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The React Security Belt: Stunning Prisoners and Human Rights Groups into Questioning Whether Its Use Is Permissible under the United States and Texas Constitutions Comment.

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COMMENTS

THE REACT SECURITY BELT: STUNNING PRISONERS AND HUMAN RIGHTS GROUPS INTO QUESTIONING WHETHER ITS USE IS PERMISSIBLE UNDER THE UNITED STATES AND TEXAS CONSTITUTIONS

SHELLEY A. NIETO DAHLBERG

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I. INTRODUCTION

In 1969, Bobby Seale was indicted for violating the Federal Anti-Riot Statute.[1] During the trial, Seale demanded that the court permit him to act on his own behalf because he was denied his lawyer of choice.[2] His motion was promptly denied.[3] Still today, what ensued is considered a

1. *See* United States v. Seale, 461 F.2d 345, 349 (7th Cir. 1972) (outlining the indictment against Seale and seven others).

2. *See id.* at 350-52 (detailing Seale's multiple demands to be represented by counsel of his choice).

3. *See id.* at 350 (quoting the trial court's ruling against Seale). Seale's original attorney, Charles R. Garry, was unable to attend pretrial proceedings due to health problems. *See id.* at 349. As a result, Garry requested a postponement of the trial. *See id.* However, the motion was denied, and Garry was unable to attend Seale's trial. *See id.* The trial court held that because of the various individuals appearing on behalf of Seale, "it was unnecessary to give Seale an opportunity to secure other Counsel in place of Garry." *Id.*

trial that "would tear at the dry roots of old democracy" and raise questions about the impartiality of the legal process.[4]

Seale, along with seven others collectively referred to as the "Chicago Eight," challenged the intent, purpose, and form behind the trial.[5] Through unconventional dress, irrelevant and inciteful comments, and Seale's multiple demands to be permitted to represent himself, these defendants brought their lifestyle to the forefront of the trial, and in doing so, enraged Judge Julius Hoffman.[6] As a result of these tactics, Judge Hoffman severed Bobby Seale's case, bound, shackled, and gagged him, and then adjudged him guilty of sixteen acts of contempt.[7] Seale, of course, appealed.[8] The Seventh Circuit ultimately reversed Judge Hoffman and ordered Seale's case to be tried before another federal judge.[9]

Today, the same potential for outrageous behavior at trial exists; the response, however, is much more exaggerated. For instance, in 1996, a young man sat motionless at a defense table listening to testimony offered against him in a trial for the robbery and slaying of a local man.[10] Around his waist, the defendant was wearing an electronic security belt, a device used to deter violent behavior.[11] Suddenly, and without reason, a

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4. JASON EPSTEIN, THE GREAT CONSPIRACY TRIAL 23-24 (1970); Leonard I. Weinglass, *Foreword* to THE CONSPIRACY TRIAL xi (JUDY CLAVIR & JOHN SPITZER eds., 1970) (discussing the revelation of the "hidden face of government").

5. *See* The CONSPIRACY TRIAL, back cover (JUDY CLAVIR & JOHN SPITZER eds., 1970).

6. *See id.*

7. *See Seale*, 461 F.2d at 350-51 (describing the trial court's sua sponte declaration of a mistrial, the simultaneous severance of Seale's case from that of his co-defendants, and the sixteen counts of contempt resulting therefrom); *see also In re* Dellinger, 461 F.2d 389, 392 (7th Cir. 1972) (discussing Seale's severance from this case after a mistrial was declared against him).

8. *See Seale*, 461 F.2d at 351 (claiming on appeal that "nearly all sixteen acts [of contempt] arose out of [Seale's] objections to Garry's absence and his attempts to represent himself at the trial").

9. *See id.* at 373 (reversing and remanding Seale's case with instructions for it to be retried before a different judge).

10. *See Defendant Apparently Jolted by Shock Belt in Courtroom Accident*, FORT WORTH STAR-TELEGRAM, Mar. 19, 1996, at 18 (describing the first day of testimony in Juan Rodriguez Chavez's death penalty trial), *available in* 1996 WL 5528299; Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt,'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A (summarizing the death penalty trial of Juan Rodriguez Chavez), *available in* 1996 WL 2109577.

11. *See* Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt,'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A (discussing the events that took place in the death penalty trial of Juan Rodriguez Chavez), *available in* 1996 WL 2109577.

powerful surge of electricity jolted the murder suspect.[12] With his fists clenched, the defendant slumped forward on the counsel table, saying "Oh, say—it's shocking me, man!"[13] All the while, the buzzing from the belt could be heard throughout the courtroom.[14]

The security belt the defendant was wearing is known as the Remote Electronically Activated Control Technology ("REACT") belt,[15] and is used as a safeguard when transporting a prisoner viewed as an escape risk.[16] The belt is also used in the courtroom on those defendants who pose a threat to judges, jurors, and bystanders.[17] Stun-Tech,[18] the com-

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12. *See Defendant Apparently Jolted by Shock Belt in Courtroom Accident*, FORT WORTH STAR-TELEGRAM, Mar. 19, 1996, at 18 (noting that the accused "apparently received an accidental jolt from a shock belt"), *available in* 1996 WL 5528299; Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt,'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A (reporting that Chavez was "jolted by a powerful surge of electricity from his 'stun belt'"), *available in* 1996 WL 2109577.

13. Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt,'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A, *available in* 1996 WL 2109577.

14. *See id.* (noting that the buzzing of the belt could be heard from at least nearby seats). The trial judge subsequently ordered the bailiffs to remove the jurors from the courtroom. *See id.* Prior to this incident, the jurors were not aware that Chavez was wearing the stun belt. *See id.* Defense attorney John Nation argued unsuccessfully that the jury would conclude that Chavez had been disciplined for some reason. *See id.*

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI. Jurors are presumed to be impartial in the absence of indications that prove otherwise, and the "existence of a juror's preconceived notion as to the guilt of the accused will not by itself destroy the presumption of impartiality." Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987). The trial judge is responsible for ensuring that the defendant receives a fair trial, consistent with the requirements of due process. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 555 (1976). However, when a jury views a defendant in extra security precautions, the jury may be prejudiced by this viewing. *See* United States v. Remmer, 347 U.S. 227, 229-30 (1954). If the defendant can demonstrate that the jury has been prejudiced as a result of any extraneous influences, then he may be entitled to a new trial. *See id.*

15. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their New Sci-Fi Weaponry,* PROGRESSIVE, July 1, 1996, at 18, *available in* 1996 WL 9254174; *Stun Belt Turns Court into Cattle Pen*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 1994, at 10A (describing one judge's order for a defendant to wear the belt), *available in* 1994 WL 6816127.

16. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their New Sci-Fi Weaponry,* PROGRESSIVE, July 1, 1996, at 18 (stating that since the commencement of sales of the belt in 1994, "the U.S. Marshals Service and more than 100 county agencies have employed the belt for prisoner transport, courtroom appearances, and medical appointments"), *available in* 1996 WL 9254174.

17. *See* RACC Indus., Inc. v. Stun-Tech, No. 66802, 1994 WL 723714, at *1 (Ohio Ct. App. Dec. 29, 1994) (explaining that prisoner restraint belts "could restrain dangerous pris-

pany that manufactures the REACT belt, claims that the belt is merely intended to immobilize prisoners believed to be a security risk.[19] However, opponents of the belt argue that it is cruel, inhumane, and degrading.[20]

Critics specifically allege that the use of the belt violates the Cruel and Unusual Punishment Clause contained in the Eighth Amendment to the United States Constitution because wearing the belt punishes a defendant prior to being declared guilty.[21] Opponents of the belt's use also contend

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oners during trial" and that the "device was designed to impart an electronic shock to prisoners who attempted to escape and/or harm individuals in the courtroom"); Julie Tamaki, *Concerns over Jail Stun Guns Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (noting that Los Angeles County Sheriff's officials recommend to the court which defendants should have the stun belt placed on them based on "whether the defendant is high risk, combative, [or] an escape risk"), *available in* 1997 WL 2197123; James Welsh, *Electroshock Torture and the Spread of Stun Technology*, LANCET, Apr. 26, 1997, at 1247 (stating that stun belts are increasingly being used in courtrooms with presiding judges at times holding the remote control), *available in* 1997 WL 9330629.

18. Stun-Tech was established in 1988 and is engaged in the production and sale of electronic pulse technology products, including stun guns, prisoner restraint belts, and electronic shields. *See RACC Indus., Inc.*, 1994 WL 723714, at *1 (outlining the origin and the purposes of the company that creates stun belts). These products are marketed and sold to law enforcement and correctional agencies throughout the United States. *See id.*

19. *See id.* (reporting that Stun-Tech officials claimed that the REACT belt was capable of restraining dangerous prisoners or defendants during trial through a non-obvious mechanism that would not dilute a prisoner's right to the presumption of innocence); Julie Tamaki, *Concerns over Jail Stun Guns Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (describing the belt's capabilities to immobilize a criminal defendant), *available in* 1997 WL 2197123.

20. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (stating that Amnesty International has launched an international campaign against the use of stun devices), *available in* 1996 WL 9254174. In 1996, Amnesty International launched an international campaign against the use of stun belts, arguing that their use constitutes a violation of international human rights standards. *See United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (summarizing Amnesty International's campaign against the use of electro-shock belts). The group is calling on the United States and other governments not only to suspend the use of the belts, but also to ban the exportation of the belts until further medical research is conducted. *See id.*; James Welsh, *Electroshock Torture and the Spread of Stun Technology*, LANCET, Apr. 26, 1997, at 1247 (opining that Amnesty International called on companies involved in the trade of electronic stun devices to refrain from exporting electroshock weapons to other countries and to ensure that such devices are not used for torture purposes), *available in* 1997 WL 9330629.

21. *See* Larry Gerber, *Order in the Court?: With Shocking Restraint*, ASSOCIATED PRESS, Apr. 8, 1994 (discussing how some attorneys argue that the painful eight-second "ride" amounts to cruel and unusual punishment, administered in a split-second decision without a hearing), *available in* 1994 WL 10133864; *United States: Amnesty Calls for Ban on Stun Belts*, INTER PRESS SERV., June 12, 1996 (reporting Amnesty International's belief

that using the belt in the courtroom destroys a defendant's Sixth Amendment presumption of innocence.[22] Finally, critics argue that the belt constructively prevents a defendant from communicating freely and effectively with his attorney.[23]

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that the belts "could constitute a violation of international human rights standards which prohibit cruel, inhumane or degrading treatment or punishment"), *available in* 1996 WL 10243365; *cf.* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); Helling v. McKinney, 509 U.S. 25, 35 (1993) (holding that whether the defendant's behavior constituted cruel and unusual punishment depends upon a dual standard of inquiry consisting of both subjective and objective elements); Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 560-62 (1994) (outlining the origins of the Cruel and Unusual Punishment Clause and the Framers' intentions when drafting the Eighth Amendment).

Americans adopted the language of the English Bill of Rights of 1689 and incorporated it into state and federal constitutions "in an effort to curb the imposition of torture or cruel punishments." *Id.* at 561. After the United States Constitution was ratified, the inclusion of the Eighth Amendment into the Bill of Rights was initiated by "criticisms of [the Constitution's] failure to provide protection for convicted criminals." *Id.* The Framers were concerned about the legislature's authority to determine appropriate punishments for crimes, and thus, they included in the Bill of Rights a "prohibition upon cruel and unusual punishments." *Id.* at 561-62.

22. *See* Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt,'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A (relating the defense attorney's concern in the Chavez murder trial that the shock belt accident may have prejudiced jurors), *available in* 1996 WL 2109577; *Use of Stun Belts Is Abuse of Power*, L.A. TIMES, July 19, 1998, at B7 (questioning the belt's use as "cruel and unusual" and thus, against the law), *available in* 1998 WL 2447230; *cf.* TEX. CODE CRIM. PROC. ANN. art. 38.03 (Vernon Supp. 1998) (providing that "[a]ll persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial"); Massey v. State, 154 Tex. Crim. 263, 269, 226 S.W.2d 856, 860 (1950) (holding that the presumption of innocence follows every criminal defendant throughout trial); Cloud v. State, 150 Tex. Crim. 458, 461, 202 S.W.2d 846, 848 (1947) (defining the presumption of innocence as "an assumption which prevails as the judgment of the law until the contrary is proven").

23. *See* People v. Garcia, 66 Cal. Rptr. 2d 350, 354 (1997) (arguing that "the threat that sudden movement will cause a debilitating electric shock may cause 'psychological' restraint which may prevent wearers from communicating with their counsel"); People v. Melanson, 937 P.2d 826, 835-36 (Colo. App. 1996) (discussing the defendant's assertion that the "reasonable fear of the belt . . . affected his mental faculties" and prevented him from participating "fully and meaningfully in his trial").

The lawyer-client privilege was codified in Texas as a rule of evidence. TEX. R. EVID. 503. The privilege promotes unrestrained communications between an attorney and a client. *See* Maryland Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 458 (Tex. 1982) (proposing that the purpose of the attorney-client privilege is to ensure "unrestrained communications between an attorney and client"); Austin v. State, 934 S.W.2d 672, 673 (Tex. Crim. App. 1996) (en banc) (explaining that the "purpose of attorney-client privilege is to promote communication between attorney and client"); Cruz v. State, 586 S.W.2d 861,

As the use of electro-shock security devices, such as the REACT belt, spreads through the American penal system,[24] courts and legislatures will be forced to evaluate the constitutional arguments made above. This Comment attempts to address and answer those exact issues in regard to the REACT belt. Part II of this Comment discusses how the belt works, and the physical and mental effects that result from its use. Part III examines the constitutionality of forcing criminal defendants to wear the REACT belt at trial by focusing on the history and modern interpretation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. Part III also compares the wearing of the belt to two recognized legitimate means of inflicting punishment prior to a conviction: denial of pretrial bail and shackling of a defendant. Part IV analyzes whether the use of the security belt prevents a client from effectively communicating with his attorney, thereby denying the defendant the due process protections provided by the Sixth Amendment.[25] Part V then evaluates the constitutionally-mandated presumption of innocence and assesses whether the belt, coupled with its potential for inadvertent activation, has the capacity to destroy that right.[26] Part VI considers the belt's use in Texas and examines its constitutionality under the Texas Constitution. Finally, Part VII argues that the belt's use should be indefinitely suspended or, in the alternative, its voltage should be decreased to a more reasonable level.

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865 (Tex. Crim. App. 1979) (stating that the chief purpose of the privilege is to facilitate communications between attorneys and their clients).

24. *See* John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (stating that more than 1,200 belts have been sold in the United States since they were first introduced in 1991), *available in* 1997 WL 4186285. The belts are currently used by the U.S. Bureau of Prisons, the U.S. Marshals Service, and prisons in such states as Washington, Alaska, Colorado, Delaware, Georgia, Maryland, and California. *See id.*; *see also* RACC Indus., Inc. v. Stun-Tech, Inc., No. 66802, 1994 WL 723714, at *1 (Ohio Ct. App. Dec. 29, 1994) (discussing the licensing agreement between Stun-Tech and its Maryland customers).

25. *See* U.S. CONST. amend. VI (stating, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense").

26. *See id.* (providing the right to an impartial jury in all criminal prosecutions); *see also* Taylor v. Kentucky, 436 U.S. 478, 485-86 (1978) (stating that "[w]hile use of the particular phrase 'presumption of innocence' . . . may not be constitutionally mandated, the Due Process Clause of the Fourteenth Amendment must be held to safeguard 'against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt'"); *In re* Winship, 397 U.S. 358, 363 (1970) (providing that the reasonable doubt standard "provides concrete substance for the presumption of innocence" that lies at the bedrock of our criminal justice system); *Dallas Murderer Gets Death Sentence: Prosecutors Have Alleged That Juan Chavez Was Involved in Multiple Killings, but He Was Convicted of Only One*, FORT WORTH STAR-TELEGRAM, Mar. 28, 1996, at 26 (outlining the accidental activation of the shock belt in the Chavez trial), *available in* 1996 WL 5529696.

II. THE REACT SECURITY BELT: SECURITY MEASURE OR TORTURE DEVICE?

A. *The Belt in Action*

The REACT security belt is an electronic shocking device that is secured around a prisoner's waist.[27] It was first introduced to the criminal justice system in 1993[28] and is currently a controversial topic.[29] Developers of the belt promote it as an alternative to using leg-irons or shackles when transporting potentially dangerous or violent prisoners.[30] Increasingly, the belt has also been used to guard against the prisoners' escape attempts, taking of hostages, or injury to the judge, jury, attorneys, or spectators.[31] Unfortunately, the increase in popularity of the belt in the early 1990s led to numerous examples of improper and unnecessary use.[32]

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27. *See* Julie Tamaki, *Concerns Over Jail Stun Guns Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (discussing where the belt is placed on a defendant's body), *available in* 1997 WL 2197123.

28. *See* Jane Meredith Adams, *Courtroom Shocker: Use of Stun Belts on Prisoners Criticized,* NEWSDAY, Aug. 16, 1998, at A19 (describing the belt's introduction in 1993 in its present form), *available in* 1998 WL 2681573; *United States: Amnesty Calls for Ban on Stun Belts*, INTER PRESS SERV., June 12, 1996 (discussing how since the belt's release, the institutions that have purchased it include the U.S. Marshals Service, the U.S. Bureau of Prisons, and greater than 100 prisons and county agencies in sixteen states), *available in* 1996 WL 10243365.

29. *See* Julie Tamaki, *Concerns over Jail Stun Guns Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (asserting that conflicting opinions exist in the debate over the use of electronic stun belts on prisoners), *available in* 1997 WL 2197123; *Use of Electrical Shock Belt on Inmate Sparks Criticism Advocates Say His Refusal to be Quiet Didn't Merit Jolt*, DALLAS MORNING NEWS, Aug. 16, 1998, at 16A (portraying the heart of the controversy to be whether Ronnie Hawkins "should have been shocked simply because he wouldn't shut up"), *available in* 1998 WL 13095188.

30. *See United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (stating that Stun-Tech recommends the use of the stun belt as an alternative restraint mechanism "when transporting potentially violent prisoners").

31. *See* Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (describing the belt's function as a protective measure against escapes), *available in* 1996 WL 3555939; *see also Stun Belt Turns Court into Cattle Pen*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 1994, at 10A (describing how one defendant was "required to sign a form advising him the belt could be activated if he made any outburst, hostile movement, tampering attempt, escape attempt, or failed to comply with a command or concealed his hands from the deputys' sight), *available in* 1994 WL 6816127.

32. *See* Anne-Marie Cusac, *Shock Value: U.S. Stun Devices Pose Human-Rights Risk*, PROGRESSIVE, Sept. 1, 1997, at 28 (quoting an ACLU representative as saying that "[s]tun belts offer enormous possibilities for abuse and the infliction of gratuitous pain"), *available in* 1997 WL 8972567; *see also United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (discussing Stun-Tech's admission that stun belts have been accidentally activated by law enforcement officers).

One such incident left a prisoner incapacitated when the belt inadvertently shocked him while he was communicating with his attorney during a pretrial hearing break.[33]

Two versions of the REACT belt are currently employed.[34] One is a clearly visible belt that fastens around the waist of the prisoner and has steel handcuff rings attached in the front.[35] This model is mainly used when transporting prisoners.[36] The other is less conspicuous and is designed to be worn under the defendant's clothing while in the courtroom.[37] This latter version of the REACT stun belt is made from a four-inch wide elastic band that wraps around the waist and fastens with Velcro.[38] Both models of the belt are powered by two nine-volt batteries connected to prongs that are attached to the inmate over the left kidney region.[39]

The belt may be activated from as far away as 300 feet, and once activated, delivers an eight-second, 50,000-volt shock.[40] This high-pulsed

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33. *See United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (reporting an incident in which the defendant was incapacitated by the activation of a stun belt while standing in front of the jury).

34. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (recognizing the two available styles of the belt), *available in* 1996 WL 9254174; John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (describing the two types of stun belts currently utilized in Clark County, Oregon), *available in* 1997 WL 4186285.

35. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (discussing the high-security version of the stun belt), *available in* 1996 WL 9254174; John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (detailing features of the belt used for transporting prisoners), *available in* 1997 WL 4186285.

36. *See* John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (contrasting the two versions of the belt), *available in* 1997 WL 4186285.

37. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (describing the high-security version of the belt in comparison with another less-visible one), *available in* 1996 WL 9254174.

38. *See* Larry Gerber, *Order in the Court?: With Shocking Restraint*, ASSOCIATED PRESS, Apr. 8, 1994 (describing the components of the REACT stun belt), *available in* 1994 WL 10133864.

39. *See id.*

40. *See* People v. Melanson, 937 P.2d 826, 835 (Colo. App. 1996) (discussing the use of the stun belt to restrain and immobilize defendants when activated); Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (explaining the capabilities of the stun belt), *available in* 1996 WL 3555939. Reports of the voltage actually emitted by the belt vary from 45,000 to 50,000 volts. *See, e.g.*, John Painter, Jr.,

electrical current travels through the body along blood channels and nerve pathways.[41] The belt's electrical emission knocks down most of its victims, causing them to shake uncontrollably and remain incapacitated for up to fifteen minutes.[42]

According to Dennis Kaufman, president of the REACT belt's manufacturing company, the belts have been sold to many criminal corrections departments across the country.[43] Although a shock of 50,000 volts appears to be dangerous, Kaufman contends that the belt is safe and causes no permanent injury.[44] However, no formal medical testing has been conducted on the belt.[45] Although one independent study was conducted

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Unruly Prisoners Get Charge from Crime-Fighting Belt, PORTLAND OREGONIAN, June 30, 1997, at B2 (reporting that the stun belt emits an eight-second, 45,000-volt emission), *available in* 1997 WL 4186285; *The Power to Shock*, ST. LOUIS POST-DISPATCH, May 7, 1994, at 14B (claiming that a 50,000 volt, eight-second current flows from the belt), *available in* 1994 WL 8154519; *Stun Belt Turns Court into Cattle Pen*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 1994, at 10A (discussing the belt's 50,000-volt discharge when activated), *available in* 1994 WL 6816127.

41. *See United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (discussing the electrical current's route through the human body).

42. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18, *available in* 1996 WL 9254174; *see, e.g.*, John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (describing the "nasty gizmo" as one capable of "quickly knocking down even the biggest and most bellicose prisoner"), *available in* 1997 WL 4186285; Julie Tamaki, *Concerns over Jail Stun Guns Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (describing the belt's purpose as one of immobilization), *available in* 1997 WL 2197123.

43. *See* Minerva Canto, *Jolt from Stun Belt Brings Civil Rights Inquiry*, SAN DIEGO UNION-TRIBUNE, Aug. 7, 1998, at A3 (describing the call for more stringent guidelines over the activation of belts, "which are used by police agencies throughout the country"), *available in* 1998 WL 4024223; Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (discussing that belts "have been sold to dozens of corrections departments nationwide"), *available in* 1996 WL 3555939.

44. *See* Dipankar De Sarkar, *Human Rights: Amnesty Targets Electro-Shock Torture Weapons*, INTER PRESS SERV., Mar. 3, 1997 (pointing out that "all the companies marketing these weapons claim they are medically safe and non-lethal if used properly"), *available in* 1997 WL 7073977; Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (emphasizing that Stun-Tech represents that the belt is safe and that the company requires all buyers to take a safety training course), *available in* 1996 WL 3555939; *see also* Anne-Marie Cusac, *Shock Value: U.S. Stun Devices Pose Human-Rights Risk*, PROGRESSIVE, Sept. 1, 1997, at 28 (reporting that the United States Commerce Department classifies electro-shock security belts as police equipment and not as torture items), *available in* 1997 WL 8972567.

45. Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their New Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (reporting that no "independent, refereed medical study has [ever] been conducted on the REACT belt"), *available in* 1996 WL 9254174; *Interview: Panelists Discuss Michigan's Proposal to Use Stun*

on anesthetized pigs,[46] it failed to shed light on what physical and psychological side-effects humans may experience as a result of the belt's activation.[47]

B. *Physical and Mental Effects of the Belt*

All prisoners ordered to wear the stun belt must sign a form entitled "Inmate Notification of Custody Control Belt Use,"[48] notifying them that activation of the belt causes immediate immobilization and may result in defecation and urination.[49] Additionally, this waiver discusses how the belt's metal prongs may leave welts on the victim's skin after the belt has been activated; these welts may take as long as six months to heal.[50] Although the waiver discusses some of the most obvious effects, it fails to address the potential for other more dangerous reactions to the belt's electrical current.

Even though electrocution has always been known to cause short-range effects, new medical evidence on electrocution suggests that mid- and long-range effects may also exist.[51] Side effects of electrocution are clas-

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Belts on Inmates Who Are Working on Chain Gangs, INTERNIGHT, Mar. 13, 1997 (discussing Amnesty International's concern that the belt "has not been subjected to any kind of independent medical testing"), *available in* 1997 WL 10274143.

46. *See* Anne-Marie Cusac, *'Stunning' Chain Gang Prisoners Is Malevolent, Inhumane and Sometimes Fatal*, WIS. ST. J., July 9, 1996, at 7A (stating that REACT belt advertising brochures are accompanied by an affidavit signed by medical doctor, Robert Stratbucker, M.D. who tested the belt on anesthetized pigs), *available in* 1996 WL 10530319; *see also* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (discussing the differences between a human being fearing electrocution and an anesthetized swine), *available in* 1996 WL 9254174.

47. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (discussing the narrow scope of the study), *available in* 1996 WL 9254174.

48. *See United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (describing the United States Prison Bureau's mandate to sign a form which is "virtually identical to that promoted by Stun-Tech for use by all law enforcement agencies").

49. *See id.*

50. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18, *available in* 1996 WL 9254174.

51. *See* Jean-Pierre Wolff, *Protecting Yourself When Working on High-Power Circuits*, EC&M ELEC. CONSTR. & MAINTENANCE, May 1, 1997, at 33 (listing the various time-based side effects), *available in* 1997 WL 10224576; *see also* John F. Rekus, *Shocking Experiences; Understanding How Electrical Injuries Occur Is an Important First Step to Their Prevention in the Workplace*, OCCUPATIONAL HAZARDS, Feb. 1, 1997, at 23 (listing several ways in which electrical energy may harm humans), *available in* 1997 WL 10435261. Examples of harm suffered after coming into contract with an electrical current include burning

sified into three time-based categories: (1) immediate, (2) secondary, and (3) long range.[52] Immediate side effects include confusion, amnesia, headaches, cessation of heartbeat, burning, and cessation of breathing.[53] Secondary side effects can last hours, or even days, after the initial shock and include paralysis, muscular pain, swelling, headaches, vision impairment, and heart irregularities.[54] Long-range side effects manifest themselves weeks to years after the shock and, among other effects, include speech and writing difficulties, paralysis, and the loss of taste.[55] Although concrete evidence regarding the effects of the REACT belt itself is lacking, similar side effects are likely to result from the belt's electrical emission.

Use of the REACT belt may also cause more serious, undetectable physical injuries.[56] The British Forensic Science Service found that high-voltage, short-duration impulses, similar to those inflicted by the belt, could cause heart attacks, ventricular fibrillation,[57] and possibly death in

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tissue, involuntary muscle contractions, and irregular heartbeat. *See id.* Additional types of injuries include the inability to breathe brought about by paralysis of the nerve centers controlling breathing, as well as cardiac arrest, a result of paralyzation of the nerves controlling the heart rhythm. *See id.* These effects depend on four factors: (1) internal body resistance, (2) voltage of the circuit, (3) the amount of current that flows through the body, and (4) the path the electricity travels through the body. *See id.*

52. *See* Jean-Pierre Wolff, *Protecting Yourself When Working on High-Power Circuits*, EC&M ELEC. CONSTR. & MAINTENANCE, May 1, 1997, at 33, *available in* 1997 WL 10224576.

53. *See id.* (listing side effects that occur immediately upon electrical shock); *see also* John F. Rekus, *Shocking Experiences; Understanding How Electrical Injuries Occur Is an Important First Step to Their Prevention in the Workplace*, OCCUPATIONAL HAZARDS, Feb. 1, 1997, at 23 (listing effects of varying intensities of current), *available in* 1997 WL 10435261.

54. *See* Jean-Pierre Wolff, *Protecting Yourself When Working on High-Power Circuits*, EC&M ELEC. CONSTR. & MAINTENANCE, May 1, 1997, at 33 (detailing possible side effects that may occur during the hours and days following the initial shock), *available in* 1997 WL 10224576.

55. *See id.* (cataloging the conceivable effects of electrical shock that may occur in the weeks and years following the incident).

56. *See United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (warning that the use of the stun belts could result in injuries that are initially undetectable).

57. *See* TABER'S CYCLOPEDIC MEDICAL DICTIONARY 722-23 (18th ed. 1997) (defining ventricular fibrillation); Margie Patlak, *When Heartbeats Go Haywire: New Treatments Can Save Lives*, FDA CONSUMER, Apr. 1, 1997, at 12 (defining ventricular fibrillation as an inefficient and irregular heartbeat that affects the lower chambers or ventricles of the heart), *available in* 1997 WL 10609274. According to Taber's Cyclopedic Medical Dictionary, ventricular fibrillation is:

> The primary mechanism and arrhythmia seen in sudden cardiac arrest. Organized electrical activity and synchronized mechanical pumping activity are absent. The electrocardiogram shows a chaotic, warry baseline. If ventricular fibrillation is not termi-

people with epilepsy or individuals using psychotropic medications.[58] These latent physical reactions to the belt's charge heighten the concern in cases of prisoners whose hearts may initially appear healthy but are later found to suffer from a congenital defect.[59]

For example, Harry Landis, a State of Texas corrections officer, was shocked twice by a shield that uses a shocking mechanism similar to the belt.[60] The shield delivered two 45,000-volt shocks as part of a training

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nated rapidly with defibrillation, blood flow to the brain is cut off, causing brain damage. Untreated ventricular fibrillation leads to death.

TABER'S CYCLOPEDIC MEDICAL DICTIONARY 722-23 (18th ed. 1997).

58. *See* Anne-Marie Cusac, *'Stunning' Chain Gang Prisoners Is Malevolent, Inhumane and Sometimes Fatal*, WIS. ST. J., July 9, 1996, at 7A, *available in* 1996 WL 10530319. According to a 1990 study by the British Forensic Science Service, "high-voltage, high-peak, short duration impulses similar to those the stun belt inflicts could cause heart failure and death." *Id.* A three-to-four second shock will likely cause complete incapacitation of the body for a full fifteen minutes. *See id.* (stating that a shock by a stun belt "knocks prisoners to the ground for up to 15 minutes"). Further, the scientists concluded that because the electrical shock "is distributed via electric currents throughout the entire body, including the brain, the chest region, and the central nervous system . . . 'anyone in contact with the victim's body at the time of shocking was also likely to receive a shock.'" Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18, *available in* 1996 WL 9254174; *see also* Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (reiterating Amnesty International's claim that the stun belts could cause heart attacks), *available in* 1996 WL 3555939.

59. *See United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (citing doctors' warnings of "undetectable risks" involving hearts that appear to be healthy but are later found to be afflicted with "a congenital problem or conduction mechanism which could result in arrhythmia"). A United States company that makes taser guns, which are similar shocking mechanisms, cites to a U.S. Consumer Protection Safety Commission report which describes the taser gun as non-lethal to healthy adults. *See id.* However, Terence B. Allen, a forensic pathologist, argues that some medical conditions, including drug abuse and heart disease, may increase the likelihood that the taser will prove to be lethal. *See id.* Allen argues that "[i]t seems only logical that a device capable of depolarizing skeletal muscle can also depolarise heart muscle and cause fibrillation under certain circumstances." *Id.*

60. *See* Anne-Marie Cusac, *Stunned by Brutality: Wisconsin's Use of Stun Belts on Chain Gangs Is a Gross Violation of Human Rights*, CAPITAL TIMES (Madison, Wis.), June 9, 1997, at 1C (reiterating the facts of the death of Texas Corrections Officer Harry Landis by means of an electro-shock shield similar to the stun belt), *available in* 1997 WL 7065281; Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (discussing the death of a Texas corrections officer after a shock from a stun-shield similar in design to the stun belt), *available in* 1996 WL 9254174.

exercise.[61] Shortly after receiving the second shock, Landis died.[62] His autopsy indicated that he suffered a cardiac dirhythmia following the electrical shock, which threw his heart into a different rhythmic beat and subsequently caused his death.[63] John McDermit, president of the company that manufactured the shield, refused to acknowledge that the electric shock killed Landis.[64] The Coryell County Justice of the Peace indicated, however, that he believed that the electric shock caused Landis's death.[65]

Physical effects are not the only possible consequence of activating the security belt. Stun-Tech's literature promotes the belt to law enforcement officials as necessary "for total psychological supremacy . . . of potentially troublesome prisoners."[66] According to Jim Kronke, a distributor and trainer for Stun-Tech, the belt's effect on prisoners is, in fact, primarily psychological.[67] Furthermore, Stun-Tech argues that the belt acts more as a deterrent rather than a means of actual punishment because of the tremendous amount of anxiety that results from wearing a belt that packs a 50,000-volt punch.[68] If these claims of heightened anxiety are true, they are quite significant because defendants could argue that the belt so unnerves them that they are unable to meaningfully participate, communicate, or assist in their own defense.[69] Moreover, use of the REACT belt raises questions about the nature of penal institutions and punishments

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61. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18, *available in* 1996 WL 9254174.

62. *See id.*

63. *See id.*

64. *See id.* (presenting the manufacturer's belief that the death of Harry Landis was merely a coincidence and "just happened to be a timing problem").

65. *See id.* (explaining that, according to Corynell County Justice of the Peace Jimmy Wood, an autopsy and a subsequent inquiry into Landis' death revealed that Landis "died as a result of cardiac dirhythmia due to coronary blockage following electric shock by an electronic stun shield").

66. *Id.*

67. *See id.* (quoting Jim Kronke, a Stun-Tech distributor and trainer, with respect to the psychological effect of the belt on prisoners). Kronke stated that "if it ever kills anyone," then "I think it's going to be from fright." *Id.*

68. *See id.* (quoting Dennis Kaufman of Stun-Tech, who stated that "[t]he fear [of wearing the belt] will elevate blood pressure as much as the shock will").

69. *See, e.g.*, United States v. Simmonds, 179 F.R.D. 308, 312 n.2 (1998) (noting the defendant's allusion to the stun belt as a device which scared him); People v. Melanson, 937 P.2d 826, 835-36 (Colo. App. 1996) (discussing the defendant's argument that "because he had a reasonable fear of the belt that affected his mental faculties, he could not participate fully and meaningfully in his trial"); *see also* Bony Saludes, *Scully Tells of Fear over Remote-Controlled Stun Belt*, PRESS DEMOCRAT, May 16, 1996, at B1 (reporting the defendant's conversation with the judge where he revealed that his fear of the belt's activation prevented him from concentrating on his own defense), *available in* 1996 WL 6171370.

under the United States Constitution. In particular, the belt's use implicates the prohibition of cruel and unusual punishments in the Eighth Amendment as well as the protections afforded by the Due Process Clause of the Fourteenth Amendment.

III. THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE

The United States Constitution indicates that there are certain rights the government must protect on behalf of its citizens, and in some cases, non-citizens.[70] The rights stated in the Constitution include the right to be free from cruel and unusual punishment,[71] the right to due process of the law,[72] and the right to a presumption of innocence.[73] Because of the potential for severe physical and mental effects, the REACT stun belt raises a particular question regarding cruel and unusual punishment.

A. *Origins of the Cruel and Unusual Punishment Clause*

The underlying purpose of the Eighth Amendment is to prevent "cruel and unusual punishments."[74] This vague language leaves the clause open for varying interpretations. Furthermore, the lack of available evidence

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70. *See, e.g.*, U.S. CONST. amend. I (listing the right to freedom of religion, speech, and the press as well as the rights to assemble and to petition the government); U.S. CONST. amend. IV (stating the right of people to be secure in their homes, persons, papers and effects in addition to protecting them from unreasonable searches and seizures); U.S. CONST. amend. V (listing the right to due process of law and just compensation); U.S. CONST. amend. VIII (requiring that no person shall be subject to excessive fines or cruel and unusual punishment); U.S. CONST. amend. XIV (providing all American citizens the rights to all privileges and immunities as a U.S. citizen as well as due process of law and equal protection).

71. *See* U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

72. *See* U.S. CONST. amend. V (providing, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV, § 1 (stating that no state shall "deprive any person of life, liberty, or property, without due process of law").

73. *See* U.S. CONST. amend. VI (listing the right to trial by an impartial jury).

74. *See* U.S. CONST. amend. VIII (providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*") (emphasis added); *see also* Tessa M. Gorman, Comment, *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, 475 (1997) (stating that the Punishment Clause seeks to uphold the "dignity of man") (citation omitted); Raymond A. Lombardo, Note, *California's Unconstitutional Punishment for Heinous Crimes: Chemical Castration of Sexual Offenders*, 65 FORDHAM L. REV. 2611, 2635 (1997) (asserting that the purpose of the Eighth Amendment punishment clause is to remind us that "even the vilest criminal remains a human being possessed of common human dignity") (citation omitted).

from the Framers of the Constitution and the drafters of the Bill of Rights grants wide interpretive discretion to the courts.[75] As a result, the scope of the Cruel and Unusual Punishment Clause is not clearly defined.

Although the clause was not ratified until 1791 as the Eighth Amendment,[76] its philosophical groundwork can be traced back to the earliest developments of Western culture, when the prohibition against excessive punishments first appeared in the pages of the Old Testament.[77] God gave Moses the *lex talionis*, or the law of retaliation,[78] which mandated that the punishment correspond to the crime committed.[79] This notion of proportionality was reaffirmed in three chapters of the Magna Carta that prohibited excessive punishment and was later recognized as a fundamental law of the people.[80]

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75. *See* Furman v. Georgia, 408 U.S. 238, 238-64 (1972) (reaffirming the long-standing recognition that the Eighth Amendment Punishment Clause cannot be bound to one precise meaning and discussing only two debates from state ratifying conventions in Massachusetts and Virginia); Trop v. Dulles, 356 U.S. 86, 89 (1958) (finding the scope of the Eighth Amendment to be at best tenuous); Wilkerson v. Utah, 99 U.S. 130, 136-37 (1879) (describing the difficulty surrounding any effort to define exactly the constitutional provision).

At the Massachusetts convention, Mr. Holmes described his fear that Congress would have an unchecked right to prescribe punishments for certain crimes. *See Furman*, 408 U.S. at 259. Patrick Henry mirrored that concern at the Virginia convention. *See id.* While these concerns provide some insight into the intent underlying the Eighth Amendment, it was not necessarily designed to prohibit torturous punishments exclusively. *See id.* at 260. Rather, both Henry and Holmes were additionally concerned with the necessity of restraining legislative power. *See id.* The only other evidence that exists of the intent underlying the Eighth Amendment are excerpts from debates in the First Congress regarding the ratification of the Bill of Rights. *See id.* at 262. However, the conversation revolved around the ambiguity in the clause's language, rather than the validity of the clause itself. *See id.*

76. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (discussing the history of the Punishment Clause and its subsequent inclusion in the Bill of Rights).

77. *See Exodus* 21:23-25 (stating "[a]nd if any mischief follows, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe"); *Leviticus* 24:19-20 (stating "[a]nd if a man cause blemish in his neighbor, as he hath done, so shall it be done to him: Breach for Breach, eye for eye, tooth for tooth; as he hath caused a blemish in man, so shall it be done to him").

78. *See* BLACKS LAW DICTIONARY 822 (5th ed. 1979) (defining the law of retaliation as *lex talionis*); *see also* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 844 (1969) (discussing that, although harsh by modern standards, *lex talionis* still established a limit on punishment).

79. *See* Anthony F. Granucci *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 844 (1969) (citing *Leviticus* 24:19-20).

80. *See* MAGNA CARTA chs. 20-22 (1215) (establishing the concept of proportionality of punishment), *reprinted in* LOUIS B. WRIGHT, MAGNA CARTA AND THE TRADITION OF LIBERTY 54 (1976); Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 560-

The idea of proportionality later grew in England, as the government enjoyed an unchecked right to punish.[81] Abuse of this power eventually gave rise to demands for protection from arbitrary punishment and disproportionate penalties.[82] As a result, the phrase "cruel and unusual punishment" appeared in the English Declaration of Rights of 1689 as an objection to the rendering of punishments not authorized by statutes and the imposition of disproportionate penalties.[83]

The cruel and unusual punishment clause of England's Declaration of Rights was subsequently adopted in the declarations of rights of several American colonies.[84] For instance, in their assertion for liberty within the

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61 (1994) (opining that the English notion of proportionality between crimes and punishments was influenced by the Magna Carta). Prior to the adoption of its Bill of Rights in 1689, England "had developed a firm common law prohibition against excessive punishment." *Id.* at 561.

81. *See* Furman v. Georgia, 408 U.S. 238, 242-43 (1972) (Douglas, J., concurring) (discussing how after the Norman Conquest of England in 1066, "arbitrary fines were replaced by discretionary amercements"); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 845-46 (1969) (recognizing the Magna Carta as a reaction to discretionary amercements in the Nordic culture); *see also* 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 449-62, 513-18 (2d ed. 1898) (discussing criminal law, types of punishment, and amercements during the time of the Norman conquest). The thirteenth-century amercement was a mandatory fine imposed as a punishment for some crime. *See id.* at 513. The fine was an offering to the King in return for favor or escape from his displeasure. *See id.*

82. *See Furman*, 408 U.S. at 317 (Douglas, J. concurring) (postulating that the "Bloody Assizes and subsequent rebellion were the events that spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments"). The assizes referred to were a series of treason trials, where the presiding justice was said to have an "insane lust for cruelty." *Id.*

83. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 860 (1969). The Cruel and Unusual Punishment Clause was enacted as (1) "an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court," and (2) "a reiteration of the English policy against disproportionate penalties." *Id.* England's prohibition against excessive punishments was reflected in its law reports and charters. *See* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 561 (1994).

84. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840-43 (1969) (identifying Virginia as the first colony to convene and determine whether to declare itself as free and independent from Great Britain); *see* Jonathan A. Vold, Comment, *The Eighth Amendment "Punishment" Clause After* Helling v. McKinney*: Four Terms, Two Standards, and a Search for Definition*, 44 DEPAUL L. REV. 215, 218-19 (1994) (reiterating that upon securing their independence, many colonies incorporated a cruel and unusual punishment clause into their initial constitutions). Following its inclusion in Virginia's constitution, eight other states adopted the Cruel and Unusual Punishment Clause as stated in the 1689 English Bill of Rights. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL.

colony, Massachusetts Bay colonists declared "[f]or bodilie [sic] punishments we allow amongst us none that are inhumane, Barbarous or cruel."[85] Virginia, as well as eight other states, subsequently incorporated the clause into their state constitutions.[86] In 1787, the federal government included the clause within the Northwest Ordinance,[87] and, following ratification by nine states in 1791, the clause became known as the Eighth Amendment to the United States Constitution.[88]

B. *The Supreme Court's Interpretation of the Eighth Amendment*

The particular punishments banned by the Cruel and Unusual Punishment Clause of the Eighth Amendment have never been clearly delineated.[89] Judges, as well as scholars, have differed over the clause's meaning.[90] The Supreme Court of the United States, however, has at-

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L. REV. 830, 840 (1969); *see also* Tessa M. Gorman, Comment, *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) (noting that Virginia's Cruel and Unusual Punishment Clause contained language taken from England's Declaration of Rights); *see generally* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 18-20 (1996) (examining the drafting of the 1776 Virginia Bill of Rights).

85. *In re* Kemmler, 136 U.S. 436, 446 n.1 (1890); *see* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 851 (1969) (reproducing the language as it appeared in the laws of Massachusetts).

86. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969). Granucci also commented that subsequent formulations of the Cruel and Unusual Punishment Clause were "considered constitutional 'boilerplate.'" *See id.*

87. *See* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 386 (1971) (indicating that the 1787 Northwest Ordinance included the right of "prohibition of cruel and unusual punishments").

88. *See* U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); *see also* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969) (discussing the inclusion of the clause in the Virginia Constitution, the Northwest Ordinance, and finally the United States Constitution).

