prison, as if to empower the institution by obscuring its inner workings.*¹⁵⁴

The history of prisoners' rights includes the use of prisoners for labor. Six models of prison labor have traded places as the most popular

¹⁴⁹ ROBINSON, *supra* note 47, at 168. The public-works-and-ways model focuses prison labor on public projects such as building or repairing roads, "draining swamps," or "reforesting devastated areas." *Id.* at 169.

¹⁵⁰ *Id.* at 167. Robinson stated that prisoners are working under this model if "prisoners are employed mainly in erecting public buildings or in constructing highways or in similar work where the purpose is to add to the durable possessions of the state[.]" *Id.* See Ozimek, *supra* note 116, at 758. Ozimek maintained that public-works-and-ways models, such as the use of chain gangs, are economically inefficient because prisoners do not have the "proper" incentives to work. *Id.*

¹⁵¹ Garvey, *supra* note 46, at 365. In the South, Georgia began using the chain gang in 1908 to build much-needed roads on which automobiles increasingly traveled. *Id.* Georgia coined the project the "good roads movement." *Id.* See Ozimek, *supra* note 116, at 1158. Judges began sentencing convicts to chain gangs in the 1860s in response to prison overcrowding. *Id.* During the Great Depression, however, the federal government banned prisoner labor in this form in favor of hiring unemployed free laborers. *Id.*; Garvey, *supra* note 46, at 365. By the 1940s, chain gangs were no longer used. Garvey, *supra* note 46, at 366. *But see* Morley, *supra* note 115, at Features. In 1995, however, Alabama became the first state to reinstate the chain gang. *Id.*

¹⁵² See *supra* Part II for a history of prisoners' rights in America.

¹⁵³ See *infra* Part III (providing an analysis of traditional prison models and their constitutionality).

¹⁵⁴ CHRISTIANSON, *supra* note 47, at 307. Christianson explains his statement by continuing, "This mystification serves to absolve society of responsibility, while conferring legitimacy and morality on the prison itself. An aura of secrecy lends mystery and idealization. For, indeed, few human inventions have become so charged with symbolic meaning as the modern prison." *Id.*

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throughout the past three centuries.¹⁵⁵ The Supreme Court has not addressed the constitutionality of five of the models, and the models' use, or non-use, was historically connected more to complications with the free market than with the Court.¹⁵⁶ Each system has a differing relationship to free labor and a different level of administration.¹⁵⁷ Furthermore, each system offers the state and the prisoner different monetary and non-monetary incentives.¹⁵⁸ Part II of this Note illuminated the big picture of administration and the jurisprudence surrounding it and introduced traditional prison models.¹⁵⁹ Part III of this Note will discuss the benefits and detriments of the different prison labor models introduced in Part II, and will apply the judicial standards outlined in Part II to identify possible constitutional problems.¹⁶⁰ Part III of this Note will discuss each model in turn.¹⁶¹

First, the lease system has very positive effects for the government, but likewise has negative effects on prisoners.¹⁶² Administration of prisoners under the lease system is simple and cost effective for the government because the government's sole responsibility is to establish a way for the lessee to choose and take possession of the prisoner.¹⁶³ As a result of the system's cost effectiveness, the sum of money the government receives is "profit."¹⁶⁴

¹⁵⁵ See *supra* Part II.E (outlining six traditional models of prison labor); *infra* Part III (examining the models' strengths and weaknesses).

¹⁵⁶ See *supra* notes 144–47 (describing the struggle between free labor and forced labor because of forced labor's ability to produce the same goods at a cheaper price, and also discussing the government's response to this dilemma).

¹⁵⁷ See *supra* Part II.E (explaining that models range from being completely closed to the free market to being completely integrated with it).

¹⁵⁸ See *infra* Part III (stating that some models offer profit to the prison, while other models are solely for the benefit of the prisoner).

¹⁵⁹ See discussion *supra* Part II.

¹⁶⁰ See *infra* Part III (hypothesizing that the lease system is the only system of the six with a serious potential for unconstitutionality).

¹⁶¹ See *supra* Part II.E (the traditional models discussed are the lease system, the contract system, the piece-price system, the public-account system, the state-use system, and the public-works-and-ways system).

¹⁶² See *infra* notes 163–73 and accompanying text (noting that positive aspects include a high profit margin for the government while negative aspects include high rates of abuse toward prisoners and probable unconstitutionality).

¹⁶³ See *supra* note 131 and accompanying text (indicating that under the lease model, private contractors pay a sum to gain possession of prisoners for their private interests). See also ROBINSON, *supra* note 47, at 156. Robinson stresses that the lessee clothes, feeds, houses, and protects prisoners. *Id.*

¹⁶⁴ See ROBINSON, *supra* note 47, at 157. Robinson reports that in 1912, Alabama grossed \$1,073,286.16 in earnings from its use of the lease system. *Id.* See also CHRISTIANSON, *supra* note 47, at 187. As the system gained opposition, the original argument in favor of its abolition was that it destroyed the dignity of labor; however, the more convincing argument was that the system was so profitable that it seriously threatened free labor. *Id.*

From the prisoner's perspective, his very life is at the mercy of the lessee.¹⁶⁵ Economically, the lessee desires to produce the greatest product for his money, and that motive encourages him to provide only minimum necessities to the prisoner while working the prisoner as hard as he can without causing death.¹⁶⁶ Furthermore, the government has no incentive to police the use of its prisoners, as prisoners are abundant and easily replaceable.¹⁶⁷

The lease model raises the most obvious constitutional problems.¹⁶⁸ If it were reinstated today in the same form as it was traditionally administered, it would almost certainly be invalidated as violating the Eighth and Thirteenth Amendments.¹⁶⁹ Applying the concept of evolving standards of decency, it is difficult to argue that under contemporary standards of decency and humanity this treatment would not amount to cruel and unusual punishment because of its strong association with slavery.¹⁷⁰ Furthermore, under the deliberate indifference standard, courts could find that the wardens who turn their head to the brutal treatment of prisoners are indirectly inflicting unnecessary and wanton pain.¹⁷¹ Certainly courts could find the lease model to be a deliberate attempt to circumvent the Thirteenth

¹⁶⁵ See *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (noting that at one time it was a crime to break a lease, punishable by large fines and continuing imprisonment at hard labor); see also note 134 and accompanying text (noting that in 1885, *The Silent South* was published, recounting true stories of prisoner brutality that lead to death).

¹⁶⁶ See *Garvey*, *supra* note 46, at 357. In fact, death was common under the system because prisoners were easily replaceable. *Id.* At the height of the model's use, convict mortality rates reached 40% in some prisons. *Id.* See also *ROBINSON*, *supra* note 47, at 157 (explaining that "[s]ince every unnecessary cent spent by the lessee on the prisoners would reduce his profits by that amount, one would naturally expect to find the minimum of existence supplied to the prisoners and the maximum of effort demanded from them").

