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ELECTRIFIED PRISON FENCING: A LETHAL BLOW TO THE EIGHTH AMENDMENT

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I. INTRODUCTION

There is a growing trend nationwide to install high voltage electric fencing systems around the perimeters of correctional institutions.¹ These fencing systems typically operate at high, often lethal, levels of electric current.² While there are few benefits, there is significant potential for serious or deadly injury to inmates. Because such fences constitute an indiscriminate, inhumane, and unreasonable application of deadly force, they violate the Eighth Amendment's³ ban on cruel and unusual⁴ punishment.

* Assistant Professor, Department of Criminal Justice, Southeast Missouri State University. The author wishes to acknowledge the editorial assistance of Ms. Beth Clukey, law clerk to the Honorable Philip G. Reinhard of the United States District Court for the Northern District of Illinois, Western Division and former editor in chief of *The John Marshall Law Review*.

1. Some of the states currently using electrified perimeter fencing include Alabama, Arkansas, California, Nevada, and Missouri. *See, e.g.*, ALA. CODE § 14-3-70 (2001); ARK. CODE ANN. § 12-28-106(a) (2001); MO. REV. STAT. § 217.141 (1999); *and* CALIF. CODE OF REGS. tit. 15, div. 3, art. 2, subsection 3270.1 (authorizing the installation of electrified fencing at certain correctional institutions).

2. The system used in California, for example, operates with 5,000 volts of electricity, while the system in Missouri uses 5,100 volts. *California DOC's Electrified Fences Cause Unexpected Hurdles*, Making Corrections Technology Work for You (LRP Publ'n), Nov. 1997, Vol. 1, No. 11, at 1; Oscar Avila, *New Missouri Prison to Have Deadly Electrified Fence*, THE KANSAS CITY STAR, Jan. 31, 1997, at C-2. It is actually the effect of the current of the electricity, and not the voltage, that is lethal. Human skin is usually an effective barrier to electricity. *See* Jearl Walker, *Electrocution*, in THE FLYING CIRCUS OF PHYSICS WITH ANSWERS 153, 285-86 (1977). Voltages greater than 240 volts are required to overcome the natural resistance of skin. *Id.* The most lethal range of current is about 0.1 to 0.2 amps, the level of current that causes the human heart to undergo fibrillation. *Id.* The high voltages employed in electric fencing ensure that the skin resistance is overcome quickly. As a comparison, most electric chairs employ a shock of between 1,700 and 2,400 volts for 30 to 60 seconds to produce a lethal current. *See Electric Chair—Execution procedure*, available at <http://www.geocities.com/CapitolHill/6142/chair.html>.

3. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

4. As will be discussed in detail later in this article, several lower federal courts have

Specifically, this article discusses the nature of electrical perimeter fencing and contends that such systems as they are currently configured constitute cruel and unusual punishment under the Eighth Amendment. In that regard, it will be asserted that electric fences fail to pass both the objective and subjective components of the Supreme Court's test for conditions-of-confinement claims. First, the level of electrical current used is an objective violation of the Eighth Amendment in that it is inconsistent with the evolving standards of decency in a maturing society. Second, the manner in which the fences are currently installed and utilized are a subjective violation of the Eighth Amendment, as it reflects deliberate indifference to the health and safety of inmates.

Section II of the article will set forth the background law that applies to the analysis regarding the constitutionality of electrified fencing. The third section will discuss which Eighth Amendment standard applies to electrified fencing. Finally, the fourth section will apply the appropriate standard to demonstrate that the fencing is unconstitutional under the Eighth Amendment.

II. BACKGROUND

Courts have yet to address the constitutionality of electrified fencing as a method of confining prison inmates and escape prevention. More generally, the United States Supreme Court has never discussed the constitutionality of using deadly force to prevent an escape.⁵ The Supreme Court has, however, decided several cases that are relevant to this discussion. Additionally, several United States Courts of Appeal decisions have addressed the constitutionality of using deadly force to prevent an escape. This existing case law provides a relevant body of law for determining the legal standard that electrical fencing must satisfy in order to pass Constitutional muster.