89. *See* Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879) (stating that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted"); JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED 26-5 (3d ed. 1996) (describing the early jurisprudence of the Eighth Amendment).

90. *See* Anthony A. Avery, Note, *Cruel and Unusual Punishments—Use of Excessive Physical Force Against an Inmate May Constitute Cruel and Unusual Punishment Even Though the Prisoner Does Not Suffer Significant Injury*, 24 ST. MARY'S L.J. 539, 542-43 (1993); *see, e.g.*, Trop v. Dulles, 356 U.S. 86, 101 (1958) (utilizing modern sensibilities and standards of decency in determining whether a punishment is cruel and unusual); Weems v. Georgia, 217 U.S. 349, 367 (1910) (stating that punishment should be imposed in propor-

tempted to define the clause more precisely over time.[91] Although early Supreme Court jurisprudence prohibited particular penalties considered cruel and unusual, more modern interpretations have added considerations of proportionality and "modern standards of decency."[92]

1. *Wilkerson v. Utah* (1878)

The Supreme Court first attempted to define the scope of the Punishment Clause nearly eighty years after its inclusion as the Eighth Amendment to the Constitution.[93] In *Wilkerson v. Utah*,[94] the Court held that the death penalty was a permissible form of punishment under the Eighth Amendment.[95] In that case, the defendant was convicted of murder in the first degree and condemned by the trial court judge to be shot to death.[96] Wilkerson challenged a Utah statute, which mandated that "every person guilty of murder in the first degree shall suffer death,"[97] maintaining that the statute violated the Eighth Amendment.[98] The Court rejected his claim and concluded that shooting was not an unnecessarily cruel form of punishment.[99]

The Court reached its conclusion through a historical analysis in which it outlined the general acceptance of certain practices and traditional

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tion to the offense); *Wilkerson*, 99 U.S. at 136 (excluding the death penalty from the clause's prohibitions).

91. *See* Anthony A. Avery, Note, *Cruel and Unusual Punishments—Use of Excessive Physical Force Against an Inmate May Constitute Cruel and Unusual Punishment Even Though the Prisoner Does Not Suffer Significant Injury*, 24 ST. MARY'S L.J. 539, 543 (1993).

92. *See, e.g., Trop*, 356 U.S. at 101 (adopting a standard that evolves with the tastes of modern society to examine punishments under the Eighth Amendment); *Weems*, 217 U.S. at 367 (enacting the principle of proportionality to Eighth Amendment considerations); *Wilkerson*, 99 U.S. at 136 (affirming punishments of cruelty or those that are torturous as forbidden by the Constitution).

93. *See Wilkerson*, 99 U.S. at 134-36 (attempting to define the scope of the Amendment).

94. 99 U.S. 130 (1878).

95. *See id.* at 136 (holding that the death sentence imposed upon the defendant did not fall within the category of cruel and unusual punishment).

96. *See id.* at 130-31.

97. *Id.* at 132.

98. *See id.* (outlining the defendant's argument that the appellate court erred in affirming the lower court's sentencing the prisoner to be shot to death).

99. *See id.* at 135-36; *see also* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 21 (1996) (paraphrasing the Court's ruling that execution by firing squad was not repugnant to the Eighth Amendment); Tessa M. Gorman, Comment, *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, 464 (1997) (echoing the Court's holding that shooting is a permissible form of punishment).

methods of execution.[100] In particular, the Court found the use of a firing squad to be an appropriate method of execution because it was a common military practice.[101] The acceptable nature of that practice enabled the Court to conclude that this particular form of the death penalty did not violate the Eighth Amendment.[102] The Court further stated, however, that although federal and territorial punishments of torture or unnecessary cruelty were forbidden by the Eighth Amendment, no concrete definition could be derived from the constitutional provision.[103] The Court's unwillingness to set the scope of the clause and its protections left future courts with a daunting and difficult task.

2. *In re Kemmler* (1889)

Over a decade later, in *In re Kemmler*,[104] a convicted murderer argued that his death sentence was cruel and unusual and would deny him of life and liberty without due process of law, thus violating the constitutions of the State of New York and the United States.[105] Relying upon the rationale utilized in *Wilkerson*, the Court stated:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the constitution. Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies something inhuman and barbarous,—something more than the mere extinguishment of life.[106]

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100. *See Wilkerson*, 99 U.S. at 134-35 (discussing the legitimacy of certain practices based on social acceptance).

101. *See id.* at 134-37.

102. *See id.* at 135-36. The court concluded its discussion by noting "that it is made obligatory upon the [trial] court to prescribe the mode of executing the sentence of death . . . where the conviction is for murder in the first degree, subject, of course, to the constitutional prohibition, that cruel and unusual punishment shall not be inflicted." *Id.* at 137.

103. *See id.* at 135-36.

104. 136 U.S. 436 (1889).

105. *See In re* Kemmler, 136 U.S. 436, 439 (1889) (explaining the defendant's complaints as contained in the application for writ of error); *see also* Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over a Century*, 35 WM. & MARY L. REV. 551, 577-78 (1994) (reproducing the facts and proceedings conducted during Kemmler's trial).

106. *In re Kemmler*, 136 U.S. at 447 (citing *Wilkerson*, 99 U.S. at 135).

The Court's standard, although expressly denouncing torturous behavior, left unanswered what forms of punishment fall within the definition of "inhuman and barbarous."

3. *Weems v. United States* (1910)

In 1910, the Supreme Court expanded the application of the cruel and unusual punishment provision in *Weems v. United States*.[107] In *Weems*, the Court conceded that although "[w]hat constitutes a cruel and unusual punishment has not been exactly decided," the clause clearly excludes those punishments that are inhumane, torturous, or barbarous.[108] The Court focused on the excessiveness of a punishment, stating that it is "a precept of justice that punishment for crime should be graduated and proportioned to offense."[109]

In the case, a Philippine court had convicted a civil servant of falsifying a public document.[110] The defendant was then sentenced to a harsh but common form of punishment called *cadena temporal,* which involved requiring convicts constantly to carry a chain at the ankle, hanging from the wrists, and be subjected to hard and painful labor by the state for fifteen years.[111] Finding this punishment to be repugnant to the Bill of Rights, the Supreme Court held that it could no longer be inflicted on the basis of tradition alone.[112] In reaching this conclusion, the Court examined the ever-changing sentiments of society, stating that the Eighth Amendment is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[113] In effect, the Court's holding in *Weems* interpreted the Eighth Amendment

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107. 217 U.S. 349 (1910).

108. Weems v. United States, 217 U.S. 349, 368 (1910).

109. *Id.* at 367.

110. *See id.* at 357 (reviewing the judgment of the Philippine Supreme Court, which affirmed the conviction of the defendant of "falsifying a 'public and official document'"). Weems was an officer with the Bureau of Coast Guard & Transportation of the United States Government. *See id.* He petitioned the United States Supreme Court to issue a writ of error to the Philippine Supreme Court affirming his conviction. *See id.* Although some questions decided by the Philippine Supreme Court could not be raised in the Supreme Court of the United States, others were amendable to the Court's jurisdiction. *See id.* at 358.

111. *See id.* at 364 (analyzing the punishment of *cadena temporal*). In addition, a person subjected to *cadena temporal* is deprived of marital and parental rights, as well as the right to administer property or dispose of it *inter vivos*, and is also subject to life-long surveillance. *See id.*

112. *See id.* at 367-68 (emphasizing that the fundamental law "prohibiting the infliction of cruel and unusual punishment" was derived from the United States Constitution but must be interpreted and applied by the Philippine courts).

113. *Id.* at 378.

as an evolving provision, leaving the decision as to whether a punishment is constitutional largely dependent upon dynamic societal standards and notions of justice.[114]

4. *Trop v. Dulles* (1958)

The Supreme Court decided very few Punishment Clause cases during the fifty years following the *Weems* decision.[115] However, the case that contributed the most to the Court's ongoing construction of the Punishment Clause was *Trop v. Dulles*.[116] The central question in *Trop* was whether statutory expatriation of a former convict who forfeits his citizenship was punishment.[117] A four-member plurality, led by Chief Justice Warren, found irrelevant whether the statute was labeled as a penal law or was simply penal in nature.[118] Rather, the plurality indicated that punishment was defined by the law's purpose; therefore, a statute depriving a person of rights was punitive in character if that was in fact the legislature's intent.[119]

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114. *Cf. id.* at 379 (recognizing "the wide range of power that the legislature [as opposed to the judiciary] possesses to adapt its penal laws to conditions as they may exist"). In a subsequent case, the Court recognized that the language of the Eighth Amendment was "not precise" and that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

115. The three cases decided during the fifty years after *Weems* are *Badders v. United States*, 240 U.S. 391 (1916), *United States ex rel. Milwaukee Soc. Democratic Publ'g Co. v. Burleson*, 255 U.S. 407 (1921), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). Of particular note is *Resweber*, wherein the Court held that a second electrocution shock, following an unsuccessful attempt, did not "make [the convict's] subsequent execution any more cruel in the constitutional sense than any other execution." Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947). More importantly, however, the Court applied the Eighth Amendment's protections to the states through the Fourteenth Amendment. *See id.* at 463 (reasoning that the Fourteenth Amendment "would prohibit by its Due Process Clause execution by a state in a cruel manner"). This extension was affirmed by majority holdings in *Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968). These cases ratified the extension of the Eighth Amendment to the states because states legislate, sentence, and administer punishment more frequently than the federal government. *See* Powell v. Texas, 392 U.S. 514, 531-32 (1968); Robinson v. California, 370 U.S. 660, 666-67 (1962). Both cases considered whether a person could be punished based on his "status" or "condition" as a narcotic substance abuser. *See Powell,* 392 U.S. at 533; *Robinson*, 370 U.S. at 667.

116. 356 U.S. 86 (1958).

117. *See* Trop v. Dulles, 356 U.S. 86, 87, 94 (1958).

118. *See id.* at 94-95.

119. *See id.* at 96-98. The Court described its process in determining whether a law is penal. *See id.* According to the Court, "[i]f the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." *Id.* at 96. However, the statute is nonpenal if the disability it imposes accomplishes another governmental purpose. *See id.*

In examining the constitutionality of the defendant's punishment, the Court found that while denationalization is not torture *per se*, it is offensive to modern sensibilities, and therefore, violates the Eighth Amendment.[120] The Court relied on *Weems* and reaffirmed what is now considered the objective element of Punishment Clause analysis, wherein "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[121]

Certain principles can be deduced from the Court's interpretation of the Eighth Amendment. For example, in *Wilkerson* and *In re Kemmler*, the Court indictated that the level of cruelty surrounding a particular punishment, in the light of history, could be a factor in determining whether punishment is cruel and unusual.[122] Subsequently, in *Weems* and *Trop*, the Court established the principle that the Eighth Amendment is not confined by its history, but rather evolves within the ever-changing societal standards of decency.[123] These cases also emphasized that courts should consider proportionality between crime and punishment when assessing and determining the appropriate type of punishment.[124] These concepts derived from the early interpretation of the Eighth Amendment continue to affect the scope of the Cruel and Unusual Punishment Clause.

5. The Supreme Court's Modern Eighth Amendment Jurisprudence

Recent cases have bound earlier Eighth Amendment standards into a more cohesive doctrine. For example, in 1976, the Court decided two cases that reaffirmed the objective standard used in the early interpretation of the Eighth Amendment.[125] In these subsequent decisions, the

120. *See id.* at 101-03.

121. *Id.* at 101-02.

122. *See In re* Kemmler, 136 U.S. 436, 446-47 (1889) (charging courts with the duty of determining which punishments are based on common knowledge); Wilkerson v. Utah, 99 U.S. 130, 134-35 (1878) (embarking on a historical analysis, chronicling the acceptance of certain practices, and examining traditional means of execution).

123. *See Trop*, 356 U.S. at 101 (using modern sensibilities and standards of decency as the foundation for determining whether a particular punishment involves an act which is cruel and unusual); Weems v. United States, 217 U.S. 349, 378 (1910) (focusing on the evolving sentiments of public opinion in determining the meaning and scope of the punishment clause).

124. *See Trop*, 356 U.S. at 100 (asserting that "[f]ines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect"); *Weems,* 217 U.S. at 367 (discussing the American "precept of justice that punishment for crime should be graduated and proportioned to offense").

125. *See* Gregg v. Georgia, 428 U.S. 153, 172 (1976) (stating that an assessment of contemporary standards with regard to a particular sanction is relevant but not conclusive);

Court also added a subjective standard of excessiveness with respect to the punishment of criminals.[126]

In *Gregg v. Georgia*,[127] the Court found that the objective standard was relevant but not conclusive.[128] The Court held that, in addition to contemporary public ideals, courts must consider whether a punishment is excessive in relation to the crime.[129] Under this standard, a punishment is excessive and unconstitutional if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[130] Four months later, in *Estelle v. Gamble*,[131] the Court added that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."[132] Although the deliberate indifference standard was specifically created to focus on a prisoner's medical needs, the standard has subsequently been applied broadly to non-medical inmate situations as well.[133]

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see also Estelle v. Gamble, 429 U.S. 97, 101 (1976) (reasserting that the Court has held "repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society'").

126. *See Estelle*, 429 U.S. at 106 (adding deliberate indifference as a factor in determining excessiveness under the punishment clause); *see also Gregg*, 428 U.S. at 173 (discussing how "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment, but is not conclusive").

127. 428 U.S. 153 (1976).

128. *See Gregg*, 428 U.S. at 173 (requiring that the court "look to objective indicia that reflect the public attitude toward a given sanction").

129. *See id.* (establishing the principle that in order for a penalty to conform to the Eighth Amendment, such a penalty must be in accord with the "dignity of man"). The Court noted that this basic, underlying concept of the Eighth Amendment means that the punishment can not be "excessive." *See id.*

130. Coker v. Georgia, 433 U.S. 584, 592 (1977) (citing *Gregg*, 428 U.S. at 173).

131. 429 U.S. 97 (1976).

132. *Estelle*, 429 U.S. at 103-05 (citation omitted). Gamble, the respondent in *Estelle*, was injured while working on a prison assignment. *See id.* at 98. In his suit against the prison facility, Gamble claimed that he had been subjected to cruel and unusual punishment because his back injury was inadequately treated. *See id.* at 98-101 (describing the prison's medical and psychological treatment of Gamble).

133. *See* Wilson v. Seiter, 501 U.S. 294, 302 (1991) (applying a deliberate indifference standard in cases involving prison conditions). In *Wilson v. Seiter*, the Supreme Court reasoned that, in cases challenging prison conditions, "the offending conduct must be *wanton*." *Id.* (emphasis added). However, the Court also noted that "wantonness does not have a fixed meaning but must be determined with 'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.'" *Id. But see* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (determining that no one test should exist when evaluating whether prison conditions violate the Eighth Amendment); Bell v. Wolfish, 441

The "good faith standard," which requires that officers exercise their power only when necessary, originated in *Gregg* and *Estelle* and has been applied more broadly in subsequent Eighth Amendment jurisprudence.[134] In *Whitley v. Albers*,[135] Justice O'Connor, writing for the majority, defined good faith as the standard that should be used to measure whether prison security actions that pose significant risks to inmates are violative of the Constitution.[136] Specifically, she emphasized the need for good faith when assessing punishment to determine whether it inflicted unnecessary and wanton pain on an individual.[137]

Later in *Hudson v. McMillian*,[138] the Court held that the use of excessive force against a prisoner may be considered cruel and unusual punishment even though the inmate suffered no serious injury.[139] Employing the *Whitley* approach, the Court stated that the extent of the injury sustained by an inmate constitutes a single factor in determining whether

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U.S. 520, 545 (1979) (identifying several general principles that guide the examination of the constitutional guarantees of prison conditions).

134. *See* Hudson v. McMillian, 503 U.S. 1, 7 (1992) (reaffirming *Whitley* in stating that "the core of judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm"); Whitley v. Albers, 475 U.S. 312, 319 (1986) (dictating that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel & Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultous cellblock").

135. 475 U.S. 312 (1986).

136. *See* Whitley v. Albers, 475 U.S. 312, 320 (1986) (defining the standard that should be used to determine whether prison security actions that pose significant risks to inmates are protected by the Constitution); Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (providing a list of factors that courts may consider in determining whether the constitutional line has been crossed in situations where the force used by prison officials is questionable). In *Whitley*, a riot occurred at the Oregon State Penitentiary because inmates believed prison guards were using unnecessary force on intoxicated prisoners. *See Whitley*, 475 U.S. at 314-16. Upon being informed of the disturbance, petitioner Harold Whitley, the prison security manager, entered the cellblock to dispel any unfounded beliefs regarding the prisoners taken into segregation. *See id.* However, the riot continued, and as a result, Albers, a prison inmate, sustained severe injuries as well as mental and emotional distress. *See id.* at 317.

137. *See Whitley*, 475 U.S. at 319 (using "obduracy and wantonness" to describe the nature of the behavior prohibited by the Eighth Amendment).

138. 503 U.S. 1 (1992).

139. *See Hudson*, 503 U.S. at 9 (explaining that the presence of a significant physical injury is not determinative of whether excessive force violates the Eighth Amendment). In *Hudson*, a prisoner brought a federal suit alleging that his Eighth Amendment rights were violated by a beating he had received from a correctional officer. *See id.* at 4. One issue the Court faced was whether use of excessive force against a prisoner may constitute cruel and unusual punishment in the absence of serious injury. *See id.*

force could have been construed as necessary.[140] The Court noted that other factors may be considered, including the need for the application of force, the relationship between that need and the force used, and whether a threat was reasonably perceived by officials.[141] However, the Court still refused to establish any rigid requirement that would prevent the use of excessive force and maintained again that "contemporary standards of decency" should determine whether force was necessary.[142]

Although the Supreme Court utilizes a number of broad factors to define the scope of the Eighth Amendment, the Court has never provided a precise meaning for the six words "nor cruel and unusual punishment inflicted."[143] This language has been construed in an elastic manner, in which all definitions, standards, and understandings complement each

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140. *See id.* at 7 (analyzing *Whitley* and determining that the severity of a suffered injury is a factor in identifying the use of "necessary force").

141. *See id.* (outlining the factors to be considered when determining whether the use of force was wanton and unnecessary). These factors, while certainly relevant, are not completely dispositive of those used in determining whether a punishment is cruel and unusual. Equal protection is another factor increasingly recognized as a basic theme implicit in the Cruel and Unusual Punishment Clause. *See* Furman v. Georgia, 408 U.S. 238, 249 (1972) (Douglas, J., concurring) (referring to Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)). The Court in *Furman* reiterated that any penalty could be considered unusual if imposed either arbitrarily or discriminatorily. *See Furman*, 408 U.S. at 249 (recognizing that an equal protection theme is implicit in punishments considered cruel and unusual and that because death penalty provisions are rarely used, a strong presumption of arbitrariness is raised). A study of Texas capital cases from 1924 through 1968 revealed that the death penalty was administered by the courts in a discriminatory pattern during that time. *See id.* at 250. If the imposition of the death penalty is based on race, age, education, or status, the punishment is arbitrary and places the official's reasonable perceptions into question. *See id.* (referring to the study in concluding that most individuals who are executed are "poor, young, and ignorant," and that "[a]lthough there may be a host of factors other than race involved," there is a definite racial difference with respect to executions); *cf. McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (discussing that a defendant alleging an equal protection violation with respect to a conviction must "prove that the decision makers in his case acted with discriminatory purpose").

142. *See Hudson*, 503 U.S. at 8-9.

143. U.S. CONST. amend. VIII. In chronological order, the cases that have interpreted the language contained in the Punishment Clause include: Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878); *In re* Kemmler, 136 U.S. 436, 447 (1890); Weems v. United States, 217 U.S. 349, 368 (1910); and Trop v. Dulles, 356 U.S. 86, 99-101 (1958). *See Hudson*, 503 U.S. at 9 (holding that the presence of substantial physical injury is not the only concern when determining whether excessive force was used in violation of the Eighth Amendment); Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (determining that no single test is appropriate for evaluating whether prison conditions violate the Eighth Amendment); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (adding "deliberate indifferences" as one consideration to interpreting the punishment clause); Trop v. Dulles, 356 U.S. 86, 101 (1958) (delineating "evolving standards of decency" as one factor in ascertaining the meaning of the Eighth Amendment).

other without restricting the punishment clause to a stagnant and unevolving meaning. In this regard, the clause should not be construed too strictly; instead it should be allowed to evolve with the changing wants and needs of society as a whole.[144] As the *Weems* Court acknowledged, "[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."[145]

C. *Reconciling the Cruel and Unusual Punishment Clause and the Use of the REACT Security Belt*

1. Stun Belts As Excessive Punishment

Opponents of the stun belt argue that using the belt is both unusual and, depending on its use, cruel, because it borders on torture.[146] In this regard, opponents claim that the belt's use violates the Cruel and Unusual Punishment Clause.[147] Although the United States Constitution fails to articulate an express prohibition of "torture,"[148] torture is undoubtedly inherent in the notions of cruelty and punishment.[149]

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144. *See Trop*, 356 U.S. at 100-01 (arguing that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

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

146. *See* Hugo Gurdon, *International: State Has Stunning Plan for Jailbreaks*, DAILY TELEGRAPH (London), Mar. 12, 1997, at 12 (describing Amnesty International's argument that the belt inflicts cruel and unusual punishment), *available in* 1997 WL 2293333; *Stun Belt Turns Court into Cattle Pen*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 1994, at 10A (arguing the belt's shock is unusual and cruel), *available in* 1994 WL 6816127.

147. *See, e.g, Stun Belt Turns Court into Cattle Pen*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 1997, at 10A (stating that the shock delivered by the belt "is certainly unusual and borders on cruelty"), *available in* 1994 WL 6816127; *Use of Stun Belt Is Abuse of Power*, L.A. TIMES, July 19, 1998, at B7 (arguing the belt is cruel and unusual and subsequently unlawful), *available in* 1998 WL 2447230.