¹⁶⁷ See *ROBINSON*, *supra* note 47, at 157. In 1912, the brutality of the lease system was so apparent that the governor of Arkansas pardoned 360 convicts and ended the use of the lease system in the state. *Id.*

¹⁶⁸ See *supra* notes 48–49 and accompanying text (recounting the Supreme Court's condemnation of "peonage" as a form of slavery and thus repugnant to the Eighth and Thirteenth Amendments, while reaffirming that convicted criminals can be subjected to other forms of involuntary servitude as a condition of their confinement).

¹⁶⁹ See *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (noting that it is unconstitutional to knowingly and forcibly return people to a condition of servitude); *supra* note 50 (contrasting the holdings in *Reynolds*, which held that systems of surety are unconstitutional, and *Bailey*, which held that the violation of any contract requiring labor to repay debt could not be a criminal offense).

¹⁷⁰ See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (setting forth the requirement for punishment to meet "evolving standards of decency that mark the progress of a maturing society[,] the new test set forth by the Court"); *supra* note 69 and accompanying text.

¹⁷¹ See *supra* Part II.C.4 (discussing the deliberate indifference standard and the requirement that prisoners demonstrate that prison officials engaged in the wanton infliction of pain to prevail on a challenge to prison conditions).

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Amendment, and in fact, the Supreme Court has held that it does.¹⁷² In short, under this system, the government simply replaces the slave-trader of old by selling humans to be used for involuntary servitude to a private master.¹⁷³

Second, the contract model draws on the positive aspects of the lease model in that it allows private entities to obtain cheap labor and maximum product.¹⁷⁴ It also seeks to remedy the cruelty that prisoners experienced under the lease model.¹⁷⁵ This system is not without its faults, however.¹⁷⁶ For example, the contract system and the lease system share the same incompatibility with the free labor market and are opposed equally by interested parties.¹⁷⁷ Furthermore, while each party is performing the proper function—the government maintains the prisoners and the contractor maintains the business—each party is fundamentally at odds with the other.¹⁷⁸ Ultimately, the government profits less because it must pay to house the prisoners, and the contractor profits less because he must pay more for the prisoner's labor.¹⁷⁹

¹⁷² See *supra* note 50 and accompanying text (noting that the practice of hiring out convicts subjects them to involuntary servitude); see also *Clyatt*, 197 U.S. at 215 (holding that a person cannot forcibly detain another person for the purpose of satisfying a debt); *supra* note 129 (indicating that some scholars even argue that increased conviction of African Americans is in reality an attempt to re-enslave them).

¹⁷³ See *United States v. Reynolds*, 235 U.S. 133, 146–47 (1914) (condemning a system of posting surety bonds for a person in return for that person's servitude). The court described the agreement as “an overturning [sic] wheel of servitude” because of the worker's constant fear of re-imprisonment. *Id.*

¹⁷⁴ See *Garvey*, *supra* note 46, at 344–45 (explaining that the contract system is similar to the lease system except that, under the contract system, the prison retains the responsibility to feed, clothe, and protect the prisoners). See also *ROBINSON*, *supra* note 47, at 159. Robinson believes there is more potential in the contract model than the lease system because the contract model results in better treatment of prisoners and is therefore a milder form of punishment. *Id.*

¹⁷⁵ See *Garvey*, *supra* note 46, at 362 (noting that by 1867, the contract model was the dominant labor model); *supra* note 134 (recounting a story of the brutal death of a prisoner for not being able to work fast enough).

¹⁷⁶ See *MCKELVEY*, *supra* note 48, at 93 (discussing the complex forces in play forming the anti-contract movement).

¹⁷⁷ See *MCKELVEY*, *supra* note 48, at 94 (giving an example of the opposition of free labor to prison labor); see also *Garvey*, *supra* note 46, at 366–67 (the Hawes-Cooper Act and the Ashurst-Sumners Act, passed during the Great Depression, made it a federal crime to transport prison-made goods interstate); *supra* note 145 (describing the shift from the contract model to the public-account model in response to the Hawes-Cooper Act and the Ashurst-Sumners Act).

¹⁷⁸ See *ROBINSON*, *supra* note 47, at 158. Robinson makes much of the contract system's advantages, the most important of which being that “it does not require business ability on the part of the prison officials nor humanitarian impulses on the part of the contractor.” *Id.*

¹⁷⁹ See *id.* at 159 (however menial the amount of money lost on each prisoner by each side, the loss of profit can be significant in the aggregate).

From the prisoner's perspective, his life is more bearable because in place of punishment are characteristics that approach, but fall short of, reformation.¹⁸⁰ For example, the prisoner is not idle during the day as he would be in a warehouse prison, and the prisoner learns the discipline and self-worth of a workingman without experiencing the unpredictable anger of a brutalized animal.¹⁸¹ However, an improvement in living conditions does not equate with adequate living conditions, as accounts of dangerous and unsanitary conditions exist under the contract model as well.¹⁸² Because the model satisfies neither the penological goal of reformation nor a prisoners' desire to live in safe conditions, the model is undesirable.¹⁸³

Third, the invention of the piece-price model is another improvement in preserving the humanity of prisoners but is also another step away from the efficiency and profitability of the old lease system.¹⁸⁴ A positive aspect is that wardens, if they choose, can show a great amount of care for prisoners, as they serve as both boss and caretaker.¹⁸⁵ However, administration takes on a new level of complexity, and

¹⁸⁰ See CHRISTIANSON, *supra* note 47, at 179. Elmira Reformatory implemented some of the most groundbreaking reform measures, such as indeterminate sentencing, designed to increase a prisoner's motivation to behave correctly. *Id.*; see also Garvey, *supra* note 46 (describing the harsh treatment that is avoided through the contract system); *supra* note 47 (explaining the progressive grading system that was becoming popular in prisons as a motivational tool).

¹⁸¹ See Garvey, *supra* note 46, at 350 (using Pennsylvania's "'silent'[] system" to explain prevailing notions of criminality and dismissing the treatment as unconstitutional); *supra* notes 46, 124 (noting that Pennsylvania's famous warehouse prisons required prisoners to remain in constant, silent solitude, which eventually and unexpectedly drove them insane).

¹⁸² See FRIEDMAN, *supra* note 51, at 159 (explaining that one reason for poor conditions was that the prison population was booming despite a steady decline in prison labor); see also ROBINSON, *supra* note 47, at 159 (arguing that a prisoner under the care of a warden is better cared for, "although one must not infer that he is thereby adequately cared for[.]").

¹⁸³ See *supra* notes 177–82 (analyzing some of the shortcomings of the contract model).

¹⁸⁴ See *supra* note 121 (under the piece-price system, a buyer pays a flat price per unit of output); see also ROBINSON, *supra* note 47, at 160 (same); *infra* notes 185–90 and accompanying text (outlining positive aspects of the system, such as prison officials' opportunity to rehabilitate prisoners, and negative aspects, such as the ever-present friction of the model with free labor).

¹⁸⁵ See ROBINSON, *supra* note 47, at 159. Robinson also notes an advantage of the system—the likelihood of reduced problems between contractor and government because opposing interests are more separated. *Id.*

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therefore costliness.¹⁸⁶ In addition, the stress on free market competition with businesses that do not employ prison labor still exists.¹⁸⁷

The piece-price system fails to satisfy either the liberal ideal of reformation or the conservative ideal of punishment.¹⁸⁸ From a liberal perspective, reformation fails because prisoners are not generally taught the job-finding and job-holding skills that a functional member of society requires.¹⁸⁹ From the conservative perspective, punishment fails because prisoners are given many of the luxuries of a free person and therefore are not made to pay for their crime.¹⁹⁰ At this point, no model satisfies either side of the spectrum, and prison costs continue to increase with each model.¹⁹¹

In contrast to the lease model, the contract and piece-price models do not obviously violate any constitutional provisions.¹⁹² Assuming prison administrators attend to the welfare of prisoners without deliberate indifference—historically a difficult accusation to prove—they are not inflicting cruel or unusual punishment.¹⁹³ Based on the case history

¹⁸⁶ See *supra* note 140 and accompanying text (noting that prison administrators take on the job of foreman as well because they supervise the prisoners' quality of work). See also ROBINSON, *supra* note 47, at 160 (explaining that while the contractor may send inspectors to ensure quality control, they are not foremen in any sense of the word, as the government is ultimately responsible for management).

¹⁸⁷ See MCKELVEY, *supra* note 48, at 94–95. The growing industrial belt of the early 1880s, encompassing states from Massachusetts to Illinois, was the first region to organize against prison labor. *Id.* at 94. By 1887, all states in the industrial belt, except Indiana, set up commissions to investigate the effects of prison labor on the free market. *Id.* See also Sexton et al., *supra* note 48, at 1 (describing Congress' attempt to limit prison manufacturing through "anti-contract" clauses in the early 1900s).

¹⁸⁸ See *infra* notes 189–91 and accompanying text (the system fails to sufficiently reform or punish); see also ROBINSON, *supra* note 47, at 160 (most of the failures of the contract system apply with equal force to the piece-price model).

¹⁸⁹ See *supra* note 122 (prison administrators are now trying to implement programs that prepare prisoners for the world outside by employing them at jobs at which they could continue upon parole and by teaching them useful job skills beyond the unskilled menial labor performed in the past).

¹⁹⁰ See *supra* Part II.D (discussing continuing public discontent with the treatment of prisoners, centering on a belief that prison life is "too easy").

¹⁹¹ See *supra* notes 162–90 (noting that each model fails to satisfy any objective of imprisonment completely, and explaining that as government retains more control over prisoners, the cost of imprisonment rises).

¹⁹² See *infra* notes 193–94 (indicating that based on the high hurdles prisoners must overcome and the low administration standards the Court accepts, the contract and piece-price systems would likely withstand constitutional scrutiny, despite their wisdom as prison labor policies).

¹⁹³ See *Estelle v. Gamble*, 429 U.S. 97, 98–108 (1976). In *Estelle*, the Court concluded that the conduct alleged in the prisoner's claim must be egregious, as even a botched execution attempt does not constitute deliberate indifference but simply "an innocent misadventure." *Id.*; see also discussion *supra* note 85 (connecting the execution attempt in *Resweber* to the

discussed in Part II, even a warden's serious negligence in attending to injuries incurred as a result of the private contractor's negligence will not rise to the level of deliberate indifference.¹⁹⁴

A truly successful public-account system, the fourth model of prison labor, would cripple the free labor market, which is perhaps why the system has never been seriously considered.¹⁹⁵ The monetary incentives of such a model are nonexistent because, while the piece-price model may be operated at a real profit for the government, the public-account model would be virtually impossible to operate for a real profit.¹⁹⁶ First, the cost of administration is further increased because the government has to hire more specialized prison employees.¹⁹⁷ Second, there are still no real incentives for prisoners to work hard, unless the model is run for non-monetary profit.¹⁹⁸

Non-monetary profit is achieved by implementing a wholehearted reformation program for prisoners.¹⁹⁹ Giving prisoners an opportunity to take pride in the product and learn a new skill, while maintaining the penalties normally associated with disobedience in a penitentiary, allows

negligent medical care in *Estelle*, which resulted from a heavy bail of cotton falling on, and injuring, a prisoner).

¹⁹⁴ See *Estelle*, 429 U.S. at 98–108 (holding that a prisoner who was injured by a six hundred pound bail of cotton, and who subsequently returned to work, did not have a section 1983 claim because the treatment did not amount to deliberate indifference).

¹⁹⁵ See *supra* notes 142–43 and accompanying text (noting that the public-account system removes private parties from the production process but allows them to purchase the finished product on the open market). See also ROBINSON, *supra* note 47, at 161 (defining the public-account system as a closed system). Certain industries were virtually eliminated in the free market because of such success as a prison industry. *Id.*

¹⁹⁶ See *id.* (hypothesizing that the reason the system could not be operated at a profit is because the prison employees would be higher-paid); *infra* notes 197–98 and accompanying text (explaining particular problems with the system, including the need to hire specialized wardens and a lack of motivation for prisoners).

¹⁹⁷ See ROBINSON, *supra* note 47, at 162 (while the traditional warden's sole profession is to manage prisoners as prisoners, a warden under the public-account system would also need business and trade knowledge to manage prisoners as employees); see also *supra* note 144 (two United States commissions in the early Twentieth century "frown[ed]" on the system, which helped lead to its decline).

¹⁹⁸ See Sexton et al., *supra* note 48, at 3 (the third example of a hybrid program in Minnesota draws on this model and runs without the expectation of profit, but for the benefit of the prisoners); *supra* note 122 (the Minnesota hybrid program teaches prisoners a skill, namely assembling computer processors, that they can apply to work after imprisonment).

¹⁹⁹ See *supra* note 122 and accompanying text (discussing the myriad benefits of prison labor programs and the government's renewed interest in them); see also *supra* note 115 (the Prison Industry Enhancement Certification Program enables prisons to apply for certificates that allow them to sell their products interstate, thus circumventing Congress's earlier use of the Commerce Clause to prevent the sale of prison-made goods).