148. *Cf.* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 46 (1996) (arguing that although torture is not explicitly referenced in a number of constitutional instruments, torture appears to be implicit in the notion of cruel and unusual treatment). Other documents that have neglected to mention torture include the English Bill of Rights, the French *Declaration des droits de l'homme et du citoyen*, and the Canadian Charter of Rights and Freedoms. *See id.* However, the 1948 Universal Declaration of Human Rights added "torture" as a prohibited act against human kind, in addition to using the word "treatment." *See id.*

149. *See id.*; *see also* Hudson v. McMillian, 503 U.S. 1, 9-10 (1992) (finding that the Eighth Amendment's prohibition of cruel and unusual punishment covers force that is "repugnant to the conscience of mankind" (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976))); Estelle v. Gamble, 429 U.S. 97, 102 (1976) (noting that the primary concern of the Eighth Amendment drafters "was to proscribe 'tortures' and other 'barbar[ous]' methods of punishment" (citation omitted)); White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996)

Torture is applicable to a wide range of actions and has been given a number of meanings.[150] However, it has clearly acquired a definition distinct from punishment or treatment.[151] One of the most complete definitions of the term "torture" was formulated at the 1984 United Nations Convention and states that torture is:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted . . . on a person for such purposes as obtaining from him . . . information or a confession, punishing him for an act he . . . has committed or is suspected of having committed, or intimidating him . . . . It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions . . . .[152]

Although the United Nations' definition of torture has no intrinsic force in American law, the Supreme Court has impliedly adopted that definition when interpreting the Cruel and Unusual Punishment Clause.[153]

(finding that the appellant failed to allege "extraordinary facts or unusual conditions" that evidenced a violation of the prisoner's Eighth Amendment rights); Novak v. Beto, 453 F.2d 661, 670-71 (5th Cir. 1971) (defining the scope of cruel and unusual punishment review as being limited to such standards as barbarous behavior or behavior that shocks the conscience); *Ex parte* Granviel, 561 S.W.2d 503, 509 (Tex. Crim. App. 1978) (quoting State v. Woodward, 69 S.E. 385 (1910), for the proposition that the "word 'cruel,' as used in the Constitution, was intended to prohibit torture, [and] agonizing punishment"); Torres v. State, 725 S.W.2d 380, 383 (Tex. App.—Amarillo 1987) (stating that the Eighth Amendment's primary function is to prohibit torture and other barbarous punishments), *vacated en banc*, 761 S.W.2d 3 (Tex. Crim. App. 1988).

150. *Compare* WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1927 (2d ed. 1983) (providing several definitions for "torture"), *with* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 46 (1996) (quoting the United Nation's definition of "torture" for the purpose of its 1984 Convention). Torture is also defined as inflicting severe pain to force information, a confession, or to obtain revenge. *See* WEBSTER'S DELUXE UNABRIDGED DICTIONARY 1927 (2d ed. 1983). In addition, it has been listed as "any method by which such pain is inflicted" or "any severe physical or mental pain, agony or anguish." *Id.*

151. *See* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 46 (1996) (discussing the evolution of the term "torture" since the adoption of the Universal Declaration of Human Rights in 1948).

152. *Id.*; *see* Matthew Lippman, *The Development and Drafting of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 17 B.C. INT'L & COMP. L. REV. 275, 301 & n.230 (1994) (describing the *United Nations Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*). The Declaration was first adopted in 1975 and "was proclaimed as a 'guideline for all States and other entities exercising effective power.'" *Id.* at 300-01.

153. *Cf.* Whitley v. Albers, 475 U.S. 312, 320 (1986) (setting forth considerations, such as whether punishment was applied in good faith or with sadistic and malicious intentions, in determining whether such actions were cruel and unusual).

For example, in *Hudson v. McMillian*,[154] the Court held that the core of a judicial inquiry in determining if excessive force constitutes cruel and unusual punishment is whether the force was applied in a good faith effort to maintain control, or rather, was motivated by malice or a sadistic desire to cause harm.[155] This standard can be reconciled with the United Nations' definition of torture. In particular, actions motivated by intimidation and coercion are proscribed by the United Nations' definition and are often driven by feelings of malice. The Supreme Court has implicitly found malicious actions to be outside the Eighth Amendment's protections by adopting a good faith standard and requiring that the punishment promote the goal of maintaining order and discipline among prisoners.[156]

In summary, prohibitions against cruel and unusual punishment are well-established in American and international law. Punishments that were cruel, inhuman, or barbarous were explicitly banned in the American colonies, and are forbidden today under the Eighth Amendment to the United States Constitution.[157] In addition, the United Nations' definition of torture prohibits "unnecessary cruelty" by including severe physical or mental pain or suffering within its scope.[158]

Use of the stun belt falls squarely within the parameters set forth in the United Nations' definition of torture as well as the Supreme Court's standard regarding cruel and unusual punishment. The belt's electrical emission not only knocks down its wearer, causing him to shake uncontrollably, but also leaves painful welts on the victim's skin that may take up to six months to heal.[159] These initial physical effects are only secondary to more life-threatening effects such as heartbeat irregularities

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154. 503 U.S. 1 (1992).

155. *See* Hudson v. McMillian, 503 U.S. 1, 7 (1992).

156. *Compare Hudson*, 503 U.S. at 7 (discussing the *Whitley* standard and application), *with* WILLIAM A. SCHABAS, THE PROHIBITION OF CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 46 (1996) (quoting the United Nations Convention's definition of torture).

157. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 852-60 (1969) (paraphrasing the evolution of the punishment clause and the actions it prohibited).

158. *See* WILLIAM A. SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE 46 (1996) (discussing the United Nations' definition of torture).

159. *See* John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (acknowledging that the belt's jolt is "enough to knock down virtually any prisoner"), *available in* 1997 WL 4186285; *see also* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (characterizing the belt's painful effects as "devastating" to its victim), *available in* 1996 WL 9254174; Julie Tamaki, *Concerns over Jail Stun Guns Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (stating that "[t]he shock is meant to immobilize a defendant without injury"), *available in* 1997 WL 2197123.

and death.[160] Arguably, these physical effects constitute "severe pain and suffering."

Furthermore, one of the primary uses of the belt, according to its manufacturer, is the belt's ability to impose "psychological supremacy" over its wearer.[161] The psychological effects of being forced to wear a device with the capability of conducting 50,000 volts of electricity through one's body unquestionably causes severe mental suffering. For example, individuals bound in such restraints often experience a sense of fear and humiliation that results in agitation, anger, and depression.[162] Such mental suffering inevitably has an intimidating or coercive effect on the wearer.

Perhaps most disturbing is the potential for stun belt abuse. For example, in *Hickey v. Reeder*,[163] the Eighth Circuit found the use of a stun gun on a prisoner violative of the prisoner's right to be free from cruel and unusual punishment.[164] In that case, the prisoner, J.B. Hickey, had refused to sweep his cell.[165] A corrections officer responded to Hickey's refusal by blasting him with a stun gun.[166] The court found the officer's

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160. *See United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (warning of "unpredictable risks," including arrhythmia, to hearts with congenital problems if shocked by a stun belt); *see also* Jean-Pierre Wolff, *Protecting Yourself When Working on High-Power Circuits*, EC&M ELEC. CONSTR. & MAINTENANCE, May 1, 1997, at 33 (stating that if the electrical current causing erratic heartbeat is not stopped within a short time, death is certain), *available in* 1997 WL 10224576.

161. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (characterizing the belt's effect on prisoners as "very psychological"), *available in* 1996 WL 9254174; John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (stating that the belt's big advantage is the psychology that goes with it), *available in* 1997 WL 4186285.

162. *See* Beth A. Buchanan Staudenmaier, Comment, *Use of Restraints in the Hospital Setting: Is the Law a Help or Hindrance to the Advancement of Changing Medical Ideology*, 22 U. DAYTON L. REV. 149, 152 (1996) (stating that "[i]n addition to physical side effects, numerous detrimental side effects are frequently associated with physical restraints"); *cf.* Laura B. Brown, Note, *He Who Controls the Mind Controls the Body: False Imprisonment, Religious Cults, and the Destruction of Volitional Capacity*, 25 VAL. U. L. REV. 407, 423 (1991) (discussing how a threat, although not physical, is enough to create a psychological restraint).

163. 12 F.3d 754 (8th Cir. 1993).

164. *See* Hickey v. Reeder, 12 F.3d 754, 756 (8th Cir. 1993).

165. *See id.*

166. *See id.* Hickey claimed that the use of the stun gun violated his right against cruel and unusual punishment. *See id.* A magistrate judge "reluctantly" found the jailer's use of the stun gun a good faith effort to restore order to the jail. *See id.*

response exaggerated, unnecessary, and a clear abuse of governmental power.[167]

In a manner similar to stun guns, stun belts present great potential for misuse and abuse. With a shocking mechanism similar to the stun gun, the belt may be used to coerce, degrade, and even torture its wearer. Use of the belt is often controlled by prison guards, and as prior use of stun devices indicates, the infliction of such punishments will often be "motivated by malice or a desire to sadistically cause harm."[168] Using punishment for such purposes was explicitly denounced as unconstitutional in *Hudson*.[169] Consequently, courts should follow *Hudson* and hold that the use of the REACT stun belt constitutes torture in violation of United States and international law.

2. Guilty Until Proven Innocent: Punishment Before Conviction

The use of the belt amounts not only to excessive punishment because of its inherently cruel nature and the potential for abuse; its use also violates the Eighth Amendment's proportionality principle. Proportionality requires that a punishment's punitive effect be symmetrical with the crime.[170] In other words, whereas a serious crime warrants serious punishment, a minor crime requires lesser punishment, and the lack of a crime altogether warrants no punishment at all.[171] Although courts have permitted the infliction of some forms of punishment, such as the denial of pretrial bail and shackling prior to conviction in a narrow set of cases,[172] the REACT belt does not fit within these limited exceptions.

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167. *See id.* (disagreeing with the trial court that the stun gun shock did not violate Hickey's Eighth Amendment rights).

168. *Cf.* WILLIAM A. SCHABAS, THE PROHIBITION OF CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS 46 (1996) (quoting the United Nations' definition of "torture").

169. *See* Hudson v. McMillian, 503 U.S. 1, 9 (1992) (stating that "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are violated").

170. *See* Solem v. Helm, 463 U.S. 277, 290 (1983) (holding that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted").

171. *See, e.g.*, State v. Kelly, 704 So. 2d 800, 800 (La. Ct. App. 1997) (summarizing the defendant's punishment for second-degree murder and attempted second-degree murder as consecutive terms of life imprisonment and forty-nine years of hard labor); State v. Warren, 492 S.E.2d 609, 609 (N.C. 1997) (discussing the defendant's death sentence that followed his guilty plea to first-degree murder).

172. *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 3 (1951) (stating that "federal law has unequivocally provided that a person arrested for a *non-capital offense* shall be admitted . . . bail") (emphasis added); United States v. Brooks, 125 F.3d 484, 502 (7th Cir. 1997) (explaining that to minimize the risk of prejudicing the jury, a defendant is entitled to the least obvious restraints available); Lemons v. Skidmore, 985 F.2d 354, 358 (7th Cir. 1993) (find-

a. Denial of Pretrial Bail

One exception to the common-law prohibition against inflicting punishment prior to conviction is the denial of pretrial bail.[173] No provision of the Bill of Rights has proved more difficult to define than the protection that the Eighth Amendment affords against excessive bail.[174] Because of the provision's elusive nature, a number of challenges to its constitutionality arose in the 1970s and 1980s.[175] Many defendants ap-

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ing that although a determination that restraints are required had been made, leg irons or shackles were not required).

173. *See* United States v. Salerno, 481 U.S. 739, 755 (1987) (stating that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception"). Thirty-eight states have constitutional capital offense exceptions to the right to bail. *See* ALA. CONST. art. I, § 16; ALASKA CONST. art. I, § 11; ARIZ. CONST. art. II, § 22, cl. 1; ARK. CONST. art. II, § 8; CAL. CONST. art. I, § 6; COLO. CONST. art. II, § 19., cl. 1(A); CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 12; FLA. CONST. art. I, § 16(a); IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 9; IND. CONST. art. I, § 17; IOWA CONST. art. I, § 12; KAN. CONST. bill of rights, § 9; KY. CONST. bill of rights, § 16; LA. CONST. art. I, § 8; ME. CONST. art. I, § 10; MICH. CONST. art. I, § 15; MISS. CONST. art. III, § 29; MO. CONST. art. I, § 20; MONT. CONST. art. III, § 21; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 7; N.J. CONST. art. I, § 11; N.M. CONST. art. II, § 13; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 8; OR. CONST. art. I, § 14; PA. CONST. art. I, § 14; R.I. CONST. art. I, § 9; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 8; TENN. CONST. art. I, § 15; TEX. CONST. art. I, § 11; VT. CONST. ch. 2, § 40(1); WASH. CONST. art. I, § 20; WYO. CONST. art. I, § 14; *see also* Karen A. Rooney, *Detaining for Danger Under the Federal and Massachusetts Bail Statutes: Controversial but Constitutional*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 465, 481 (1996) (discussing the Massachusetts Bail Statute, which allows a defendant to be released on personal recognizance, and subsequent amendments that focus on the defendant's dangerousness and the potential for flight).

174. *See* William F. Duker, *The Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33, 86 (1977) (characterizing the Eighth Amendment's bar against excessive bail as an "anomaly"); J. Patrick Hickey, *Preventative Detention and the Crime of Being Dangerous*, 58 GEO. L.J. 287, 288 (1969) (discussing the Court's nebulous standard for what constitutes excessive bail as "bail not reasonably calculated to secure the appearance of the accused"); John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223, 1224 (1969) (describing the Eighth Amendment's excessive bail prohibition as one subject to varying interpretations).

175. *See, e.g.*, *In re* Nordin, 192 Cal. Rptr. 38, 40 (Cal. Ct. App. 1983) (expounding on the petitioner's claim that the denial of bail violated the Eighth Amendment of the U.S. Constitution as well as California's state constitution); Gardner v. Murphy, 402 So. 2d 525, 526 (Fla. Dist. Ct. App. 1981) (explaining that the petitioner brought a habeas corpus action alleging that he was being held in violation of Article I, Section 14 of the Florida constitution); State v. Handa, 657 P.2d 464, 467 (Haw. 1983) (holding that Article 1, Section 12 of the Hawaii Constitution prohibits excessive, unreasonable, or arbitrary denial of bail); Putnam v. State, 582 S.W.2d 146, 147 (Tex. Crim. App. 1979) (describing appellant's contention that Article 44.04(c) of the Texas Code of Criminal Procedure is indefinite and uncertain regarding the denial of bail and, thus, unconstitutional); Smith v. State, 829 S.W.2d 885, 886 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (stating that the appellant's only point of error was that the denial of bail violated Article 1, Section 11 of the

pealed their convictions under a theory of proportionality, arguing that the denial of bail was in fact, excessive bail and "cruel and unusual" in relation to the alleged crime.[176]

Theoretically, bail should be set at an amount no higher than that required to ensure the accused's presence at trial.[177] However, factors other than economics motivate courts to conclude that no amount of bail is "excessive."[178] For example, if the defendant poses a grave threat to the community, the amount of bail set is immaterial.[179] Similarly, if the

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Texas constitution, which secures bail for all prisoners); State v. Blackmer, 631 A.2d 1134, 1136 (Vt. 1993) (stating that the defendant appealed the decision to hold him without bail on state constitutional grounds). *But see Ex parte* Sierra, 514 S.W.2d 760, 761 n.1 (Tex. Crim. App. 1974) (allowing the denial of bail, in accordance with the Texas Penal Code, for defendants accused of capital crimes) (citing *Ex parte* Contella, 485 S.W.2d 910, 912 (Tex. Crim. App. 1972)). Additional challenges to pretrial detention implicate the Fifth Amendment right to due process of law. *See* United States v. Edwards, 430 A.2d 1321, 1331 (D.C. 1981) (reiterating the appellant's attack on the procedure for pretrial detention as violative of his Fifth Amendment right to due process).

176. *See, e.g., Ex parte* Emery, 970 S.W.2d 144, 146 (Tex. App.—Waco 1998, no pet. h.) (holding that the lower court "abused its discretion in setting bail at $100,000" for delivery of a controlled substance); Read v. State, 959 S.W.2d 228, 230 (Tex. App.—Fort Worth 1998, no pet. h.) (reducing the amount of bail in response to its excessiveness in relation to the offense of driving while intoxicated).

177. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951) (creating the standard for what constitutes excessive bail under the Eighth Amendment).

178. *See* Bitter v. United States, 389 U.S. 15, 16 (1967) (describing the trial judge's "broad powers to ensure the orderly and expeditious progress of a trial"); Carbo v. United States, 288 F.2d 282, 285 (9th Cir. 1961) (listing factors relevant to the determination of when bail is or is not proper).

179. *See* United States v. Salerno, 481 U.S. 739, 748 (1987) (stating the well-established doctrine that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest"). When making such a determination, the court may consider the character of the defendant, the weight of the evidence, and the potential punishment if convicted. *See id.* at 751; White v. United States, 412 F.2d 145, 146 (D.C. Cir. 1968) (adding that the defendant's relationship to the community is a factor to consider in a bail determination); United States v. Hinton, 238 F. Supp. 230, 231 (D.D.C. 1965) (listing a number of additional considerations that can contribute to a court's decision regarding bail); Putnam v. State, 582 S.W.2d 146, 150 (Tex. Crim. App. 1979) (restating the principle that a defendant may be denied bail if he is found "likely to commit" an offense during such time); *Ex parte* Miles, 474 S.W.2d 224, 225 (Tex. Crim. App. 1971) (holding the denial of bail to be reasonable where the defendant was charged with a felony offense and had two prior convictions); *Ex parte* Washburn, 280 S.W.2d 257, 258 (Tex. Crim. App. 1955) (allowing circumstantial evidence to be used in the decision to deny bail); *see also* Perez v. State, 897 S.W.2d 893, 894 (Tex. App.—San Antonio 1995, no pet.) (discussing how a constitutional right to bail is limited to preconviction cases); *In re* S.L.L., 906 S.W.2d 190, 193 (Tex. App.—Austin 1995, no pet.) (noting that a right to bail is not afforded to juveniles). "The purpose of bail is to ensure the return of the accused at subsequent proceedings" where the defendant's guilt or innocence will be determined. BLACK'S LAW DICTIONARY 140 (6th ed. 1990).

defendant poses a substantial risk of flight, bail may be denied.[180] The Bail Reform Act of 1984 envisions these types of interests and allows defendants to be detained without bail pending trial if an officer of the court finds that "no condition or combination of conditions will reasonably assure . . . the safety of any other person and the community."[181] In *United States v. Salerno,*[182] the Supreme Court upheld this provision as constitutional.[183]

In *Salerno*, the Court examined whether the Act was an impermissible punishment before trial under the Due Process Clause of the Fifth Amendment.[184] The Court adopted a three-prong test to determine whether the restriction on the suspect's liberty was punitive or regulatory.[185] First, the Court examined Congress's intent behind the Act.[186] If Congress's intent was to punish, the Act was unconstitutional.[187] However, if the restraint on liberty was related to a permissible purpose, and no punitive intent was evident, then the restriction would be declared as regulatory.[188] Applying this test, the Court found no legislative intent to punish and that pretrial detention was a permissible regulatory action that was not excessive in relation to the goal of ensuring the defendant's appearance at trial.[189]

The *Salerno* Court also considered whether pretrial detention under the Bail Reform Act was excessive bail in violation of the Eighth Amend-

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180. *See Stack*, 342 U.S. at 4 (stating that the right to bail is founded upon the accused's assurance that he will stand trial).

181. 18 U.S.C. § 3142(e) (1985); *see* Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1048 (1988) (citing the Bail Reform Act of 1984); Louis M. Natali, Jr. & Edward D. Ohlbaum, *Redrafting the Due Process Model: The Preventative Detention Blueprint*, 62 TEMP. L. REV. 1225, 1230 (1989) (describing how the Act "authorizes the government to detain federal defendants who have been indicted by a grand jury solely on the ground that they represent a danger to the community").

182. 481 U.S. 739 (1987).

183. *See Salerno*, 481 U.S. at 748 (concluding that the detention imposed by the Act is merely regulatory and does not constitute punishment in violation of the Fifth Amendment).

184. *See id.* at 746-47 (outlining factors to consider in determining "whether a restriction on liberty constitutes impermissible punishment or permissible regulation").

185. *See id.* at 747-48.

186. *See id.* at 746-47 (citing Schall v. Martin, 467 U.S. 253, 269 (1984) and Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)).

187. *See id.* at 748 (concluding that if pretrial detentions are regulatory in nature, then they "[do] not constitute punishment before trial in violation of the Due Process Clause").

188. *See id.* at 747 (concluding that the Bail Reform Act "falls on the regulatory side of the dichotomy").

189. *See id.* at 748 (concluding "that the pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause").

ment.[190] The Court reaffirmed its proposition established in an earlier case, *Stack v. Boyle,*[191] in which the Court explained that the primary purpose of bail is to guarantee the defendant's appearance at trial.[192] However, the *Salerno* Court went further in determining that the right to bail is not absolute and that the Eighth Amendment does not guarantee the right to bail.[193] However, the Court also concluded that pretrial detention must not be excessive when weighed against the governmental interest in protecting the community.[194]

One commentator has criticized the Supreme Court's ruling in *Salerno*, arguing that the ruling defies "the common sense understanding of what it means to be punished."[195] In *Kennedy v. Mendoza-Martinez*,[196] the Supreme Court set forth more comprehensive guidelines to distinguish between regulatory and punitive sanctions.[197] The Court held that if an express punitive intent was absent from the sanction, the following factors must be weighed:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment, retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may be rationally connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .[198]

This test derived by the *Kennedy* Court took into consideration an objective view of the liberty restraint as well as its effect on the defen-

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190. *See id.* at 752 (holding that the Bail Reform Act survives an Eighth Amendment challenge).

191. 342 U.S. 1 (1951).

192. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951) (stating that bail set at an amount higher than that needed to assure the presence of the accused at trial is 'excessive' under the Eighth Amendment).

193. *See Salerno*, 481 U.S. at 754 (asserting that the Eighth Amendment fails to say that all arrests are bailable).