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for a real possibility of reform.²⁰⁰ However, success of such a program hinges on the public's acceptance of the resulting loss of profit. Nevertheless, it is not impossible to imagine a contemporary system able to market incredibly inexpensive products to the public, while simultaneously reinforcing the positive impact the products will have on society.²⁰¹

Fifth, the state-use model has the same monetary drawbacks and non-monetary incentives as the public-account model.²⁰² The free labor market would undoubtedly favor this system because it no longer has to compete with cheap prison-made goods marketed to the same potential consumers.²⁰³ However, with the growing number of prisons being built and maintained, private contracts for prison construction, maintenance, and supply have become big business and certain special interests would likely lobby to keep those contracts on the free market, as opposed to delegating them to be handled within the prison itself.²⁰⁴

The Indiana example discussed previously, in which the Indiana governor's office commissioned a prison woodworking shop to build a new table for the office, illustrates the benefits of the state-use model because the prisoners created a product of which they were proud while obtaining a skill.²⁰⁵ Furthermore, the governor's office not only acquired a piece of functional art for a great price, but it also became a positive symbol of what imprisonment in the new millennium could yield.²⁰⁶

²⁰⁰ See *supra* note 148 and accompanying text for an example of an Indiana prison project that was non profit-making, but had non-monetary benefits for the prisoners and the state. See also Miller, *supra* note 112 (discussing the federal government's reinvestigation of prison labor and its possible benefits).

²⁰¹ See *supra* note 122 (indicating that several states have reintroduced prison labor programs that are designed to accommodate the private sector through purchasing, investing, or other means, in an attempt to reduce market friction).

²⁰² See Garvey, *supra* note 46, at 344-45 (noting that the state-use model is very similar to the public-account system in that it builds on the increased government involvement of the public-account system by calling for state agencies to be the sole purchasers of the prison-manufactured products).

²⁰³ See *supra* note 145 (explaining that the system was so favored by the public that by 1940 the state-use system was the dominant model for prison labor).

²⁰⁴ See *supra* note 146 (noting that, generally, the state is required to purchase their goods from the prison unless the prison cannot fill the request); see also ROBINSON, *supra* note 47, at 161 (noting that, in contrast to prisons, jails do not usually employ the state-use system because they are numerous and generally decentralized, whereas the state-use model requires centralization, planning, and organization among prison entities).

²⁰⁵ See *supra* note 148 (explaining that the Indiana governor's office commissioned a prison woodworking shop to create a new table for the office).

²⁰⁶ See *supra* note 148 (noting that the table depicted the shape of Indiana and the prison workers inlaid each county with a different piece of wood found only in the state).

The sixth and final traditional model, the public-works-and-ways model, is as imperfect as the other models.²⁰⁷ The largest drawback of a public-works-and-ways system is the state's transportation and administration costs associated with bringing and supervising the prisoners on the jobsite, instead of in the confines of a prison.²⁰⁸ Despite these difficulties, in 1995, Alabama became the first state in nearly half a century to employ the use of chain gangs for public works.²⁰⁹ Since 1995, other states such as Florida and Michigan have reinstated the chain gang as well.²¹⁰ Chain gangs satisfy the public desire for tangible punishment by creating a visible display of retribution on, for example, the side of a state highway.²¹¹

Although Alabama's form of the public-works-and-ways system has spawned considerable debate about its constitutionality and wisdom, or lack thereof, other forms of the system could be much more beneficial to

²⁰⁷ See ROBINSON, *supra* note 47, at 168 (the public-works-and-ways model is essentially a state-use system that only employs prisoners to work government projects). The public-works-and-ways model focuses prison labor on public projects such as building or repairing roads, "draining swamps," or "reforesting devastated areas." *Id.* at 169.

²⁰⁸ See *id.* at 167-68. Robinson cites several arguments for the system, including an improvement in prisoner health from working outside and the ease with which the prisons can acquire appropriations for public projects. *Id.*

²⁰⁹ See Morley, *supra* note 115, at Features, and Ozimek, *supra* note 116, at 763 (describing the growing phenomenon of chain gangs in Alabama, Florida, and Wisconsin, to name a few states).

²¹⁰ See Peloso, *supra* note 116, at 1459-60. The public sees prisons as affording inmates too many luxuries: cable television, exercise facilities, and libraries to name a few. *Id.* The main driving force for the reintroduction of chain gangs is the legislators' responses to the public's perception that prison is a "cake-walk" and is not retributive enough. *Id.* at 1460-62.

²¹¹ See Interview, *supra* note 4 (Sheriff Joe Arpaio believes strongly that shame can serve as a punishment and an incentive to reform). The prisoners are therefore at the forefront of drivers' minds, and the drivers' gawking causes shame and embarrassment for the prisoners. *Id.* In fact, many politicians proudly say that shame and embarrassment are main objectives of the chain-gang. *Id.* States like Alabama, concededly for ulterior purposes, have employed the chain-gang method of supervision. *Id.*; Morley, *supra* note 115, at Features (Limestone Correctional Facility in Alabama uses primarily repeat offenders or other inmates that have already been stripped of other privileges). Like chain gangs of the early Twentieth century, prisoners wear bright colored or striped jumpsuits and are connected together in groups of twenty to thirty by chains and shackles. *Id.* See also Cohen, *supra* note 115 (describing the sight of the chain gang workers); Jeanne Martha Perreault, *Chain Gang Narratives and the Politics of "Speaking For,"* 24 U. HAW. PRESS 152, 152 (2001). The shackles used on chain gangs of the early Twentieth century would rub on prisoners' ankles, creating sores known as "shackle poison." Perreault at 152. Currently, at least one prison guard, who is usually armed with a shotgun, supervises each gang. *Id.*; Morley, *supra* note 115, at Features (describing Alabama's renewed use of chain gangs). One can see how this sight would burn an image in the onlooker's mind and also cause shame and embarrassment to the prisoner. *Id.* See generally Cullen, *supra* note 45 (discussing the possibility of successful reformation and rehabilitation).

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the state, the prisoners, and the public.²¹² For example, the use of chains to connect prisoners is completely unnecessary in a practical sense and, when used contemporarily, can only be seen as a political gimmick.²¹³ Furthermore, weapons technology has advanced since the early twentieth century to include a wide variety of effective yet non-lethal arms, rendering firearms unnecessary to maintain control over workers.²¹⁴

Aside from the lease and contract models, the remaining models do not pose serious constitutional concerns, assuming they are administered according to the standards the Court has set forth.²¹⁵ In fact, the models would work most successfully when they exceed the Court's expectations.²¹⁶ Historically, the Court has deferred a great deal to the wisdom of prison administrators absent clear abuses of power.²¹⁷ The Court has accepted and affirmed time after time—even in the new millennium—that the standard of care the Court requires of prison administrators is very low in order to pass constitutional muster.²¹⁸ Moreover, with respect to prisoners' due process rights, the Court has relied, especially since 1995, on internal grievance procedures to filter out the frivolous claims and bring serious violations to the surface.²¹⁹

²¹² See *infra* Part IV text and accompanying notes (proposing a new model code for the operation of prison labor).

²¹³ See Mireya Navarro, *Florida to Resume Chain Gangs: Rules on Shackles are Criticized*, THE NEW YORK TIMES (Nov. 21, 1995), available at <http://query.nytimes.com/gst/fullpage.html?res=9B02E3DD1339F932A15752C1A963958260> (last visited Feb. 2, 2008) (corrections specialists have differing views on the purpose and utility of chaining prisoners together).

²¹⁴ See Lev Grossman, *Beyond the Rubber Bullet*, TIME MAGAZINE (Jul. 22, 2002), available at <http://www.time.com/time/nation/article/0,8599,322588,00.html> (last visited Feb. 2, 2008). There are many alternatives to the traditional firearm. *Id.* For example, tail-stabilized bean-bag guns and sponge guns deliver a powerful punch to the recipient without the possibility of breaking the recipient's limbs. *Id.* Other cutting edge methods of non-lethal force include heat guns, which deliver a powerful burning feeling without actually burning the skin, and deployable Kevlar nets, which immobilize an individual without injuring him. *Id.*

²¹⁵ See *supra* Part II.C (explaining the guidelines the Court has used since the industrial revolution, including the "evolving standards of decency" and "deliberate indifference" tests).

²¹⁶ See *infra* Part IV.B (presenting new models of prison labor that attempt to cure the failures of traditional models while exceeding Constitutional expectations).

²¹⁷ See *supra* Parts II.A, II.C.4 (discussing the deference accorded to prison administrators under various circumstances).

²¹⁸ See *supra* Parts II.C.4, II.D (examining the deliberate indifference standard and its application to different constitutional challenges prisoners have raised).

²¹⁹ See *supra* note 114 (defining the Prison Litigation Reformation Act and its requirements); Morley, *supra* note 115, at Features. To exemplify the Court's return to the hands-off doctrine, consider that the Alabama chain gangs, despite their controversy, have not been held unconstitutional. *Id.*; *supra* notes 115-17 and accompanying text (stating that the Supreme Court has not decided the constitutionality of chain gangs).

Each of the six models has been tested by society and deemed at least a partial failure at some point in history.²²⁰ Instead of discarding the old models completely, a more modest and perhaps successful approach would be to take the benefits of each system, test them against constitutional problems, and combine them to create a new model that will satisfy the punishment, rehabilitative, and constitutional objectives of imprisonment.²²¹

IV. PROPOSED LEGISLATION AND MODEL CODE FOR PRISON LABOR PROGRAMS

*Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.*²²²

By combining the best aspects of each of the six models with a new perspective of constitutionality, a new model Code can be constructed as a template for federal, state, and municipal legislatures to adopt.²²³ The Code must take into account the direction in which the country appears to be moving and the possible future of the definition “evolving standards of decency” to survive enduring constitutional scrutiny.²²⁴ It must also provide for sufficient economic and non-economic successes to sustain itself in the public forum and ultimately avoid political backlash.²²⁵ This Note asserts that the tools to create a successful prison labor model are readily available in the existing models of prison labor as well as existing jurisprudential doctrine regarding prisoners’ rights, and proposes a new uniform Code for such a model.²²⁶

²²⁰ See *supra* Part III (analyzing the six models and the reasons they have failed historically).

²²¹ See *infra* Part IV (proposing a new model code containing prison labor systems that are beneficial to the government, and the prisoner, and would also meet the Supreme Court’s constitutional tests).

²²² *Weems v. United States*, 217 U.S. 349, 373 (1910).

²²³ See *infra* Part IV.B (proposing a new model code of prison labor).

²²⁴ See discussion *supra* Part II.C.2 (concerning the “evolving standards of decency” test propounded in *Trop*).

²²⁵ See *supra* Part II.C (discussing the fickle public attitude toward prisons and criminals).

²²⁶ See *infra* Part IV.B (proposing an integrated model of prison labor). Regarding this Note’s proposed statutory language, current statutory language is denoted in regular font, proposed deletions are denoted in strikethrough font, and additions are denoted in italicized font.

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A. Congress Should Amend 18 U.S.C. § 1761(c)(1)²²⁷

Congress should amend 18 U.S.C. § 1761(c)(1) as follows:

- (c) In addition to the exceptions set forth in subsection (b) of this section, this chapter shall not apply to goods, wares, or merchandise manufactured, produced, or mined by convicts or prisoners who—
- (1) are participating in—~~one of not more than 50~~ 80 non-Federal prison work pilot projects designated by the Director of the Bureau of Justice Assistance²²⁸

Commentary

This addition loosens the limitations on the movement of prison-made goods through interstate commerce.²²⁹ Given that the Bureau of Justice Assistance has already issued 41 of 50 certificates, Congress should authorize the issuance of more certificates to qualifying jurisdictions, which would further the expansion of work programs that produce prison-made goods.²³⁰

B. Proposed Model Prison Labor Code²³¹

The following Model Prison Labor Code (“MPLC”) should be implemented:²³²

²²⁷ See 18 U.S.C. §1761(c)(1) (2000). 18 U.S.C. § 1761 was originally called the Justice System Improvement Act of 1979. See *id.*

²²⁸ *Id.* The author of this Note proposes to delete the language that is denoted with a strikethrough and replace it with the language in italics.

²²⁹ See *supra* note 115 and accompanying text (discussing federal laws regulating the movement of prison-manufactured goods in interstate commerce).

²³⁰ BUREAU OF JUSTICE ASSISTANCE, *Prison Industry Enhancement Certification Program (PIECP)*, U.S. DEPARTMENT OF JUSTICE, available at <http://www.ojp.usdoj.gov/BJA/grant/piecp.html> (last visited Feb. 2, 2008).

²³¹ Unless otherwise noted, this Code’s language is the unique idea of the author of this Note. Furthermore, this proposed Code does not build on any past legislation or formal policy, but is a compilation of the traditional labor models set forth in Part II.E. However, the idea of a hybrid model of prison labor has been introduced in several states, and is discussed *supra*, note 122. Essentially, this Code is merely a skeleton of what could be developed into a detailed manual for successful operation of prison labor programs.