194. *See id.* at 153 (stating that the proposition set forth in *Stack* "is far too slender a reed on which to rest" the argument that the Eighth Amendment grants a right to bail based only on flight considerations).

195. Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1060 (1988).

196. 372 U.S. 144 (1963).

197. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (listing seven factors relevant to an inquiry as to whether a sanction is excessive in relation to its purpose).

198. *Id.*

dant.[199] Consequently, when applying these factors, the *Kennedy* Court found that the pretrial detention in question was punitive and in violation of the well-established principle that punishment prior to adjudication of guilt violates the Due Process Clause of the Fifth Amendment. Such a punishment is considered inherently excessive under the Eighth Amendment's proportionality principle.[200]

Forcing an accused to wear the REACT belt is similar to pretrial detention because it acts as punishment imposed prior to adjudication of guilt. Under a *Kennedy* analysis, the belt acts as an affirmative restraint, limiting the accused's ability to participate effectively in his or her defense. Activation of the belt also "promotes the traditional aims of punishment—retribution and deterrence."[201] Specifically, the belt is used to deter escape attempts and violent outbreaks in the courtroom and is used also as a means to punish defendants for such actions.[202] Although such behavior by the defendant is criminal and may warrant the belt's activation, the belt is excessive punishment when compared with more traditional methods of restraint. For instance, courts have generally held that in certain circumstances, shackles, gags, or other methods of binding are permissible methods of restraining a contemptuous defendant.[203] Whereas other types of physical restraint merely hinder movement, the REACT belt provides a powerful shock as well as an alarming error rate that threatens its wearer's health. The belt is, therefore, punitive in nature and, like the pretrial detention reviewed in *Kennedy*, unconstitutional because it is an excessive punishment without due process of law.

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199. *See* Michael J. Eason, *Eighth Amendment—Pretrial Detention: What Will Become of the Innocent?*, 78 J. CRIM. L. & CRIMINOLOGY 1048, 1062 (1988) (arguing that the defendant's perspective must also be taken into consideration). The objective standard takes into consideration "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101-02 (1958).

200. *See Kennedy*, 372 U.S. at 186 (concluding that the statute cannot withstand constitutional scrutiny and that "punishment cannot be imposed without 'due process of law'").

201. *Id.* at 168.

202. *See* Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (describing the belt as a protective measure against escapes), *available in* 1996 WL 3555939; *United States of America: Use of Electro-Shock Stun Belts* (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (stating that the belt's manufacturer recommends it be used for transporting violent criminals).

203. *See, e.g.*, Illinois v. Allen, 397 U.S. 337, 343 (1970) (listing three constitutionally permissible ways to handle a disruptive defendant); United States v. Garcia, 625 F.2d 162, 168 (7th Cir. 1980) (allowing restraints upon the showing of manifest need).

b. Shackling

Shackling is another exception to the prohibition against inflicting punishment prior to conviction.[204] The Supreme Court first addressed the constitutionality of restraining a criminal defendant in the courtroom in a 1970 case, *Illinois v. Allen*.[205] In *Allen*, the Court acknowledged the risks posed by gagging or shackling a defendant during trial and held that such measures were permissible only as a last resort.[206]

Similarly, courts throughout the United States have reaffirmed the principle that only upon a showing of exceptional circumstances or manifest need may defendants be restrained in the courtroom.[207] However, the types of restraints courts have repeatedly upheld as constitutional have a very limited effect on their wearer's bodies.[208] Specifically, restraints such as shackles or chains usually do no more than hinder movement.

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204. *See Allen*, 397 U.S. at 343 (listing three constitutionally permissible means of restraining a disruptive defendant); People v. Harrington, 42 Cal. 165, 167 (Cal. 1871) (asserting that under the common law, a prisoner is entitled to appear for trial free from all manner of restraints, "unless there [is] evident danger of his escape"). The Criminal Practice Act provided that a person charged with an offense should not be subjected, *before conviction*, "to any more restraint than is necessary." *Id.* at 168. The court thus reversed the lower court's ruling as an abuse of discretion because of the lack of necessity for manacles during trial. *See id.*

205. *See Allen*, 397 U.S. at 338 (presenting the issue whether an accused retains the Sixth Amendment's Confrontation Clause right when his courtroom behavior is disruptive).

206. *See id.* at 343 (arguing that trying an individual while bound before a jury denotes that it is acceptable as long as other remedies have been exhausted).

207. *See, e.g., Garcia*, 625 F.2d at 168 (affirming the trial court's decision that the defendant should be handcuffed upon the showing of a manifest need); United States v. Esquer, 459 F.2d 431, 433 (7th Cir. 1972) (agreeing with the appellant that shackling a witness should be employed only in situations of extreme need); People v. Hillery, 423 P.2d 208, 214-15 (Cal. 1967) (providing that the defendant's refusal to dress for court and his resistance to being brought to court constituted a manifest need); People v. Kimball, 55 P.2d 483, 484 (Cal. 1936) (relaying that the defendant's expressed intention to escape, his threat to kill witnesses, and the secret lead pipe that the defendant concealed in the courtroom demonstrated such a need); *Harrington*, 42 Cal. at 167 (referring to the rule at common law that defendants are entitled to appear free of shackles or bonds unless there is an evident danger of escape); Cooks v. State, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992) (setting forth the rule that only in rare circumstances, where sufficient reasons exists, can shackling be ordered); Long v. Texas, 823 S.W.2d 259, 282 (Tex. Crim. App. 1991) (holding that efforts should be made to prevent the jury from viewing a defendant in shackles absent a showing of exceptional circumstances or manifest need); *see also* Kennedy v. Cardwell, 487 F.2d 101, 105-06 (6th Cir. 1973) (discussing the historical development of the rule that the defendant should be unfettered when standing trial).

208. *See, e.g., Garcia*, 625 F.2d at 168 (upholding the use of handcuffs upon a showing of manifest need); *Cooks,* 844 S.W.2d at 722 (allowing shackles to be used when sufficient reasons exist).

The use and effects of the belt, when viewed in light of the possible physical reactions the wearer may experience, are completely different than the court's use of shackles and other types of physical restraints. Unlike shackles, which only temporarily restrict an alleged criminal's freedom, the belt, if activated, may cause the individual serious physical injury that could be permanent in nature.[209] Although the initial shock may only result in temporary immobilization,[210] other, more serious, physical effects may result from a 50,000-volt shock. For instance, a person experiencing such a jolt might immediately suffer amnesia, severe burns, and heartbeat irregularities; several years later, he may also endure sensory disabilities and paralysis.[211] In addition to these possible physical effects, the belt's wearer may develop heightened anxiety over the belt's potential for activation and the resulting severe physical effects, rendering him incapable of effectively participating in his criminal defense.[212]

The differences between shackling and the REACT belt demonstrate that use of the belt does not overcome the general prohibition against imposing punishment prior to conviction. Whereas shackles merely hinder the wearer's movement, the belt's powerful shock can result in permanent physical injury and possibly even death. This vast difference in the effects of the two restraint mechanisms should compel courts to utilize a stricter standard of scrutiny in examining the belt's constitutionality. Under a strict standard of review, the REACT belt would fall outside the protections afforded by the Eighth Amendment.

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209. *See United States of America: Electro-Shock Stun Belts—Torture at the Push of a Button* (visited Feb. 25, 1998) <http://www.amnesty.org//news/1996/25104896.htm> (discussing how data from other electro-shock weapons indicates that a shock from a stun belt could result in long-term physical or mental injuries, including death).

210. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (reporting how people who have experienced such electrical shock may also suffer from "intense pain, muscle contractions, lost bowel control, vomiting and urination"), *available in* 1996 WL 9254174.

211. *See* John F. Rekus, *Shocking Experiences; Understanding How Electrical Injuries Occur Is an Important First Step to Their Prevention in the Workplace*, OCCUPATIONAL HAZARDS, Feb. 1, 1997, at 23 (listing several ways in which electrical shock can harm an individual, including irregular heartbeat and cardiac arrest), *available in* 1997 WL 10435261.

212. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (calling "the belt's effect on prisoners very psychological"), *available in* 1996 WL 9254174; John Painter, Jr., *Unruly Prisoners Get Charge from Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (stating that the psychological effect of the belt on its wearer is its greatest advantage), *available in* 1997 WL 4186285.

IV. The Effects of the Belt on Communication in Court Between Criminal Defendants and Their Attorneys

A. *The Incorporated Sixth Amendment Right to Counsel*

Use of the REACT stun belt not only constitutes cruel and unusual punishment violative of the Eighth Amendment, but its use also infringes upon the Sixth Amendment right to counsel. The right to counsel is one component of procedural due process, guaranteeing "meaningful access to our legal system" as "a fundamental right of citizenship in this country."[213] Interwoven in that right is an individual's right to retain counsel who can assist in ascertaining and asserting a defendant's legal rights.[214] With the increasing use of security belts, defendants are frequently alleging that a requirement to wear the belt creates such grave fear in their minds that they are unable to participate fully and meaningfully in their own trials.[215] Consequently, the issue arises as to whether criminal de-

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213. Porter v. Califano, 592 F.2d 770, 780 (5th Cir. 1979).

214. *See* U.S. Const. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"); *see also* Potashnick v. Port City Const. Co., 609 F.2d 1101, 1117 (5th Cir. 1980) (explaining that in criminal decisions, the Supreme Court has found the defendant's right to retain counsel implicit in Fifth Amendment due process protections). *See generally* Bonnie Dunninger, *Twenty-Fifth Annual Review of Criminal Procedure*, 84 Geo. L.J. 641, 1115-39 (1996) (outlining the scope and application of the right to counsel). This right applies to all federal and state criminal prosecutions. *See id.*; *see also* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (applying the right to counsel under the Sixth Amendment to state criminal prosecutions); Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (applying the Sixth Amendment right to all federal criminal proceedings). The first time the Court recognized a constitutional right to a fair trial was in *Powell v. Alabama.* *See* Powell v. Alabama, 287 U.S. 45, 69 (1932) (stating that denying counsel to a party in any case or court "would be a denial of a hearing, and, therefore, of due process in the constitutional sense"). Powell and two other African American defendants were accused of raping two white girls. *See id.* at 49. At each trial, the men were convicted and denied appellate remedies. *See id.* at 50. The Supreme Court overruled their convictions on the basis that even though the Scottsboro defendants had been formally represented, their lawyers had not been appointed until the morning that trial began. *See id.* at 56. Such late appointments were constitutionality inadequate because the defendants had no access to legal service in a critical time during the proceedings against them. *See id.* at 58. Additionally, in light of the illiteracy and youth of the defendants, the circumstances of public hostility, and the imprisonment and close surveillance of the individuals by military officials, the trial court's failure to provide them a reasonable opportunity to obtain counsel was a denial of due process. *See id.* at 57-58. The Court concluded that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 68-69.

215. *See, e.g.*, People v. Garcia, 66 Cal. Rptr. 2d 350, 353 (1997) (proclaiming that the threat of a debilitating shock causes a psychological restraint that prevents defendants from effectively communicating with their attorneys); People v. Melanson, 937 P.2d 826,

fendants who are forced to wear the belt are being denied due process of law.

The right to legal representation is derived from the principle that notice and the opportunity to be heard before the tribunal are essential to ensuring an enforceable judgment that adheres to the requirements of due process of law.[216] It is generally accepted and recognized that even the most intelligent and gifted defendants are incapable of defending themselves adequately in a criminal trial.[217] Participation of a licensed lawyer, therefore, is typically required to protect a defendant's rights.[218] To this end, open lines of communication between lawyer and client are

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835-36 (Colo. Ct. App. 1996) (detailing the defendant's assertion that the stun belt created a reasonable fear that affected his mental faculties, preventing meaningful participation in the trial).

216. *See* Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) (finding that the accused's right to counsel is without a doubt a fundamental right); United States v. Cronic, 466 U.S. 648, 654 (1984) (holding that of all the rights an accused person maintains, the right to representation by counsel is the most pervasive due to the fact that, through counsel, the defendant may protect other rights); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (defining the opportunity to be heard as a fundamental facet of due process); Von Moltke v. Gillies, 332 U.S. 708, 720 (1948) (reaffirming the idea that the Sixth Amendment provides an accused who is unable to afford an attorney with defense counsel); Powell v. Alabama, 287 U.S. 45, 71 (1932) (holding that the right to counsel was so vital that the trial court's failure to provide effective counsel was, in effect, a denial of due process within the meaning of the Fourteenth Amendment of the United States Constitution). *But see* Caplin & Drysdale v. United States, 491 U.S. 617, 624 (1989) (stating that the Sixth Amendment "guarantees defendants in criminal cases the right to adequate representation," but not the right to choose their counsel); Wheat v. United States, 486 U.S. 153, 159 (1988) (limiting the scope of the Sixth Amendment to providing "an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers"); United States v. Childress, 58 F.3d 693, 734 (D.C. Cir. 1995) (reaffirming the Supreme Court's holding that the right to counsel is limited in several respects).

217. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (discussing how even an educated layman is incapable "of determining for himself whether [an] indictment is good or bad," who can thus be convicted based upon incompetent evidence or placed on trial absent a proper charge); Powell v. Alabama, 287 U.S. 45, 69 (1932) (finding that most individuals require guidance of counsel during an adversarial proceeding); *see also* Raymond Y. Lin, Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279, 1280 (1983) (recognizing that because many prisoners are incapable of using law libraries, one court has held that law libraries alone are an insufficient manner of providing legal assistance, and states must supply prisoners with some type of attorney assistance).

218. *See Kimmelman*, 477 U.S. at 374 (stating that "[t]he right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process"); *Gideon*, 372 U.S. at 343 (describing "[t]he Sixth Amendment as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'"); *see also* Raymond Y. Lin, Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279, 1281 (1983) (indicating that attorney assistance must be provided to "ensure effective access to all prisoners").

vital to the defendant's right to a fair and impartial trial.[219] Thus, when a criminal defendant is excessively restrained, he is potentially deprived of the ability to communicate effectively with counsel, thereby denying him access to the judicial process.[220]

B. *Standard of Review: The Use of Physical Restraints in the Courtroom*

To protect the right of access to the judicial system, courts have also adopted a limited exception that permits the use of shackles and other forms of physical restraints upon a defendant while in the courtroom. As previously mentioned, in *Illinois v. Allen*,[221] the Supreme Court originated the notion that only under exceptional circumstances may physical restraints be used.[222] Several reasons underlie this mandate. These reasons include maintaining an "indicia of innocence" for the defendant and preventing any interference with attorney-client communications.

In *People v. Harrington*,[223] a California court overturned a defendant's conviction on the basis that the defendant had been chained during the trial.[224] The court concluded that the right to be free from chains was a constitutional right.[225] The court also held that when a prisoner on trial for a felony is deprived of the right to manage his own defense, or is

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219. *See generally* U.S. CONST. amend. VI (allowing an accused to enjoy the right "to have Assistance of Counsel for his defense" and a trial by an impartial jury).

220. *See* Spain v. Rushen, 883 F.2d 712, 720 (9th Cir. 1989) (stating that "one of the defendant's primary advantages of being present at trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total restraint"); Kennedy v. Cardwell, 487 F.2d 101, 106 (6th Cir. 1973) (arguing that restraints confuse mental faculties, therefore abridging a defendant's constitutional right of a defense).

221. 397 U.S. 337 (1970).

222. *See* Illinois v. Allen, 397 U.S. 337, 344 (1970) (stating that some circumstances dictate binding or shackling a defendant and that such a response in those circumstances would be reasonable and fair).

223. 42 Cal. 165 (1871).

224. *See* People v. Harrington, 42 Cal. 165, 169 (1871) (holding that it was a direct violation of the common law to require a prisoner to appear in chains and shackles during his trial). In 1797, Sir Edward Coke introduced the principle that a defendant is entitled to be free from restraints in the courtroom. *See* Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351, 351 (1971). To exemplify the antiquity of this concept, Sir Edward Coke cites to the *Magna Carta*, Virgil, and the Books of *Luke* and *John*. *See id.*

225. *See Harrington*, 42 Cal. at 168 (opining that physical burdens impair mental faculties and interfere with a defendant's constitutional right to a defense).

refused the aid of counsel, any judgment rendered against him must be reversed.[226]

In another nineteenth-century shackling case, *State v. Kring*,[227] the Missouri Supreme Court reiterated the principle that placing a prisoner in shackles may deprive him of the "free and calm" use of his mental faculties.[228] In that case, the court reasoned that a jury might "conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted. . . ."[229] In addition to that prejudice, the court recognized that because the restraints deprived the accused of his mental processes, this deprivation was a basis for the right to be free from restraints.[230]

Preserving the defendant's right to have the "free and calm use" of his mental faculties becomes increasingly difficult as courts use modern restraining devices. Even though these methods of restraint appear to be less encumbering than traditional techniques, contemporary devices actually inhibit the defendant's right to participate in his defense. In particular, the REACT belt interferes with a defendant's ability to consult effectively, orally or in writing, with defense counsel; such interference is a constitutional concern. Furthermore, after a 50,000-volt blast of electricity, a criminal defendant is not only immediately physically immobilized but may also suffer from confusion and amnesia.[231] In addition, as noted earlier, the belt helps ensure "total psychological supremacy" over criminal defendants.[232] If the belt's wearer were to focus on the possible

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226. *See id.* (stating that the restraints would prejudicially affect the defendant's statutory right to testify as a competent witness on his own behalf).

227. 64 Mo. 591 (1877).

228. *See* State v. Kring, 64 Mo. 591, 593 (1877) (providing an additional condition arising from the use of shackles).

229. *Id.*

230. *See id. But see* Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351, 354 (1971) (asserting that the interference with the defendant's handling of papers or ability to write to counsel may be more realistic claims of restraint than interference with the defendant's mental processes).

231. *See* Jean-Pierre Wolff, *Protecting Yourself When Working on High-Power Circuits*, EC&M ELEC. CONSTR. & MAINTENANCE, May 1, 1997, at 33 (listing the immediate effects of a high-powered electrical shock), *available in* 1997 WL 10224576. A prisoner wearing the belt may also experience muscular pain, headaches, and vision impairment. *See id.* Any of these types of physical ailments would prevent a reasonable person from fully concentrating upon any task. Because a criminal defendant's freedom is jeopardized, the Constitution mandates that he or she have the opportunity to actively participate in his or her own trial. *See* U.S. CONST. amend. VI. However, the belt's high incidents of accidental activations make ensuring its wearer's constitutionally mandated right to due process impossible.

232. *See United States of America: Use of Electro-Shock Stun Belts*, (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (discussing the lan-

pain and humiliation that he would suffer should the belt be activated, he would then be rendered incapable of effectively participating in his defense and thus deprived of his Sixth Amendment right to counsel.[233]

Moreover, with its debilitating electrical charge, the belt is more invasive and harmful than any other type of physical restraint. Consider an individual wearing a device that has the ability to conduct 50,000 volts of electricity through his body, potentially causing severe pain, burns, self-urination and defecation. Anticipating that the device might activate would be sufficient to distract any individual and interfere with the ability to participate in the trial at hand. Consequently, the belt's immediate physical and psychological effects following an activation plainly constrain any attorney-client communications.

The issue of the belt's effects on attorney-client relations was recently raised in *People v. Garcia*.[234] A California trial court required the accused, an alleged drug dealer and murderer, to wear a REACT belt under his clothing.[235] When the defendant's counsel objected to the use of the belt, the prosecutor and bailiff explained that because the accused was charged with murder and had an extensive criminal history, the belt was

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guage in the belt manufacturer's promotional literature); *see also* Anne-Marie Cusac, *'Stunning' Chain Gang Prisoners Is Malevolent, Inhumane and Sometimes Fatal*, WIS. ST. J., July 9, 1996, at 7A (discussing the combination of fear and adrenaline in a defendant's reaction to the shock), *available in* 1996 WL 10530319; Larry Gerber, *Order in the Court?: With Shocking Restraint*, ASSOCIATED PRESS, Apr. 8, 1994 (quoting Captain Thomas P. Twellman of the Orange County Marshal's Office for the proposition that knowledge of the belt contributes to the prisoners' good behavior), *available in* 1994 WL 10133864; John R. Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (quoting Denis Kaufman, of Stun-Tech, as saying that the psychology that follows from the use of the belt its biggest advantage), *available in* 1997 WL 4186285; *Stun Belt Turns Court into Cattle Pen*, SUN-SENTINEL (Ft. Lauderdale), Apr. 12, 1994, at 10A (asserting that the use of the belt to intimidate the defendant raises questions of both moral and ethical proportions), *available in* 1994 WL 6816127.

233. *See* U.S. CONST. amend. VI (granting the accused in all criminal cases the right "to have Assistance of Counsel for his defense").

234. 66 Cal. Rptr. 2d 350 (Cal. Ct. App. 1997).

235. *See* People v. Garcia, 66 Cal. Rptr. 2d 350, 353 (Cal. Ct. App. 1997). In *People v. Garcia*, the prisoner notification form, signed by the defendant, stated:

> The belt could be activated if the wearer [failed] to 'comply with officer direction' or acted with:
>
> A. Any outburst or quick movement
> B. Any hostile movement
> C. Any tampering with the belt
> D. Failure to comply with verbal command for movement of your person
> E. Any attempt to escape custody
> F. Any loss of vision of your hands by the custodial officer
> G. Any overt act against any person within a fifty (50) foot vicinity.

Id. at 353.

necessary to preserve order and safety in the courtroom.[236] The trial court overruled the objection, and the defendant was subsequently convicted.[237] On appeal, the defendant contended that the belt qualified as a restraint because, rather than focusing on his defense, he obsessed over the threat of any sudden movement and debilitating shock resulting therefrom.[238] However, because the defendant never argued that wearing the belt would prevent him from communicating with his attorney in the lower court, the appellate court declined to address this issue.[239]

Although the California court declined to discuss the issue relating to the belt's effects, this case illustrates the developing concern regarding the belt's costs and benefits. As the use of the REACT belt continues to increase, more defendants may be denied fundamental due process through the lack of effective assistance of counsel. Consequently, use of the belt at trial should be declared unconstitutional as violative of the Sixth Amendment.