²³² The goal of the Section One mission statement and qualifications is to delineate the requirements for prisoners to enter the programs, and set the standards that prisoners are required to follow in order to remain in the programs.

MPLC § 1-100 Goals of Prison Labor

The goals of all prison labor programs are as follows:

- (a) To serve the community by releasing inmates who are better prepared to be productive, law abiding members of society.
- (b) To serve inmates by teaching them valuable skills and work habits, and by making them disciplined and productive.
- (c) To serve the Jurisdiction by generating revenue to reduce costs associated with imprisonment.
- (d) To serve society at large by carrying out the sentence imposed by the Judicial system in a strict, yet meaningful, way.

MPLC § 1-102 Prisoner Grievance Procedure²³³

Pursuant to 42 U.S.C. § 1997(e), prisoners shall exhaust administrative remedies before filing a claim under 42 U.S.C. § 1983.²³⁴ The complaining prisoner shall be entitled to the following:

- (a) written notice of violations;
- (b) access to any and all evidence against him regarding the written notice of violation;
- (c) an opportunity to present his case, including the opportunity to present evidence, witnesses, and rebuttal to State's evidence, to a neutral panel of fact-finders;
- (d) access to the written decision of the fact-finders before or immediately following revocation of a prisoner's status or privileges.

MPLC § 1-103 Qualifications for Participation in Prison Labor Programs

All general population prisoners shall work in some capacity unless they are medically disqualified, as determined by a medical professional. The Department of Corrections or its organizations shall determine the percentage of time each prisoner shall spend per week in work programs, educational programs, and treatment programs. The total amount of time spent in the combined programs shall not exceed forty hours per week, per prisoner.

²³³ See *supra* note 114 and accompanying text (providing the text and explanation of the Prison Litigation Reformation Act).

²³⁴ See *Suits by Prisoners*, 42 U.S.C. § 1997e (2000). See *supra* note 83 for the text of 42 U.S.C. § 1983 regarding civil actions for deprivation of rights.

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MPLC § 1-104 Qualifications for Participation in Work Release or Work Furlough Programs

- (a) Each prison in the Jurisdiction shall have either a work release or work furlough program, or both.
- (b) Minimum security prisoners incarcerated for a nonviolent offense may petition the Department of Community Corrections for admission to a work release or work furlough program when they have not more than twelve months of their sentence, including good time credit, remaining.
- (c) The Department of Community Corrections shall have sole discretion over admission into work release programs.
- (d) The Department of Community Corrections shall:
 - (1) notify applicants within thirty days of their acceptance or denial;
 - (2) provide an explanation of why applicants were denied and whether they are qualified to apply again if they complete clearly outlined requirements (such as further job training);
 - (3) place accepted applicants in a qualified work release program, supervised by a Community Corrections Officer within sixty days of acceptance;
 - (4) establish procedures for Community Corrections Officers to periodically evaluate work release prisoners including, but not limited to:
 - (i) requiring prisoners to make and follow a detailed daily schedule;
 - (ii) requiring regular drug testing; and
 - (iii) requiring prisoners to abide by a curfew, the violation of which will initiate re-evaluation by Community Corrections Officers for the fitness of the prisoners to continue in the program.

MPLC § 1-105 Qualifications for Participation in Shock Incarceration Programs

Inmates may participate in shock incarceration programs on a voluntary basis if:

- (a) the instant offense is their first felony conviction; and
- (b) they are sentenced to not more than seven years in a Jurisdiction prison; and

- (c) the Jurisdiction Probation Department Pre-Sentence Investigation Report, the sentencing court, and the Department of Corrections unanimously recommend a Shock Incarceration Program.

Commentary

The mission statement of the Code is important because it establishes that the Code is meant to satisfy goals of retribution and rehabilitation. The Code is designed to give administrators flexibility in imposing labor requirements while still providing a structure within which to adhere. Therefore, strict requirements are set forth outlining that, generally, prisoners must work, but that not all prisoners are suitable for all programs. Finally, because the Court has held that prisoners are guaranteed a minimum level of due process before or immediately following disciplinary action, the Code includes a section specifically dedicated to grievance procedures.²³⁵

MPLC § 2-201 Prisoner Status—Level Three²³⁶

- (a) All prisoners shall enter as level three inmates on either maximum or medium security status. Level three inmates are afforded only basic provisions meeting constitutional protections and are allowed limited additional amenities solely in the discretion of the prison administrators. Level three inmates shall work for the benefit of the Jurisdiction on public works projects or prison projects in controlled inmate groups and shall abide by the rules of said groups, or be subject to discipline from prison administrators.
- (b) All level three inmates shall wear pink jumpsuits displaying the prisoner's identification number and the statute number under which he was convicted.
- (c) All level three inmates are expected to progress to level two status within six months of intake; however, prison

²³⁵ See *Morrissey v. Brewer*, 408 U.S. 471, 488-89 (1972). *Morrissey* outlined the procedures to which prisoners are entitled. *Id.* This Code includes those procedures needed to satisfy constitutional guarantees as outlined by the Court.

²³⁶ Creating different levels of status is deliberately reminiscent of the caste system, which is of questionable success in a free society but would be useful in a controlled society as both a motivation to comply with the rules and a tool for punishment for those individuals who do not comply. See CHRISTIANSON, *supra* note 47, at 179 (discussing the prisoner status level system employed at Elmira Reformatory).

administrators have sole discretion as to the status level of inmates.

MPLC § 2-202 Prisoner Status—Level Two

- (a) Prisoners may spend up to ninety percent of their incarceration as level two inmates.
- (b) Level two inmates shall wear brightly colored jumpsuits to distinguish them from other levels of inmates, which shall include their identification numbers, but no other information.
- (c) Prisoners may enjoy increased access to amenities as determined by prison administrators, including, but not limited to:
 - (1) increased television, telephone, radio, library, and internet access;
 - (2) increased access to exercise equipment; and
 - (3) increased out-of-cell visiting time.
- (d) All prisoners obtaining level two status shall:
 - (1) work in one of the available work programs within the Jurisdiction unless they are disqualified for a medical reason as determined by a medical professional;
 - (2) continue educational, vocational, and treatment programming;
 - (3) commit a minimal amount of infractions as determined by the prison administrator; and
 - (4) show progress as determined by the prison administrator.
- (e) Level two inmates may progress to level one status as determined by the prison administrators.