V. The Presumption of Innocence and the Fourteenth Amendment's Due Process Clause

In addition to resolving Sixth and Eighth Amendment concerns, courts should also conclude that the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant's right to stand trial without wearing a stun belt. The Fourteenth Amendment provides that all persons are presumed innocent until proven guilty and are entitled to a fair and impartial trial.[240] From this provision flows the notion that a criminal

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236. *See id.*

237. *See id.* (reviewing the trial court's order that the defendant wear the belt because it was "a 'minimal restraint' that 'is absolutely not visible' and that caused 'no prejudice to the defendant at all'").

238. *See id.* at 354 (analyzing the appellant's argument that an electric shock from the belt may cause a "psychological" restraint that could prevent effective communication with counsel).

239. *See id.* (describing the court's refusal to address the issue due to counsel's error in waiving the claim).

240. The presumption of innocence is not specifically stated in the Constitution, but is universally recognized as a component of due process. *See* Bentley v. Crist, 469 F.2d 854, 855-56 (9th Cir. 1972) (discussing how the denial of appellant's opportunity to wear civilian clothing during trial violated his long-recognized right to a presumption of innocence); Hernandez v. Beto, 443 F.2d 634, 637 (5th Cir. 1971) (concluding that trying the defendant in prison clothing infringed upon his fundamental right to presumption of innocence); Government of Virgin Islands v. Lake, 362 F.2d 770, 774 (3d Cir. 1966) (conceding that in criminal cases, due process of law mandates a presumption of innocence); *cf.* Deutch v. United States, 367 U.S. 456, 471 (1961) (holding that courts must afford a defendant who refuses to answer questions of congressional committee every right guaranteed to defendants in other criminal cases). *But see* United States v. Thoresen, 428 F.2d 654, 661 (9th Cir. 1970) (upholding a statutory provision in spite of the presumption of innocence, which is

defendant is generally entitled to an "indicia of innocence."[241] Included in the "indicia of innocence" is the right to appear in a court of law unencumbered before a jury.[242] As the Colorado Supreme Court stated in *Eaddy v. People*,[243] "the presumption of innocence requires the garb of innocence, . . . [and] every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man."[244] When a criminal defendant, however, is forced to wear a stun belt, the defendant's presumption of innocence is violated. Judicial precedent addressing the presumption of innocence and physical restraints can be grouped into four categories: "garb of innocence" cases where a defendant appears shackled before a jury; cases where a defendant initially appears free from restraint, but due to disruptive behavior, is later shackled; cases involving an excessive number of guards placed in a courtroom; and those instances where a defendant is inadvertently seen by a juror in restraints.[245]

Cases in the first category typically involve defendants who stand trial in shackles.[246] The principle that a prisoner shall be brought into a court-

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guaranteed by the Due Process Clause of the Fifth Amendment). The statute in question made it a crime for anyone, who was previously indicted or convicted of a crime punishable by imprisonment greater than one year, to transport firearms. *See id.*; William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 337 (1995) (quoting Justice Darling, who noted that the presumption of innocence is merely "a pretense, a delusion, and empty sound"); LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence*, 37 CLEV. ST. L. REV. 393, 408-13 (1989) (describing the erosion of the presumption of innocence concept).

241. *See* United States v. Samuel, 431 F.2d 610, 614 (4th Cir. 1970) (upholding the proposition that a defendant is presumed innocent and entitled to the "indicia of innocence" at trial); Eaddy v. People, 174 P.2d 717, 718-19 (Colo. 1946) (interpreting the presumption of innocence to include "the garb of innocence").

242. *See* Harrell v. Israel, 672 F.2d 632, 635 (7th Cir. 1982) (stating that criminal defendants generally have the right to appear before a jury free from physical restraints); Kennedy v. Cardwell, 487 F.2d 101, 105 (6th Cir. 1973) (restating the rule that requiring a prisoner to be brought before a jury free from bonds and shackles is a fundamental attribute of a fair and impartial trial); *Eaddy,* 174 P.2d at 718-19 (reiterating that "every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man"); Cox v. State, 931 S.W.2d 349, 352 (Tex. App.—Fort Worth 1996) (describing the harm that a criminal defendant suffers upon a jury viewing him in restraints, including damage to his constitutional presumption of innocence), *pet. dism'd, improvidently granted*, 951 S.W.2d 5 (Tex. Crim. App. 1997).

243. 174 P.2d 717 (Colo. 1946).

244. *Eaddy*, 174 P.2d at 718-19; *see also Samuel*, 431 F.2d at 615 (reiterating the principle that an accused's right to an "indicia of innocence" must bow to competing rights of courtroom participants and society as a whole).

245. *See Kennedy*, 487 F.2d at 104-10.

246. *See id.* at 104; *see, e.g.*, United States v. Kress, 451 F.2d 576, 577 (9th Cir. 1971) (dismissing appellant's point of error that handcuffs destroyed his presumption of innocence); United States v. Thompson, 432 F.2d 997, 998 (4th Cir. 1970) (remanding the case

room free from bonds or shackles is an important element in ensuring a fair and impartial trial.[247] Specifically, the restraints on the accused should never affect his reasoning or abridge his ability to defend against criminal charges.[248] Furthermore, when a court allows a prisoner to be brought into the courtroom in shackles, the jury may conceive an initial prejudice against the accused, therefore depriving that individual of the presumption of innocence.[249] Shackling a defendant in the courtroom can also divest the judicial proceedings of dignity and integrity, which the trial judge should seek to uphold.[250]

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and compelling the district judge to evaluate the need for handcuffs and to state the reasons for requiring them); Woodards v. Cardwell, 430 F.2d 978, 980, 982 (6th Cir. 1970) (finding that the use of shackles during trial was an abuse of discretion and amounted to a violation of due process); Loux v. United States, 389 F.2d 911, 919 (9th Cir. 1968) (asking on appeal whether the use of shackles in trial court constituted an abuse of discretion).

247. *See* Illinois v. Allen, 397 U.S. 337, 344 (1970) (recognizing that in order to ensure a fair and impartial trial, "no person should be tried while shackled" or gagged); Hardin v. Estelle, 484 F.2d 944, 946 (5th Cir. 1973) (affirming that shackling of the accused during a state criminal trial deprived the defendant of a fair trial, thus constituting a fundamental error); Clark v. State, 195 So. 2d 786, 788 (Ala. 1967) (concluding "that to bring a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with notions of fair trial"); State v. Robinson, 507 S.W.2d 61, 61-62 (Mo. Ct. App. 1974) (condemning the bringing of a person into court in shackles where there is no apparent need, and promulgating the common-law right that the accused should be tried for criminal offense free from shackles); State v. McKay, 165 P.2d 389, 405 (Nev. 1946) (applying the right that the accused in a criminal prosecution be free from shackles as part of the guarantee of a free and impartial trial); *cf.* United States v. Garcia, 625 F.2d 162, 168 (7th Cir. 1980) (holding that shackling of defense witnesses may detract from their credibility and thus prejudice the defense); United States v. Roustio, 455 F.2d 366, 371 (7th Cir. 1972) (stating that concurrent to the defendant's right to be free of shackles is the defendant's right to have witnesses appear in the same manner). *But see Kennedy*, 487 F.2d at 105 n.5 (providing that the shackling of defense witnesses may not directly affect the presumption of innocence)

248. *See* Cox v. State, 931 S.W.2d 349, 353 (Tex. App.—Fort Worth 1996) (discussing the capability of physical restraints to interfere with the defendant's mental faculties), *pet dism'd, improvidently granted*, 951 S.W.2d 5 (Tex. Crim. App. 1997); Brown v. State, 877 S.W.2d 869, 871 (Tex. App.—San Antonio 1994, no writ) (identifying the interference that physical restraints cause on a defendant's thought processes); Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351, 355 (1971) (quoting Illinois v. Allen, 397 U.S. 337 (1970), where the Supreme Court recognized the detrimental effects that physical restraints have on the attorney-client communication process).

249. *See* State v. Kring, 64 Mo. 591, 593 (1877) (arguing that when the defendant is placed in shackles the jury must conceive a prejudice against him); Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351, 355 (1971) (asserting the justification for the right to not appear in shackles is to protect the presumption of innocence).

250. *See Allen*, 397 U.S. at 344 (recognizing the varying effects that binding and gagging the criminal defendant may have on the jury, the defendant, and courtroom decorum). Justice Brennan, in his concurring opinion to *Illinois v. Allen*, stated, "It offends not only

In addition, the use of physical restraints should be limited. When a defendant is viewed by a jury in shackles or handcuffs, the presumption of innocence is gravely impaired.[251] Shackles should only be used to prevent escape of the accused,[252] to protect anyone in the courtroom,[253] to maintain order during trial, or when manifest need can be shown.[254] If an

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the judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law." *Id.* at 350-51. *Cf. Kennedy*, 487 F.2d at 106 & n.8 (asserting that not only is the prejudice factor a concern, but the concerns are the disabilities suffered by a shackled defendant).

251. *See* Cooks v. State, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992) (en banc) (stating that "[w]hen a defendant is viewed by the jury in handcuffs or shackles, his presumption of innocence is seriously infringed"); Long v. State, 823 S.W.2d 259, 282 (Tex. Crim. App. 1991) (expressing that "[t]he harm of a defendant suffers when the jury sees him in handcuffs or shackles is that his constitutional presumption of innocence is infringed"(quoting Moore v. State, 535 S.W.2d 357, 358 (Tex. Crim. App. 1976)). *But see* United States v. Kress, 451 F.2d 576, 577 (9th Cir. 1971) (per curiam) (reaffirming that in order to question a court's discretion, the record must reflect more than the fact that the defendant was handcuffed before the jury); McDonald v. United States, 89 F.2d 128, 136 (8th Cir. 1937) (holding that something more than the mere handcuffing of a defendant must be shown in order to label a trial court's discretionary action as erroneous). Both of these decisions require that a defendant show something more than just the fact of shackling to obtain a reversal. *Kennedy*, 487 F.2d at 107.

252. *See Kennedy*, 487 F.2d at 111 (rejecting the prisoner's petition for habeas corpus and holding that the trial judge did not abuse discretion in permitting the prisoner to be handcuffed to the officer because the prisoner had previously escaped through the sawed bars of his cell); State v. Moen, 491 P.2d 858, 861 (Idaho 1971) (considering the defendant's risk for escape as a factor when determining whether the failure to remove handcuffs during the trial was an abuse of discretion); People v. Mendola, 140 N.E.2d 353, 356 (N.Y. 1957) (stating that more than unusual measures could be taken to prevent a second escape attempt by accused). *But see* McKenzey v. State, 225 S.E.2d 512, 515 (Ga. App. 1976) (reversing an escape conviction). In *McKenzey*, the Georgia court noted that although the accused was on trial for escape, there was evidence that his cell door remained unlocked at night and that he was often left unsupervised while working, providing him many escape opportunities. *See id.* at 514.

253. *See* Corey v. State, 9 A.2d 283, 283-84 (Conn. 1939) (upholding the utilization of restraints to prevent the accused from committing violence in the courtroom); State v. Brooks, 352 P.2d 611, 613 (Haw. 1960) (preventing violence in the courtroom by allowing the defendant to appear handcuffed in the courtroom); State v. Evans, 169 N.W.2d 200, 210 (Iowa 1969) (prohibiting the accused from injuring others in the courtroom by upholding the use of handcuffs in the trial court); State v. Richards, 467 S.W.2d 33, 38 (Mo. 1971) (allowing the judge to maintain security in the courtroom through the use of handcuffs after the accused swung at a witness); Gray v. State, 268 S.W. 941, 949-50 (Tex. Crim. App. 1924) (permitting physical restraints to deter the accused from self-destruction or from injuring bystanders or officers of the court).

254. *See Allen*, 397 U.S. at 346 (establishing boundaries for when restraints may be imposed); People v. Duran, 545 P.2d 1322, 1327 (Cal. 1976) (providing that restraints may be used upon a showing of a manifest need for such restraints); *McKenzey*, 225 S.E.2d at 514 (excepting to the general rule special circumstances that dictate added safety precautions in the courtroom).

event occurs that justifies the use of restraints, the grounds for using the restraints should be detailed with specificity in the record.[255]

Closely related to this first category of "indicia of innocence" cases are those instances involving a disruptive and insurgent defendant during the actual trial.[256] In that type of situation, the defendant is not initially restrained, but because of inappropriate behavior, restraints become necessary either for purposes of security or because the defendant was so disruptive and abusive during the proceedings that the trial could no longer continue in an orderly manner.[257] For example, in *Illinois v. Allen*,[258] the Supreme Court faced the issue of whether the Sixth Amendment right of a defendant to be present during trial was violated when an unruly or disorderly defendant was ejected from the courtroom.[259] The Court, affirming the trial judge's discretion in dealing with such conduct, held that a defendant can waive the right to be present at trial if, after a warning by the trial judge, the accused continues with the disruptive be-

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255. *See Cooks*, 844 S.W.2d at 722 (stating that "[t]he trial judge must state with specificity the reasons supporting his decision to restrain the defendant"); Long v. State, 823 S.W.2d 259, 282 (Tex. Crim. App. 1991) (en banc) (arguing that detailing the reasons for shackling assists the appellate court in determining whether doing so was an abuse of discretion).

256. *See Kennedy,* 487 F.2d at 107 (comparing groups of cases in relationship to their facts). In particular, the *Kennedy* opinion discusses *United States* v. *Samuel,* 431 F.2d 610, 614 (1970), wherein the defendant requested the handcuffs he was wearing be removed. *See id.* However, the judge refused because of the violent nature of the alleged crime and difficulties in the courthouse. *See id.* Another case cited by the *Kennedy* court was *Woodards v. Cardwell*, 430 F.2d 978 (1970). *See id.* In *Woodards v. Cardwell*, the court held that the mere likelihood of escape was not sufficient reason to shackle the defendant and doing so was an abuse of discretion. *See* Woodards v. Cardwell, 430 F.2d 978, 981-82 (1970).

257. *See Allen*, 397 U.S. at 340 (describing the trial judge's motivation for removing the disruptive defendant from the courtroom); United States v. Henderson, 472 F.2d 556, 557 (5th Cir. 1973) (permitting the use of restraining devices in the courtroom where the defendant exhibits the potential to be dangerous); United States v. Seale, 461 F.2d 345, 351 (7th Cir. 1972) (finding that mistrial and severance of the defendant's case to be proper actions to ensure a fair and orderly trial); United States v. Bentvena, 319 F.2d 916, 930 (2d Cir. 1963) (finding no abuse of discretion in the trial judge's actions of fining two defendants in order to preserve the security of the courtroom).

258. 397 U.S. 337 (1970).

259. *See Allen*, 397 U.S. at 340. In *Allen*, the respondent, on trial for robbery, was expelled from the courtroom for repeated disruptive behavior, including the use of abusive and vile language directed at the trial judge. *See id.* After giving assurances of good conduct, the respondent was permitted in the courtroom. *See id.* at 341. He was convicted, and upon writ of habeas corpus in federal court, argued that he had been deprived of his rights, as guaranteed by the Sixth and Fourteenth Amendments, to confront the witnesses against him. *See id.* The Seventh Circuit held that a criminal defendant can lose his right to be present at trial, if after a judge's warning he persists in conducting himself in such a disruptive manner. *See id.* at 342-43.

havior.[260] The Court determined that there are three constitutional ways of dealing with such situations: (1) binding and gagging the defendant; (2) citing the defendant for contempt; and (3) expelling the defendant from the courtroom.[261] However, the Court stated that these methods are only to be used as a last resort.[262]

The third grouping of cases regarding the "indicia of innocence" involves the presence of an excessive number of guards in the courtroom.[263] The general rule is that a defendant has the right to be tried in an atmosphere free of bias, such as a courtroom without an excessive number of guards, except in such circumstances that necessitate added security precautions.[264] The concern is that placing guards next to or nearby a criminal defendant will likely exacerbate the impression in the minds of the jurors that the defendant is untrustworthy or dangerous and, thus, a criminal.[265] Additionally, placing guards in close proximity to the defendant may hamper his ability to consult with his attorney.[266]

The fourth group of cases addresses instances where the defendant is inadvertently seen by a juror in shackles or some form of restraint either

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260. *See id.* at 343.

261. *See id.* at 343-46.

262. *See id.*

263. *See* Kennedy v. Cardwell, 487 F.2d 101, 108 (6th Cir. 1973) (listing an excessive number of guards in the courtroom as another category of indicia of innocence cases); *see, e.g.*, Dorman v. United States, 435 F.2d 385, 398 (D.C. Cir. 1970) (placing marshals behind the appellant during trial did not prejudice the jury); United States v. Greenwell, 418 F.2d 846, 847 (4th Cir. 1969) (finding that the district judge did not abuse his discretion by conducting a trial under stringent security arrangements); Burwell v. Teets, 245 F.2d 154, 168 (9th Cir. 1957) (finding no merit in appellant's claim that stationing guards in the courtroom denied him due process).

264. *See Kennedy,* 487 F.2d at 108 (recognizing that the defendant is entitled to a trial free from partialities created by the presence of an excessive number of guards in the courtroom except where special circumstances require otherwise). The reach of this right has not been clearly defined because in only one case has relief been granted due to the presence of excessive guards. *See id.* at 108 n.14 (citing Dennis v. Dees, 278 F. Supp. 354 (E.D. La. 1968)).

265. *See Kennedy*, 487 F.2d at 108 (indicating that an excessive number of guards creates an inference of the defendant's dangerousness or untrustworthiness); McCloskey v. Boslow, 349 F.2d 119, 121 (4th Cir. 1965) (commenting on the use of six guards during trial proceedings and how their presence influenced the jury's verdict); Dennis v. Dees, 278 F. Supp. 354, 357 (E.D. La. 1968) (upholding petitioner's allegations that excessive court personnel prejudiced his rights of equal protection and due process).

266. *See Kennedy*, 487 F.2d at 108. *But see Dorman*, 435 F.2d at 397-98 (allowing guards to be used is an acceptable method of protecting the defendant's rights). The use of guards, when wisely employed, can provide the best means of protecting a defendant's right to a fair and impartial trial. *See Kennedy*, 487 F.2d at 108. Guards can be strategically placed in the courtroom, in plain clothing, without the jury ever knowing of their existence. *See id.* at 109.

in the courtroom, the courthouse, or during transport from the prison.[267] In these circumstances, the reasons underlying the general rule against shackling a defendant during a criminal trial are no longer present because the defendant is not subject to anguish or mental diversion.[268] Moreover, under such a scenario, there is little risk of detracting from the dignity of the court.[269] Rather, the danger to the accused is the possibility of prejudice that a brief, inadvertent exposure may create in a juror's mind.[270] Therefore, the single relevant issue when a defendant is seen in a restraint device is the degree of prejudice that affects the defendant's right to a fair trial.[271]

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267. *See Kennedy*, 487 F.2d at 109 (discussing cases where the defendant was briefly seen in restraints as another category where the indicia of innocence is challenged); *see, e.g.*, United States v. Figueroa-Espinoza, 454 F.2d 590, 591 (9th Cir. 1972) (finding that a mistrial was not proper even though jurors may have seen the appellants in handcuffs); United States v. Leach, 429 F.2d 956, 962 (8th Cir. 1970) (holding that the trial court did not err in refusing to grant a mistrial in spite of the fact that jurors saw the defendants in handcuffs); Hardin v. United States, 324 F.2d 553, 554 (5th Cir. 1963) (averring that without a showing of prejudice, the trial court was not in error for denying a motion for mistrial after jurors saw the appellant handcuffed in an elevator); Way v. United States, 285 F.2d 253, 254 (10th Cir. 1960) (recognizing the general rule that due process relies upon freedom from restraints in courtroom, but because there was no showing of prejudice, a new trial was properly denied); Bayless v. United States, 200 F.2d 113, 114 (9th Cir. 1952) (finding no error in the trial court's failure to dismiss the venire after they viewed the appellant in handcuffs); Blaine v. United States, 136 F.2d 284, 285 (D.C. Cir. 1943) (concluding that the removal of manacles in the jury's presence was not prejudicial); State v. Smith, 322 So. 2d 197, 200 (La. 1975) (holding that the inadvertent viewing of handcuffs on the defendant did not constitute grounds for a mistrial). *But see* Holbrook v. Flynn, 475 U.S. 560, 568 (1986) (discussing how the deployment of additional security personnel does not have the same inherent prejudicial element as shackling).

268. *See Kennedy,* 487 F.2d at 109.

269. *See* Joan M. Krauskopf, *Physical Restraint of the Defendant in the Courtroom*, 15 ST. LOUIS U. L.J. 351, 359 (1971) (outlining the prejudicial effects of physical restraints in courtrooms).

270. *See id.* In these types of situations, the venirepersons observe the defendant outside the courtroom, and the people responsible for dealing with transport of the defendant are often not instructed on how to respond to this type of situation. *See id.* at n.16. Several state courts have in fact held that the manner in which a criminal defendant is transported is within the discretion of the officer who has custody of the accused. *See, e.g.,* Allen v. State, 221 S.E.2d 405, 409 (Ga. 1975) (acknowledging that discretion may be used to transport and safely detain a prisoner); Marion v. Commonwealth, 108 S.W.2d 721, 723 (Ky. 1937) (finding the method of transporting the defendant to be a discretionary action of the officer who has custody of the defendants); Donehy v. Commonwealth, 186 S.W. 161, 164 (Ky. 1916) (stating that "we entertain no doubt that it is within the sound discretion of an officer in custody of criminals . . . to place handcuffs on [the defendant] when he is taken to the court from the jail for trial"). *But see* United States v. Bankston, 424 F.2d 714, 716 (5th Cir. 1970) (holding that the decision to shackle a defendant is best suited for the judge because he or she is most familiar with the defendant's background and history).

271. *See Kennedy*, 487 F.2d at 109.

The electronic security belt potentially falls into two of the "indicia of innocence" categories. The use of a visible transport belt may fall into the first category, which maintains that visible restraints may taint an impartial jury, because the belt may destroy the accused's presumption of innocence. The belt fastens around the prisoner's waist outside his or her clothing and has two plainly visible handcuff rings attached in front.[272] In addition, jurors may see a criminal defendant wearing the belt during transport, thus prejudicing their reasoning and violating the defendant's constitutional rights.[273]

The use of the belt also falls into the fourth type of "indicia of innocence" cases because there is a possibility that the defendant may be shocked in the view of a juror either during trial or outside of the courtroom. In this regard, the record for accidental activations of the belt is particularly disturbing. During the few years that the REACT belt has been in use in courtrooms, it has been activated a total of twenty-one times, only twelve times intentionally.[274] This approximate forty-three percent error rate demonstrates the real possibility that the belt will shock the defendant in the presence of a juror either during trial or outside the courtroom.