MPLC § 2-203 Prisoner Status—Level One

- (a) All level one inmates are classified as minimum security status.
- (b) Level one inmates have demonstrated the ability to behave as a member of a community and are thus treated as closely to a member of the community as is possible in an institutional setting. Accordingly, level one inmates enjoy a list of benefits including, but not limited to:
 - (1) greatest access to amenities;
 - (2) greatest out-of-cell time;
 - (3) opportunities for the highest paying jobs; and

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- (4) opportunities for work release and work furlough programs.
- (c) Level one inmates shall wear brightly colored jumpsuits to distinguish them from other levels of inmates, which shall display their name and identification number, but no other information.

Commentary

Creating status levels for prisoners that are easily identifiable to both corrections officers and other inmates intentionally creates segregation in the prison community. As compared to a caste system, level three inmates are treated with less respect than level two inmates, and so forth. While this system is retributive, shaming, and possibly embarrassing for inmates by printing their offenses clearly on their apparel, it also reinforces a desire for upward mobility that will translate into a similar desire outside prison walls.

Importantly, the outlined treatment of level three inmates satisfies the mandates of the Court in its interpretation of the Eighth and Fourteenth Amendments because it is clearly related to overarching penological objectives. Of course, the actual implementation of the system may result in some acts of unnecessary and wanton conduct by renegade corrections officers, but that risk is inherent in any corrections facility and does not discount the true intention of the Code.²³⁷

MPLC § 3-301 Limitations on Prison Work Programs²³⁸

Individual prisons are not limited to any of the work programs defined in this Code. Institutions may create work programs as it sees fit to further the goals set forth in this Code and to the extent allowed under law.

Commentary

The purpose of Section 3-301 is to reinforce the need for flexibility within each institution. Each correctional facility is different not only in the prison population, but in the capability for industry within the facility, as well as in the surrounding market conditions. Prison

²³⁷ See *supra* notes 94 & 101 and accompanying text (discussing what constitutes constitutionally prohibited conduct by corrections officers).

²³⁸ The goal of this provision is to make clear that this Code is not all-inclusive. States should be encouraged to experiment with hybrids of all existing models and to invent new models.

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administrators must be given deference in deciding what programs best fit their institutions. However, the author of this Note presents this Code containing a wide variety of programs, all of which could be successful when applied to the correct environment.²³⁹ The ultimate goal of the Code is to institute enough programs in each institution so that every general population prisoner is laboring in some capacity.

MPLC § 4-401 Shock Incarceration Programs

Shock Incarceration programs shall be designed to fit each individual institution's needs, but shall incorporate the following elements:

- (a) military boot camp-style discipline and training;
- (b) a strictly regimented schedule;
- (c) clearly defined rules and penalties;
- (b) mentally and physically demanding labor; and
- (e) cognitive skills training.

Shock Incarceration programs shall be evaluated by the Jurisdiction Department of Corrections if it exceeds a thirty percent drop out rate or falls below a ten percent drop out rate.

Commentary

The Shock Incarceration Program outlined in this Code closely parallels the Federal shock incarceration program approved in 18 U.S.C. § 4046.²⁴⁰

MPLC § 5-501 Public Sector Programs Definition²⁴¹

Section Five labor models shall be completely funded, operated, managed, and evaluated by the Jurisdiction Department of Corrections. All laborers for this model shall be medium security inmates from the general prison population. All laborers work on either a good-time reduction incentive program, or a piece-price system in which inmates are paid per unit of product they complete. Laborers are not required to use any of their wages to recoup the costs of their incarceration.

²³⁹ See Sexton et al., *supra* note 48, at 3 (providing examples of pilot programs showing success).

²⁴⁰ See *supra* note 118 and accompanying text for an explanation of the Shock Incarceration Program.

²⁴¹ See *supra* Parts II.E & III (the public sector models draw on, and expands upon, the state-use and public-works-and-ways models of prison labor explained in Part II.E and analyzed in Part III).

MPLC § 5-502 Controlled Inmate Group Public Works Program

- (a) The Controlled Inmate Group Program shall substitute any and all forms of “chain gang” in Jurisdiction.
- (b) Inmates shall be transported in groups, not to exceed twenty inmates per group, to public property for the purpose of conducting maintenance.
- (c) One corrections officer shall be responsible for one group of inmates.
- (d) Inmates shall wear brightly colored work-clothes for the purposes of identification, displaying the inmate’s identification number, and in addition, a printed or graphic message, approved by Jurisdiction Department of Correction, aimed at deterring and preventing crime.
- (e) Inmates shall work for eight hours in one day in all safe working weather conditions, taking one thirty minute break for lunch and four fifteen minute rest breaks throughout the work day.
- (f) Inmates shall perform the duties as assigned by the corrections officer or face disciplinary measures upon return to the prison including, but not limited to, a loss of any privileges.
- (g) Any inmate that attempts to escape the group while in the course of a work day shall be subdued and captured using non-lethal force and shall face serious disciplinary measures when returned to the prison.

MPLC § 5-503 Controlled Inmate Group Prison Works Program

- (a) The Controlled Inmate Group Program shall substitute any and all forms of “chain gang” in Jurisdiction.
- (b) Inmates shall be assigned in groups, each group consisting of five to twenty inmates, to work in various areas within the prison and for the benefit of the prison. Areas of work include, but are not limited to:
 - (1) canteen cleaning and food service;
 - (2) prison landscaping;
 - (3) prison laundry;
 - (4) prison farming of hogs, beef, poultry, and vegetables for prison consumption;
 - (5) construction of prison facilities;
 - (6) woodworking or metalworking for the benefit of the prison facilities; and

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- (7) other prison maintenance.
- (c) Inmates shall wear a designated color of work clothes, displaying either their identification numbers or their names to distinguish them from other inmates.
- (d) Inmates shall work for eight hours in one day in safe working weather conditions, taking one thirty minute break for lunch and two fifteen minute rest breaks throughout the work day.
- (e) Inmates shall perform the duties as assigned by the corrections officer or face disciplinary measures including, but not limited to, a loss of any privileges.

MPLC § 5-504 Controlled Inmate Group Private Sector Purchaser Program

- (a) The Controlled Inmate Group Program shall substitute any and all forms of "chain gang" in Jurisdiction.
- (b) The Department of Corrections prison industry shall produce all goods and services for the benefit of one private sector purchaser on the open market.
- (c) The private sector purchaser shall maintain a contract with the prison facility for a fixed term to be renewed at the purchaser's desire.
- (d) The private sector purchaser shall have insubstantial financial or managerial interest in the industry.
- (e) Unconventional corrections officers may be employed that have special knowledge of the industry and can act as foremen. Unconventional corrections officers shall not be a substitute for traditionally trained corrections officers.
- (f) Inmates shall work for eight hours in one day in safe working weather conditions, taking one thirty minute break for lunch and two fifteen minute rest breaks throughout the workday.
- (g) Inmates shall perform the duties as assigned by the corrections officer or face disciplinary measures including, but not limited to, a loss of any privileges.