Even if Stun-Tech, the belt's manufacturer, were to correct the belt's tendency to activate without provocation, concerns about a defendant's presumption of innocence would not lessen. A defendant would remain fearful of the painful physical consequences following any electrical

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272. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (discussing the high-security transport belt), *available in* 1996 WL 9254174; John Painter, Jr., *Unruly Prisoners Get Charge From a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (describing the types of belts used in Oregon), *available in* 1997 WL 4186285.

273. *Cf. United States of America: Use of Electro-Shock Stun Belts*, (visited Feb. 25, 1998) <http://www.amnesty.org/ailib/aipub/1996/AMR/25104596.htm> (detailing instances when the belt inadvertently shocked the wearer, creating the potential for jurors to perceive the shock and to develop a prejudice against the defendant).

274. *Compare* Paul Forster, *Connected: Shock Horror Torture and the Technology of Pain*, DAILY TELEGRAPH (London), June 10, 1997, at 8 (presenting statistics that the belt has been activated twelve times intentionally and nine times accidentally), *available in* 1997 WL 2315880, *with* Julie Tamaki, *Concerns over Jail Stun Guns Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (asserting that the belt has been purposefully activated a total of fourteen times and inadvertently activated nine additional times), *available in* 1997 WL 2197123; *see also* Anne-Marie Cusac, *'Stunning' Chain Gang Prisoners Is Malevolent, Inhumane and Sometimes Fatal*, WIS. ST. J., July 9, 1996, at 7A (referring to a comment by Stun-Tech's President that unintentional activations match intentional ones, nine times each), *available in* 1996 WL 10530319; Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (referring to Stun-Tech President's comment that belts were used to shock inmates intentionally ten times and accidentally eight times), *available in* 1996 WL 3555939.

shock, thus affecting his outward physical demeanor. Alternatively, a juror may simply notice that the defendant is watching whomever is holding the monitor,[275] or the juror may form the belief that the defendant's nervous guise is a result of guilt, therefore destroying the impartiality of the jury.

As concerns regarding the belt become more prevalent, reviewing courts will be forced to analyze whether the belt is a permissible form of restraint in America's courtrooms. The presumption of innocence guaranteed by the Fourteenth Amendment prohibits the belt's use in courtrooms and dictates that a reviewing court should find that the belt is an impermissable form of restraint.

VI. Use of the REACT Belt in Texas

Use of the REACT belt raises similar problems under state constitutions, particularly that of Texas. The Texas Constitution provides protections to the criminally accused that are substantially similar to those afforded by the United States Constitution.[276] In Texas, the right to be free from excessive bail and cruel and unusual punishment is protected by the Bill of Rights.[277] In addition, the lawyer-client privilege, which was codified by the Texas Legislature as an evidentiary rule, is used in Texas to protect the right of access to the court system.[278] Moreover, criminal defendants are guaranteed a presumption of innocence under their right to an impartial jury.[279] These protections are all weakened as the use of the belt becomes more prevalent in Texas. A recent case involving the use of the REACT belt is currently pending before the Texas Court of Criminal Appeals,[280] thus placing the Court in the position to address

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275. *See Electroshock Torture and the Spread of Stun Technology*, LANCET, Apr. 26, 1997, at 1247 (stating how the presiding judge often holds the remote control), *available in* 1997 WL 9330629.

276. *Compare* U.S. CONST. amend. I (listing the right to freedom of religion), *and* U.S. CONST. amend. VIII (stating that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"), *with* TEX. CONST. art. I, §§ 4-6 (protecting the religious rights of Texas citizens), *and* TEX. CONST. art. I, § 13 (providing "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted").

277. *See* TEX. CONST. art. I, § 13.

278. *See* TEX. R. EVID. 503 (providing a privilege for communications between an attorney and his or her client).

279. *See* TEX. CONST. art. I, § 10 (stating that criminal defendants are enititled to an impartial jury trial).

280. Facsimile from Dianna L. Sobotik, Deputy Clerk, Texas Court of Criminal Appeals, to Shelley A. Nieto Dahlberg, Comment Editor, *St. Mary's Law Journal* (Sept. 21, 1998) (on file with the *St. Mary's Law Journal*) (stating that State v. Chavez, F-9575680-

these challenges and curb the use of security belts in Texas in order to protect criminal defendants' constitutional rights.

A. *The Belt As Punishment Prior to a Determination of Guilt*

Many courts have upheld the practice of pretrial detention as constitutional, each requiring that strict criteria be met before such punishment could be inflicted.[281] For example, in *Gardner v. Murphy*,[282] a Florida district court held that only upon a display of conduct that evidenced flagrant disregard of a court's authority or an attempt to evade a court's processes, may bail be revoked.[283] Texas, however, appears to have approached the constitutionality of pretrial bail denial more stringently than other jurisdictions.

For example, in *Queen v. State*,[284] a Texas court of appeals overturned the trial court's decision to revoke a defendant's pretrial bond and held that neither trial nor appellate courts have the power to ignore express statutory or constitutional provisions with respect to the rights of defendants.[285] In essence, the Texas appellate court argued that the rights de-

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RM (194th Dist. Ct., Dallas County, Tex. Mar. 27, 1996), is pending before the Texas Court of Criminal Appeals as *Chavez v. State*, case number 72,396).

281. *See* Young v. Hubbard, 673 F.2d 132, 134 (5th Cir. 1982) (rejecting the prisoner's equal protection and due process challenge to a Mississippi statute that makes bail a matter for the trial court's discretion); Finetti v. Harris, 609 F.2d 594, 599 (2d Cir. 1979) (requiring that once the state establishes provisions for pretrial bail, bail cannot be denied unreasonably or arbitrarily because of the mandates of the Eighth and Fourteenth Amendments); Hamilton v. New Mexico, 479 F.2d 343, 344 (10th Cir. 1973) (recognizing that a state prisoner whose case is pending on appeal has no federal constitutional right to bail); United States v. Hazard, 598 F. Supp. 1442, 1449 (N.D. Ill. 1984) (rejecting the constitutional challenge that the Eighth Amendment's prohibition of excessive bail necessarily implies a right to bail); *cf.* United States *ex rel.* Sampson v. Brewer, 593 F.2d 798, 799 (7th Cir. 1979) (stating that the petitioner has the burden to show that the record is without a rational basis for the denial of bail); United States *ex rel.* Fink v. Heyd, 408 F.2d 7, 7 (5th Cir. 1969) (finding "no absolute right to bail pending appeal").

282. 402 So. 2d 525 (Fla. Dist. Ct. App. 1981).

283. *See* Gardner v. Murphy, 402 So. 2d 525, 526 (Fla. Dist. Ct. App. 1981) (recognizing that the right to bail can be released when conduct "evinces a flagrant disregard of the court's authority") (footnote omitted); *see also* Middleton v. Polk, 399 So. 2d 1105, 1106 (Fla. Dist. Ct. App. 1981) (affirming the trial court's revocation of bail after petitioner failed to comply with the trial court's instructions); Johnson v. Pellicer, 388 So. 2d 571, 580 (Fla. Dist. Ct. App. 1980) (holding that the defendant's conduct was not in flagrant disregard of the court's authority).

284. 842 S.W.2d 708, 711 (Tex. App.—Houston [1st Dist.] 1992), *aff'd*, 877 S.W.2d 752 (Tex. Crim. App. 1994).

285. *See* Queen v. State, 842 S.W.2d 708, 711 (Tex. App.—Houston [1st Dist.] 1992) (acknowledging that trial and appellate courts lack "inherent powers" which generally permit a court to ignore statutory and constitutional mandates), *aff'd*, 877 S.W.2d 752 (Tex. Crim. App. 1994). The defendant was originally charged and convicted of burglary of a

veloped by Texas jurisprudence are not eliminated once a judge becomes concerned that an individual poses a risk to public safety.[286] If the trial court is concerned about public safety, then the proper method for allaying such concern is to increase the amount of bail; denying bail altogether would violate the will of the people as expressed in the Texas Constitution and by statute.[287]

To this end, Texas law requires that strict procedural standards be followed before pretrial bail can be denied.[288] According to the Texas Code of Criminal Procedure, the right to bail is absolute except in capital offenses where "the proof is evident."[289] This phrase requires evidence that is clear, strong, and leads to the conclusion "that a capital murder has been committed, the accused is a guilty party, and the accused will be convicted of capital murder."[290] In cases of a misdemeanor, the sheriff or other peace officer may take bail from the defendant, the amount of which is regulated by that officer.[291] In felony cases, the court determines the appropriate amount of bail.[292] If no amount has been fixed, then the sheriff or other peace officer may set bail at an amount deemed reasonable.[293] Upon a decision that bail is proper, the judge orders the accused to execute a bail bond with sufficient surety.[294] The accused must be given a reasonable time to procure the security, and, if after such time no security is given, the judge will order the accused to jail.[295]

These stringent procedural requirements preceding the denial of pretrial bail are vastly different from the tenuous standards in place for physical restraints. In Texas, the court has a duty to ensure "that proceedings be conducted with dignity and in an orderly and expeditious manner . . . so that justice is done."[296] Thus, the court's authority to impose the use

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habitation. *See id.* at 709. After being granted a new trial, bail was set at $200,000 and then reduced to $75,000 plus conditions. *See id.* at 711. He was later reported absent from his home, in violation of the conditions set on his bail. *See id.*

286. *See id.* at 711. (explaining that the courts must follow the expressed will of the people as it is found in the laws and constitution).

287. *See id.*

288. *See generally* TEX. CODE CRIM. PROC. ANN. arts. 17.20-.28 (Vernon 1977) (discussing the right to bail in instances of felony and misdemeanor offenses).

289. *Id.* art. 1.07.

290. McKenzie v. State, 777 S.W.2d 746, 749 (Tex. App.—Beaumont 1989, no pet.).

291. *See* TEX. CODE CRIM. PROC. ANN. art. 17.20 (Vernon 1977); *see also* Hokr v. State, 545 S.W.2d 463, 464-65 (Tex. Crim. App. 1977) (interpreting the Texas statute permitting bail in misdemeanor cases).

292. *See* TEX. CODE CRIM. PROC. ANN. art. 17.21 (Vernon 1977).

293. *See id.* art. 17.22.

294. *See id.* art. 17.25

295. *See id.* arts. 17.26-.27.

296. TEX. GOV'T CODE ANN. § 21.001 (Vernon 1986). In Texas, an accused's constitutional right to bail under Article I, Section 11 of the Texas Constitution ends with the entry

of physical restraints is broad and plenary.[297] Similarly, many other states have vague standards as to when physical restraints may be used.[298] Such ambiguous guidelines leave much discretion to the courts and may lead to overuse and abuse of restraints such as the REACT belt.

B. *Texas Rule of Evidence 503: The Lawyer-Client Privilege*

The right to uninhibited communications between a lawyer and his client is another right that is compromised by use of the REACT belt in Texas. The Texas legislature has acknowledged the need for unimpeded communication between lawyer and client by codifying the common-law attorney-client privilege as a rule of evidence.[299] The purpose of this

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of a judgment of guilt. *See Ex parte* Laday, 594 S.W.2d 102, 103 (Tex. Crim. App. 1977) (en banc) (noting that Article I, Section 11 refers to prisoners *prior* to adjudication of guilt). However, defendants convicted of misdemeanor offenses have a right to reasonable bail pending appeal. *See* TEX. CODE CRIM. PROC. ANN. art 44.04(a) (Vernon Supp. 1998). Yet, those convicted of a felony are not permitted bail if their punishment exceeds fifteen years imprisonment. *See id.* art. 44.04(b).

297. *See* TEX. CODE CRIM. PROC. ANN. art. 44.04 (Vernon 1979 & Supp. 1998) (outlining the discretion that trial courts may exercise); *Ex parte* Jacobs, 664 S.W.2d 360, 363 (Tex. Crim. App. 1984) (limiting the trial courts' broad power by requiring that it be exercised with caution).

298. *See, e.g.,* CAL. GOV'T CODE § 20440 (West 1997) (granting a county peace officer power to preserve order in the courtroom and "to guard and maintain the security of prisoners during court appearances"); 725 ILL. COMP. STAT. 5/104-31 (West 1997) (permitting the defendant to be placed in security devices or other security measures during the period of transportation in order to assure secure transport of the defendant and the safety of others); N.J. STAT. ANN. § 28:6-1 (West 1997) (granting the sheriff power to provide for courtroom security); N.C. GEN. STAT. § 15A-1031 (1997) (allowing the judge to order physical restraints when he finds the restraint to be "reasonably necessary"); OKLA. STAT. ANN. tit. 22, § 15 (West 1997) (allowing no "more restraint than is necessary for [the defendant's] detention" but expressly prohibiting chains and shackles during the trial by jury).

299. *See* TEX. R. EVID. 503(b)(1): The rule states in pertinent part that:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer; [or] (B) between his lawyer and the lawyer's representative.

Id.; *see* Austin v. State, 934 S.W.2d 672, 673 (Tex. Crim. App. 1996) (en banc) (stating that "[t]he purpose of the attorney-client privilege is to promote communication between attorney and client unrestrained by fear that these confidences may later be revealed"); *cf.* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a), (b)(1), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A-1 (Vernon Supp. 1998) (providing that a lawyer may not reveal confidential communications, including privileged information); *In re* Auclair, 961 F.2d 65, 70 (5th Cir. 1992) (allowing communications made in the course of preliminary discussions between an attorney and his prospective client to remain privileged even though the representation was not accepted).

privilege is to permit the free flow of information between clients and their attorneys as well as to reassure clients that details of their communications with counsel will not be disclosed.[300] Restrictions on discussions between lawyers and their clients threaten an attorney's ability to provide sound legal advice.[301] The lawyer-client privilege promotes open conversation between attorneys and clients, recognizing that advocacy depends largely upon the lawyer being fully informed by the client.[302] Therefore, any limitations on the attorney-client privilege must be narrowly defined, eliminating the privilege only when it is abused or justifiably necessary.[303]

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300. *See Austin*, 934 S.W.2d at 673 (outlining the purpose of the privilege as to promote communications between the attorney and the client); Cruz v. State, 586 S.W.2d 861, 865 (Tex. Crim. App. [Panel Op.] 1979) (applying the privilege to allow the client to feel unrestrained by fear that confidences may later be revealed). The attorney-client privilege is one of the oldest privileges in American law. *See* Lynne Liberato, *Attorney-Client Privilege in Texas*, 31 S. TEX. L. REV. 519, 519 (1990) (stressing the lawyer's critical role in achieving a "just result" at trial). The right to object when confidential communications to an attorney are revealed "dates back to Elizabethan days, when its purpose was to protect the honor of attorneys." *Id.* Accordingly, the privilege has been included in every edition of the Texas Code of Criminal Procedure from 1856 to 1985. *See id.* at 519-20. However, it was repealed from the criminal statute and is presently included in Texas Rule of Evidence 503, which applies to both criminal and civil proceedings. *See id.* at 520; *see also* TEX. R. EVID. 503(b). As a rule of evidence, it "allows a party to exclude the admission of privileged communications into evidence" during a trial. Lynne Liberato, *Attorney-Client Privilege in Texas*, 31 S. TEX. L. REV. 519, 521 (1990).

301. *See* Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982) (explaining that "[r]estrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice").

302. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (recognizing that the purpose of the lawyer-client privilege is to "encourage full and frank communication between attorneys and their clients"); Trammel v. United States, 445 U.S. 40, 51 (1980) (observing that "[t]he lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out"); Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or apprehension of disclosure"); *see also* Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 671 (1992) (pointing out the importance of assistance of counsel both prior to, and during, formal criminal proceedings).

303. *See* Clark v. United States, 289 U.S. 1, 15 (1933) (presenting the hypothetical situation where the attorney-client privilege is abused and stating that the privilege is released when the client consults an attorney to commit a fraud); *Martin*, 686 F.2d at 32 (discussing the limitations on the privilege); *see also* Moody v. IRS, 654 F.2d 795, 800 (D.C. Cir. 1981) (establishing that the work product privilege is inapplicable "to prevent disclosure of work product generated by those very activities the privilege was meant to prevent"); Strong v. State, 773 S.W.2d 543, 547-48 (Tex. Crim. App. 1989) (en banc) (interpreting the attorney-client privilege to be "an exclusionary rule of evidence" which

Lawyer-client communications and the right to trial are impeded by the use of the REACT belt. Individuals forced to wear the belt argue the psychological effects resulting from its use prevent the defendants from fully and meaningfully participating in their trials.[304] These claims are particularly valid when viewed in light of the belt's advertised use of creating "psychological supremacy" over its wearer.[305] The belt's potential for accidental activations also contributes to the legitimacy of these claims.[306]

C. *Presumption of Innocence and the Texas Constitution*

Use of the REACT belt also implicates another fundamental right of the criminally accused in Texas. Article I, Section 10 of the Texas Constitution sets out the rights of the accused in criminal prosecutions.[307] Specifically, it provides that "the accused shall have a speedy public trial by an impartial jury."[308] Trial by an impartial jury operates as a protection of civil liberties and is "said to be one which favors neither party, which is unprejudiced, disinterested, equitable, and just; and which is composed of jurors who have not prejudged the merits of the case."[309] Implicit in the language of the Texas Bill of Rights is the defendant's right to have the presumption of innocence unaltered and absolutely free from preju-

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"has been limited both by statutory exception and strict construction"); Duval County Ranch Co. v. Alamo Lumber Co., 663 S.W.2d 627, 634 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.) (restricting "application of the rule of privilege of communications between attorney and client").

304. *See, e.g.,* People v. Garcia, 66 Cal. Rptr. 2d 350, 353 (1997) (detailing the belt's threat of debilitating shock and the resulting psychological effects); People v. Melanson, 937 P.2d 826, 835-36 (Colo. Ct. App. 1996) (discussing the defendant's assertion that the stun belt prevented him from participating in his trial).

305. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (describing the belt's effect as "very psychological"), *available in* 1996 WL 9254174; John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (reporting the belt's big advantage as the psychological restraint that follows from its use), *available in* 1997 WL 4186285.

306. *See* Paul Forester, *Connected: Shock Horror-Torture and the Technology of Pain*, DAILY TELEGRAPH (London), June 10, 1997, at 8 (reporting statistics that the belt has been activated accidentally nine times), *available in* 1997 WL 2315880; Julie Tamaki, *Concerns Over Jail Stun Guns Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (discussing the belt's nine inadvertent activations), *available in* 1997 WL 2197123.

307. *See generally* TEX. CONST. art. I, § 10 (providing a multitude of rights for a criminally accused defendant).

308. *Id.*

309. *See* TEX. CONST. art. I, § 10 interp. commentary (Vernon 1997) (citing Duncan v. State, 79 Tex. Crim. 206, 184 S.W. 195 (1916)).

dice.[310] Intimately interwoven into the presumption of innocence and the right to an impartial trial is the proposition that no defendant should be placed in shackles while in the jury's presence except upon a showing of "manifest need."[311] If the judge orders the use of such restraints, the jury may infer "that the trial judge has expressed the opinion that the accused is a dangerous person and is not to be trusted."[312]

The belt's use in Texas implicates a defendant's right to an impartial trial and a presumption of innocence. Due to the belt's alarmingly high error rate, intentional or accidental activation in the presence of the jury raises concerns that jurors may reasonably infer that the defendant is dangerous and in need of additional restraints. Such an inference could easily damage the zealously guarded presumption of innocence and infringe upon the defendant's right to a fair trial under the Texas constitutional framework.

D. Chavez v. State—*A Response to the REACT Belt in Texas*

Pending before the Texas Court of Criminal Appeals is a case involving a defendant whom the jury viewed in a restraint device.[313] Juan Rodriguez Chavez was sitting calmly at the defense table, waiting for testimony to begin in a capital murder trial.[314] He was wearing a REACT security belt because of a prison rumor that he would attempt to escape once he was in the courtroom.[315] Without warning, Chavez slumped over the de-

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310. *See* Shaw v. State, 846 S.W.2d 482, 486 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd, untimely filed) (linking the right to a presumption of innocence with the right to an impartial trial); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.03 (Vernon Supp. 1998) (providing a presumption of innocence to "all persons").

311. *See Shaw*, 846 S.W.2d at 486.

312. *Id.*

313. Facsimile from Dianna L. Sobotik, Deputy Clerk, Texas Court of Criminal Appeals, to Shelley A. Nieto Dahlberg, Comment Editor, *St. Mary's Law Journal* (Sept. 21, 1998) (on file with the *St. Mary's Law Journal*) (stating that State v. Chavez, F-9575680-RM (194th Dist. Ct., Dallas County, Tex. Mar. 27, 1996), is pending before the Texas Court of Criminal Appeals as *Chavez v. State*, case number 72,396).

314. *See Defendant Apparently Jolted by Shock Belt in Courtroom Accident*, FORT WORTH STAR-TELEGRAM, Mar. 19, 1996, at 18 (reporting on the events that occurred during the Chavez murder trial), *available in* 1996 WL 5528299; Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt,'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A (discussing the events of the Chavez murder trial), *available in* 1996 WL 2109577.

315. *See* Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt,'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A (remarking that "Judge Entz had ordered Mr. Chavez to wear the belt after . . . reports from jail that he planned to grab a bailiff's gun and shoot his way out of the courtroom"), *available in* 1996 WL 2109577. The *Chavez* case involved the shooting death of Jose Morales, who was killed "while using a pay phone." *Dallas Murderer Gets Death*

fense table, with a cry of pain and said, "Oh say—it's shocking me man!"[316] The jury witnessed the entire event and was immediately escorted from the courtroom.[317] After a hearing, in which each juror was interviewed to discuss their impressions of what had occurred, the trial was permitted to continue.[318] Chavez was eventually convicted of murder and sentenced to death.[319]

The question currently on appeal is whether the inadvertent activation of the REACT belt was enough to prejudice the jury in such a manner as to prevent the jury from rendering a fair and impartial verdict against Chavez.[320] Although many of the jurors may have been unaware that what shocked the defendant was, in fact, a security precaution, others were probably able to infer from the judge's questions, the shock, and the reaction in the courtroom, that Chavez was under strict surveillance and possibly constituted a security risk.[321]

As the belt becomes more prevalent in the Texas and American criminal judicial systems, a scenario similar to Chavez's is likely to arise again. Consequently, criminal defendants will be deprived of their right to be free from cruel and unusual punishment as well as their rights to the effective assistance of counsel and the presumption of innocence. Given the importance of these rights, the judicial and legislative branches at both the federal and state levels must take immediate action regarding the use of the REACT stun belt.

Sentence: Prosecutors Have Alleged That Juan Chavez Was Involved in Multiple Killings, but He Was Convicted of Only One, FORT WORTH STAR-TELEGRAM, Mar. 28, 1996, at 26, *available in* 1996 WL 5529696.

316. Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A, *available in* 1996 WL 2109577. *But see Defendant Apparently Jolted by Shock Belt in Courtroom Accident*, FORT WORTH STAR-TELEGRAM, Mar. 19, 1996, at 18, (quoting Chavez as declaring, "I'm getting shocked."), *available in* 1996 WL 5528299.

317. *See e.g.*, Steve Scott, *Security Device Jolts Defendant in Murder Trial: Attorneys for Chavez Ask Judge to Declare Mistrial over 'Stun Belt,'* DALLAS MORNING NEWS, Mar. 19, 1996, at 15A, *available in* 1996 WL 2109577.

318. *See id.*

319. *See Dallas Murderer Gets Death Sentence: Prosecutors Have Alleged That Juan Chavez Was Involved in Multiple Killings, but He Was Convicted of Only One*, FORT WORTH STAR-TELEGRAM, Mar. 28, 1996, at 26, *available in* 1996 WL 5529696.

320. *See id.*

321. *See* Steve Scott, *Trial Continues Despite Incident With 'Stun Belt'—Two Witnesses Describe Killing After Mistrial Motion Denied*, DALLAS MORNING NEWS, Mar. 20, 1997, at 37A (presenting the defense attorney's argument that one juror believed Chavez made a threatening move, thus activating the device, while another believed that Chavez was wearing the belt because he was an escape risk), *available in* 1996 WL 2109822. However, all jurors, including an alternate, informed the judge that they were capable of remaining impartial during the remainder of the case. *See id.*

VII. RECOMMENDATIONS

With the increasing use of the REACT belt in American penal and judicial systems, concerns regarding whether a criminal defendant's Sixth, Eighth, and Fourteenth Amendment rights are being violated become increasingly relevant.[322] In particular, the REACT belt implicates the right to be free from cruel and unusual punishment, the right to effective assistance of counsel, and the right to a presumption of innocence.[323] To protect these constitutional rights, the judiciary, as well as the United States Congress and state legislatures, should take the necessary steps to prevent the further use of the REACT belt. Two solutions to this problem exist: (1) immediately suspend the use of stun belts, or in the alternative, (2) decrease the amount of voltage emitted by stun belts.

A. *Immediate Suspension of the Use of Stun Belts*

1. Adverse Physiological Effects

Although Stun-Tech, the manufacturer of the REACT belt, asserts that the belt is safe because it only operates between four and six milliamps,[324] Stun-Tech fails to consider the particular circumstances of, and

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322. *See, e.g.,* People v. Melanson, 937 P.2d 826, 835-36 (Colo. Ct. App. 1996) (describing the defendant's argument that the belt created a reasonable fear that affected his mental faculties, rendering him incapable of fully and meaningfully participating in his defense); *Internight: Crime & Punishment* (MSNBC television broadcast, Mar. 13, 1997) (arguing that from the standpoint of the ACLU, the belt is "[c]ruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution"), *available in* 1997 WL 10274143.

323. *See* U.S. CONST. amend. VI (ensuring the "Assistance of Counsel"); U.S. CONST. amend. VIII (proscribing "cruel and unusual punishment"); U.S. CONST. amend. XIV (implying a presumption of innocence for "all persons").

324. *See* Anne-Marie Cusac, *Stunning Technology: Corrections Cowboys Get a Charge out of Their Sci-Fi Weaponry*, PROGRESSIVE, July 1, 1996, at 18 (reiterating Stun-Tech's argument that belts are one-hundred percent non-lethal), *available in* 1996 WL 9254174; Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (quoting Dennis Kaufman, of Stun-Tech, as stating that belts sold to corrections departments across the country are safe and that all buyers must take a safety training course), *available in* 1996 WL 3555939; Larry Gerber, *Order in the Court?: With Shocking Restraint*, ASSOCIATED PRESS, Apr. 8, 1994 (presenting Stun-Tech's argument that no permanent injury results from shock), *available in* 1994 WL 10133864; John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (repeating Stun-Tech president's statement that the belt is not dangerous due to its low ampere output), *available in* 1997 WL 4186285; *see also* Frank Green, *Torture Weapons or Tools of Order? Officials Say State Prisons Now Safer*, RICHMOND TIMES-DISPATCH, May 18, 1997, at A1 (stating that the milliamps used in the belt are less than that used to light a string of Christmas lights), *available in* 1997 WL 7618475. *But see* Paul Forster, *Connected: Shock Horror—Torture and Technology of Pain*, DAILY TELEGRAPH (London), June 10, 1997, at 8 (discussing medical reports indicating that high-pulsed,

the impact on, individual wearers. For example, prisoners with unknown heart defects are at an increased risk of dying as a result of a shock from the security belt.[325] Additionally, body resistance may alter the effect electricity has on an individual.[326] Because "resistance decreases as the skin becomes moist through sweating or through contact with water,"[327] the belt's electricity may affect prisoners assigned to perform manual labor differently than prisoners who are not involved in strenuous work activity.[328]

Another risk arises if the belt is used on an individual working on a chain gang. As a member of a work crew, a prisoner will be working with rocks and other hard instruments.[329] Once the belt is activated, an individual suffering the electrical charge has no control over where he falls or whether a part of his body, including his head, may hit a hard surface.[330]

Because the REACT belt has such lethal potential, and other less dangerous, yet effective, means of securing prisoners exist, the use of the stun belts should be suspended. This suspension should be indefinite unless

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50,000-volt shock could result in burns and long-term physical and mental injuries), *available in* 1997 WL 2315880; Jean-Pierre Wolff, *Protecting Yourself When Working on High-Power Circuits*, EC&M ELEC. CONSTR. & MAINTENANCE, May 1, 1997, at 33 (discussing new evidence suggesting how electric shocks can produce side effects, which manifest themselves weeks, months, or years later), *available in* 1997 WL 10224576.

325. *Cf.* Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 CREIGHTON L. REV. 733, 788 (1995) (recommending that police officers using stun devices be aware of the risk of respiratory arrest on the subject against whom the belt is employed).

326. *See* John F. Rekus, *Shocking Experiences; Understanding How Electrical Injuries Occur Is an Important First Step to Their Prevention in the Workplace*, OCCUPATIONAL HAZARDS, Feb. 1, 1997, at 23 (listing internal body resistance as one of four factors that determine the effect of an electrical shock on the human body), *available in* 1997 WL 10435261.

327. *Id.*

328. *See* Anne-Marie Cusac, *Stunned by Brutality: Wisconsin's Use of Stun Belts on Chain Gangs Is a Gross Violation of Human Rights*, CAPITAL TIMES (Madison, Wis.), June 9, 1997, at 1C (discussing the possible risk posed to individuals wearing stun belts in varying circumstances), *available in* 1997 WL 7065281.

329. *See id.*

330. *See Internight: Crime & Punishment* (MSNBC television broadcast, Mar. 13, 1997) (providing a discussion among both defenders and opponents of the stun belt), *available in* 1997 WL 10274143. Nadine Strossen of the American Civil Liberties Union argues that in addition to the risks that follow from use of the belt, a number of inmates are members of a chain gang and, thus, "already hobble and can't possibly run." *Id.* According to her argument, the belt is, therefore, unnecessary. *See id.*; *see also* Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 CREIGHTON L. REV. 733, 789 (1995) (warning of the risks, including injuries to heads or bones, involved with the use of stun devices on those subjects prone to falls from a standing position).

sufficient medical evidence is produced to prove that the REACT belt is not capable of seriously injuring or killing the people on which it is used. In particular, any medical testing must clearly demonstrate that the use of such weapons for law enforcement purposes will not contribute to deaths, torture, permanent physical or psychological injury, or any other cruel and inhumane treatment.

2. Potential for Abuse

Apart from the need for medical testing, the belt's potential for abuse also poses too great a risk to permit its continued use. Specifically, prisoners are at risk of being victims to guards abusing the belts in a display of their own power.[331] For example, Lieutenant Ray McWhorter, head of the tactical squad at Hays State Prison, testified in a sworn deposition that he and several other prison guards went on an officially-sanctioned outburst of unprovoked violence on July 10, 1996.[332] When discussing the force used, he stated that he saw prisoners "getting slammed to the floor, slammed against the walls, dragged out of their rooms . . . walked on . . . kicked [and] having their heads stepped on."[333]

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331. *Cf.* John Beauge, *Torture Alleged at Lewisburg*, HARRISBURG PATRIOT, Oct. 29, 1997, at B6 (reporting allegations of unprovoked beatings and torture in the Lewisburg Federal Penitentiary and subsequent lawsuit), *available in* 1997 WL 7536421; Mark Bowes, *State Police Probe of Jail Being Sought: Beatings, Abuse of Inmates Alleged*, RICHMOND TIMES-DISPATCH, Aug. 29, 1997, at B1 (detailing investigation of alleged inmate beatings at Henrico County Jail), *available in* 1997 WL 7627611; Rhonda Cook, *Depositions Detail Abuse of Inmates—Prison Guards Speak: Latest Revelations Suggest a Systemwide Belief That Beating Prisoners Is OK*, ATLANTA J.-CONST., Sept. 9, 1997, at C1 (providing insight into the alleged beatings in a southern Georgia prison), *available in* 1997 WL 3990590; Pamela J. Podger, *Protesters Seek Special Probe of Corcoran Prison: Group Calls on Attorney General to Name Prosecutor to Study Alleged Brutality*, FRESNO BEE, Sept. 20, 1996, at B1 (discussing protestors' demand that the Attorney General investigate the fatal shootings of seven Corcoran inmates and allegations of beatings, torture and abuse), *available in* 1996 WL 6824031; *Prison Abuse Inquiry Moving Forward: FBI to Investigate Beatings Seen on Tape—Texas Jailers Could Face Up to 10 Years*, DALLAS MORNING NEWS, Aug. 21, 1997, at 23A (documenting the FBI's announcement that it will go ahead with full-scale investigation of beatings "of Missouri prisoners whose torture at a Texas county jail was caught on videotape"), *available in* 1997 WL 11513723.

332. *See* Rhonda Cook, *Depositions Detail Abuse of Inmates—Prison Guards Speak: Latest Revelations Suggest a Systemwide Belief That Beating Prisoners Is OK*, ATLANTA J.-CONST., Sept. 9, 1997, at C1 (discussing recently released testimony from prison officials detailing inmate abuse that is the subject of a federal lawsuit), *available in* 1997 WL 3990590; *Hays State Prison: 'It Was a Free-For-All,'* ATLANTA J.-CONST., July 10, 1997, at A10 (confirming allegations of a violent attack against inmates by prison guards), *available in* 1997 WL 3980766.

333. *Hays State Prison: 'It Was a Free-For-All,'* ATLANTA J.-CONST., July 10, 1997, at A10, *available in* 1997 WL 3980766.

These types of violent rampages suggest a system-wide belief that abusing inmates is permissible.[334] If this belief pervades American prison systems, abuse of the stun belt's powerful electric shock may quickly become a reality. Because of the potential for such inadvertent activation and misuse of the electrical shock tool, the use of stun belts should be suspended indefinitely.

3. Use of the Belt Impairs the Proper Administration of Justice

REACT belts also should no longer be permitted in the courtrooms of America. Accidental activations make ensuring a criminal defendant a fair and impartial trial impossible; a likelihood exists that any reasonable person, after viewing a prisoner experience a torturous electrical shock, will be prejudiced either in favor of or against the defendant. Furthermore, due to the belt's disturbingly high error rate, eliminating the use of the belts in the courtroom is the only adequate safeguard to protect criminal defendants' rights to a presumption of innocence.

Because a presumption of innocence outweighs any possible utility of the belt, the elimination of stun belts in America's courtrooms and courthouses is particularly necessary. Moreover, other equally effective means of restraining a defendant exist. For example, in *Illinois v. Allen*,[335] the Supreme Court concluded:

> No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant . . .: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.[336]

Although this list is not exhaustive, courts must balance the potential for prejudice with the need to sustain order in the courtroom.[337]

In addition to protecting the right to the presumption of innocence, prohibiting the use of the belts will help promote and ensure freedom

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334. *See* Rhonda Cook, *Depositions Detail Abuse of Inmates—Prison Guards Speak: Latest Revelations Suggest a Systemwide Belief That Beating Prisoners Is OK*, ATLANTA J.-CONST., Sept. 9, 1997, at C1 (discussing sworn statements by prison employees, which stated that top prison authorities sanctioned and actively participated in unprovoked prison beatings), *available in* 1997 WL 3990590.

335. 397 U.S. 337 (1970).

336. Illinois v. Allen, 397 U.S. 337, 343-44 (1970).

337. *See* United States v. Stewart, 20 F.3d 911, 915 (8th Cir. 1994) (noting that "[c]ourts must do the best they can to evaluate the likely effects of a particular procedure," in order to arrive at the proper balance between prejudice and order (quoting Estelle v. Williams, 425 U.S. 501, 504 (1976))).

from cruel and unusual punishment. By suspending the belt's use, inmates and criminal defendants will not be subject to the belt's torturous shock or punitive effects prior to being convicted. Furthermore, suspension of the belt's use will ensure due process of law for all individuals by preserving a defendant's presumption of innocence and furthering the attorney-client communication process.

B. *Decrease the Amount of Voltage Emitted by Stun Belts*

If courts and legislatures fail to eliminate the use of stun belts in the judicial and penal systems of America, then, at a minimum, the voltage emitted from the belt should be decreased. However, this alternative is an option only after proponents of the belt provide some empirical proof that the belt's activation will not result in death or serious injury. Although no electrical shock is completely safe, the belt, as currently constructed, poses an unacceptable risk to its wearer because of the degree of voltage emitted and its extremely high rate of accidental misfire.[338] In addition, several factors, including the voltage of the circuit, the body's internal resistance, the amount of current flowing through the body, the path the current travels, and the contact time, render unpredictable what actual effect the electricity will have on a particular individual.[339] By decreasing the belt's shock to a range between 5,000 and 10,000 volts, in accordance with the wearer's size and body resistance, painful muscular contractions will be the sole definite result.[340] Thus, the belt will continue

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338. *See* Sabrina Eaton, *Rights Group Seeks Stun Belt Ban*, PLAIN DEALER (Cleveland), June 13, 1996, at 16A (explaining the capabilities of the belt), *available in* 1996 WL 3555939; John Painter, Jr., *Unruly Prisoners Get Charge from a Crime-Fighting Belt*, PORTLAND OREGONIAN, June 30, 1997, at B2 (reporting the stun belt emits an eight-second, 45,000-volt shock), *available in* 1997 WL 4186285; Julie Tamaki, *Concerns over Jail Stun Gun Spark Debate*, L.A. TIMES, Apr. 2, 1997, at B3 (asserting the belt has been activated purposefully fourteen times and another nine times accidentally), *available in* 1997 WL 2197123.

339. *See* John F. Rekus, *Shocking Experiences; Understanding How Electrical Injuries Occur Is an Important First Step to Their Prevention in the Workplace*, OCCUPATIONAL HAZARDS, Feb. 1, 1997, at 23 (listing the elements contributing to the degree of harm suffered as a result of an electric shock), *available in* 1997 WL 10435261; Jean-Pierre Wolff, *Protecting Yourself When Working on High-Power Circuits*, EC&M ELEC. CONSTR. & MAINTENANCE, May 1, 1997, at 33 (detailing factors that influence the effects of a shock), *available in* 1997 WL 10224576.

340. *See* John F. Rekus, *Shocking Experiences; Understanding How Electrical Injuries Occur Is an Important First Step to Their Prevention in the Workplace*, OCCUPATIONAL HAZARDS, Feb. 1, 1997, at 23 (listing physiological effects of electrical current at differing levels), *available in* 1997 WL 10435261. There is no bright line dividing what is defined as high- versus low-voltage, but the division is generally accepted as between 600 and 1,000 volts. *See id.* Resistance to electrical current, however, is measured in ohms; the average body resistance is approximately 100,000 ohms, which decreases as the skin's moisture in-

to serve its purpose of immobilizing a prisoner, without the exaggerated pain, degradation, and possibility of death.

VIII. CONCLUSION

The use of the REACT stun belt infringes upon criminal defendants' and prisoners' fundamental rights; therefore, it cannot withstand judicial scrutiny in light of the United States and Texas Constitutions. Not only does the belt constitute cruel and unusual punishment, but it also has the potential to deprive prisoners of their rights to due process. Moreover, the belt disrupts the attorney-client communication process and destroys a criminal defendant's presumption of innocence. Furthermore, other alternatives provide sufficiently effective means to prevent unruly prisoners from destroying the integrity of the courts. By using handcuffs, leg irons, and in extreme situations, gagging or expelling the prisoner, courts have maintained the order so desperately desired.

The purported benefits that follow from using the stun belt do not outweigh the risk of inadvertent or purposeful activation. Proponents of the belt argue that its use saves money by requiring a smaller number of guards to monitor dangerous inmates and prisoners.[341] However, William Schulz, Executive Director of Amnesty International, counters that the belts will save money only until a state is successfully sued for the serious injury or death of an inmate resulting from the belt's activation.[342] Illustrative is a recent incident in California where a defendant filed a $50

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creases. *See id.* (explaining the role of body resistance in the effects that electricity has on the human body); Jean-Pierre Wolff, *Protecting Yourself When Working on High-Power Circuits*, EC&M ELEC. CONSTR. & MAINTENANCE, May 1, 1997, at 33 (announcing that as the skin's resistance is breached by an electrical current, the resistance drops, allowing the current to increase), *available in* 1997 WL 10224576. The skin's resistance can range from as "little as 500 ohms when wet, to 600,000 ohms when dry." *Id.* Age also contributes to the skin's level of resistance. *See id.* Thus, current is a function of voltage and body resistance and can be calculated according to ohms law. *See* John F. Rekus, *Shocking Experiences; Understanding How Electrical Injuries Occur Is an Important First Step to Their Prevention in the Workplace,* OCCUPATIONAL HAZARDS, Feb. 1, 1997, at 23 (providing the mathematical formula for calculating current as "Current in amps = Voltage in volts/resistance in ohms"), *available in* 1997 WL 10435261. Thus, the belt's 50,000-volt charge, when divided by the average body resistance of 100,000 ohms, results in 500 milliamps of current flowing through the wearer's body. *See id.* Any shock over 100 milliamps can cause certain ventricular fibrillation or even severe burns and muscular contractions. *See id.*

341. *See Internight: Crime & Punishment* (MSNBC television broadcast, Mar. 13, 1997) (covering the discussion between Amnesty International Executive Director William F. Schulz, American Civil Liberties Union President Nadine Strossen, Stun-Tech's Chief Executive Officer Dennis Kaufman, and Wisconsin State Senator Scott Fitzgerald, regarding the reintroduction of chain gangs in Wisconsin and the use of stun belts as a restraining mechanism), *available in* 1997 WL 10274143.

342. *See id.*

million lawsuit against a municipal judge after receiving a jolt from the belt.[343] The judge's motivation for ordering the activation of the belt was to silence the *pro se* defendant.[344]

Incidents such as this one have not only outraged civil libertarians, but also have reinvigorated the call for more explicit guidelines on appropriate activation of the belt and spurred an investigation by the federal government into possible civil rights violations.[345] Because the belt's utility lacks concrete justification, courts and legislatures at both the federal and state levels should take the necessary steps to ensure that the belts are no longer used in the criminal justice system. By doing so, they will uphold the tradition of the United States and Texas Constitutions and the rights guaranteed to all.

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343. *See Courtroom Pyrotechnics 101*, 61 TEX. B.J. 741, 741 (1998) (discussing the $50 million lawsuit against a California judge for activating the belt); Shannon Tangonan, *Use of Stun Belt on Defendant Sets Off Outcry*, USA TODAY, July 20, 1998, at 3A (detailing the actions leading up to the impending lawsuit), *available in* 1998 WL 5730817; *Use of Electrical Shock Belt on Inmate Sparks Criticism Advocates Say His Refusal to Be Quiet Didn't Merit Jolt*, DALLAS MORNING NEWS, Aug. 16, 1998, at 16A (describing the judge's order for the bailiff to activate the remote-controlled stun belt), *available in* 1998 WL 13095188.

344. *See Courtroom Pyrotechnics 101*, 61 TEX. B.J. 741, 741 (1998) (outlining the defendant's continuous interruptions of the judicial proceedings); Shannon Tangonan, *Use of Stun Belt on Defendant Sets Off Outcry*, USA TODAY, July 20, 1998, at 3A (stating that the "defendant, Ronnie Hawkins, was stunned for repeated courtroom outbursts"), *available in* 1998 WL 5730817; *Use of Electrical Shock Belt on Inmate Sparks Criticism Advocates Say His Refusal to Be Quiet Didn't Merit Jolt*, DALLAS MORNING NEWS, Aug. 16, 1998, at 16A (discussing Hawkins' repeated outbursts and the subsequent shock from the belt), *available in* 1998 WL 13095188.

345. *See Use of Electrical Shock Belt on Inmate Sparks Criticism Advocates Say His Refusal to be Quiet Didn't Merit Jolt*, DALLAS MORNING NEWS, Aug. 16, 1998, at 16A (reporting the anger created by the activation of the belt and the subsequent investigation for possible civil rights violations), *available in* 1998 WL 13095188.