Commentary

The term "controlled inmate group" includes level two or level three inmates who pose a security risk. Despite the constitutionality of the traditional "chain gang," new technology makes chaining even high-risk

prisoners together unnecessary.²⁴² Because the retributive component of incarceration is satisfied in other ways throughout the Code, the sole purpose of the use of weapons is for safety.

These model statutory provisions maintain a closed-market prison model in which prisoners perform labor directly for the prison, and solely for the prison's benefit. They are most suited for prisons without the facilities to set up large production centers. Furthermore, these models are most profitable when coupled with strong incentives for prisoners to work hard, such as a reduction of sentence.

MPLC § 6-601 Private Sector Models Definition²⁴³

Section Six labor models may be funded publicly by the Jurisdiction, privately by businesses, or by both. All laborers for this model shall be medium security inmates from the general prison population. All laborers work for either minimum wage, or the market value of their work. Their rate of payment shall be governed by the legislation of Jurisdiction. Laborers are required to use a portion of their wages to recoup the costs of their incarceration. A laborer's wages are to be distributed as follows:

Thirty-three percent (33%) shall be paid directly to the Jurisdiction Department of Corrections to offset costs of room and board.

Five percent (5%) shall be paid to the Jurisdiction agency in charge of Jurisdiction's victim assistance program.

Any previously court-ordered support for spouses or dependants shall be paid out of the laborer's wages, not applying to arrears or accruing with interest.

Any remaining portion may be kept by the laborer to use as he chooses, unless monetary penalties have been assessed by the prison, in which case that amount shall be deducted from laborer's wages in equal amounts each pay period until paid, not to exceed ten percent (10%) of the total earned per period.

MPLC § 6-602 Private Sector Investing

Private sector businesses shall not be prohibited from investing in prison industries, without further obligation to the prison. The

²⁴² See Grossman, *supra* note 214 (presenting alternatives to chains and shackles, such as tail stabilized bean-bag guns, sponge guns, and nets).

²⁴³ See *supra* note 122 (describing test programs in several states). The private sector models in this Code are loosely based on the lease, contract, piece-price, and public-account models explained in Part II.E. See Sexton et al., *supra* note 48, at 3. The Code also incorporates hybrid models that some states are currently testing. *Id.*

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businesses shall have no guarantee of profitable return of their money and may withdraw their investment at any time.

MPLC § 6-603 Private Sector Management of Prison Industry

Private Sector businesses shall not be prohibited from managing prison industries without further obligation or involvement in the industry.

MPLC § 6-604 Private Sector Ownership of Prison Industry

Private Sector businesses shall not be prohibited from owning prison industries, regardless of whether they are the dominant purchaser of goods. The business shall have exclusive management of aspects of the business including, but not limited to:

- (a) hiring and firing;
- (b) acceptable standards of work required of prison employees; and
- (c) production.

MPLC § 6-605 Joint Private and Public Ownership

Private sector businesses shall not be prohibited from joining with Jurisdiction Department of Corrections Facilities in forming a business partnership. The private sector business shall be responsible for management of the joint venture to the extent it is a partner. The applicable laws of Jurisdiction will govern such a partnership.

MPLC § 6-606 Dominant Purchaser Private Sector Partner

Private sector businesses shall not be prohibited from being both a partner with Jurisdiction Department of Correction Facilities and the dominant purchaser of goods produced.

Commentary

These model statutory provisions, designed for use with level two inmates, seek to mend the fences between the public and private sector. By allowing the widest variety of private sector involvement, jurisdictions have options for the program that present the least friction with free labor, while also presenting the greatest opportunity for profit. Furthermore, prisoners are offsetting the cost of their own incarceration by paying one-third of their wages to the Department of Corrections.

The benefits to prisoners are also abundant. Most importantly, the risk of constitutional violations of prisoners' rights is very low because inmates are under the joint control of the public and private sector. Second, prisoners learn to manage their money in a basic way by being forced to apportion it according to the Code. Third, prisoners may learn valuable job-seeking skills because private sector businesses using prison labor may require actual applications and interviews before hiring. Fourth, prisoners have the opportunity to work in one industry for a longer period of time and learn the skills of that industry, which will allow them to pursue working in that industry after their release from incarceration.

This Code is a basic template for a more integrated model of prison labor. The Court, through its interpretation of what constitutes cruel and unusual punishment, allows wide latitude for the implementation of programs aimed at retribution and rehabilitation.²⁴⁴ It is unwise and untrue to maintain that the two ideals cannot function together, just as it is unwise and untrue to maintain that free labor and forced labor cannot coexist.

V. CONCLUSION

The current statistics surrounding many aspects of imprisonment in the United States demonstrate that the current system is unacceptable.²⁴⁵ In fact, if the current trends continue, this nation's leaders will have to make difficult decisions about how to imprison, who to imprison, and how much can be spent on imprisonment. However, the current trends do not have to continue, as this Note has suggested.

This Note recounted the history of prisoners' rights in America from the establishment of the Republic to the present.²⁴⁶ Furthermore, it analyzed the constitutional principles expounded in history as applied to labor in correctional institutions.²⁴⁷ Finally, it proposed to balance the goals of imprisonment with constitutional protections through a model that requires all general population prisoners to work as part of their punishment and reform.²⁴⁸

²⁴⁴ See *supra* Part III (concluding that the tests the Supreme Court has applied to determine the constitutionality of prison conditions are generally easy for the government to satisfy).

²⁴⁵ See *supra* notes 1-4 and accompanying text for a brief list of pertinent statistics.

²⁴⁶ See *supra* Part II (discussing the case law surrounding the treatment of prisoners).

²⁴⁷ See *supra* Part III.B (applying constitutional standards to traditional prison labor models).

²⁴⁸ See *supra* Part IV.B (laying out a framework for an integrated model of prison labor).

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In summary, the four pillars of imprisonment—punishment, retribution, rehabilitation, and reform—do not have to be in opposition, butting up against constitutional protections and public desires. In fact, the four can all be satisfied through new models of prison labor that benefit the state, the prisoner, and private interests. The Eighth Amendment grew out of fear of excruciating and inhumane punishment. It has metamorphosed into perhaps the only Amendment that ensures both protection and punishment for prisoners. The new model Code proposed in this Note embraces the duality of the Eighth Amendment and uses it to create a positive and integrated system of prison labor, hopefully retiring the historical friction surrounding imprisonment in the United States.

Amy L. Riederer*

* J.D. Candidate, Valparaiso University School of Law (2009); B.A., Political Science, University of Wisconsin (2006).