Two lines of Supreme Court cases arguably have relevance to the issue of the constitutionality of electrified fences. One line is the "use-of-force" cases, and the other is the "conditions-of-confinement" cases.⁶ Both will be

considered the use of deadly force to prevent an escape as implicating the cruel and unusual punishment clause of the Eighth Amendment. See *Kinney v. Indiana Youth Center*, 950 F.2d 462 (7th Cir. 1991) and *Gravelly v. Madden*, 142 F.3d 345 (6th Cir. 1998).

5. As discussed earlier, two United States Courts of Appeal decisions have addressed this issue. See *supra* note 4.

6. These terminologies are based on the language of applicable Supreme Court cases. In *Whitley v. Albers*, 475 U.S. 312 (1986) and *Hudson v. McMillian*, 503 U.S. 1 (1992), the claims arose out of situations involving the direct application of force to an inmate. In *Whitley* the force was administered to quell a developing prison riot, while in *Hudson* the force was applied to an inmate who was being transferred from one location to another within the prison. In "conditions-of-confinement" cases, the inmates' claims were based on injuries that resulted from a condition of their incarceration, such as lack of medical care (*Estelle v. Gamble*, 429 U.S. 97 (1976)), double celling (*Rhodes v. Chapman*, 452 U.S. 337 (1981)), the presence of tobacco smoke (*Helling v. McKinney*, 509 U.S. 25 (1993)), or unsanitary conditions (*Wilson v. Seiter*, 501 U.S. 294 (1991)).

discussed initially to give the reader an understanding of potentially relevant Supreme Court law. The subsequent section will then discuss and determine which line of cases and, consequently, which standard, is most applicable to the electrified fence situation.

III. THE "USE-OF-FORCE" CASES

Two key Supreme Court cases have defined the parameters for use of force in dealing with prison disturbances and breaches of peace and order. In *Whitley v. Albers*⁷ and *Hudson v. McMillian*,⁸ the Court stated the Eighth Amendment applies to use-of-force situations in a correctional institution. The Court further established in those cases a standard by which courts must determine whether a particular use of force constitutes cruel and unusual punishment.

The *Whitley* case arose out of an inmate disturbance at the state penitentiary in Oregon in which a correctional officer was taken hostage.⁹ After efforts at negotiation failed, the commander in charge organized an assault squad.¹⁰ During the assault, he ordered another officer armed with a shotgun to "shoot the bastards."¹¹ The officer then fired two warning shots.¹² When the plaintiff, another inmate, appeared to chase after the commander who was attempting to rescue the hostage, the officer shot the plaintiff in the leg with the shotgun, causing him severe injury.¹³

The plaintiff filed an action pursuant to 42 U.S.C. § 1983, claiming the use of force violated his rights under the Eighth Amendment.¹⁴ The district court directed a verdict in favor of the defendants, reasoning that the use of force was reasonably necessary as a matter of law.¹⁵ The United States Court of Appeals for the Ninth Circuit reversed, holding sufficient evidence existed for a jury to conclude either that the use of force was unnecessary or that the implementation of the assault plan was done with deliberate indifference to the plaintiff's right to be free from cruel and unusual punishment.¹⁶ The Supreme Court granted a writ of certiorari to decide what standard should apply to an inmate's claim that he was subjected to cruel and unusual punishment when he was shot during an attempt to quell a prison riot.¹⁷ The *Whitley* Court began its analysis by noting that an express intent

7. 475 U.S. 312 (1986).

8. 503 U.S. 1 (1992).

9. *Whitley*, 475 U.S. at 314-15.

10. *Id.* at 315.

11. *Id.* at 316.

12. *Id.*

13. *Id.* at 316-17.

14. *Id.* at 317.

15. *Id.*

16. *Id.* at 317-18.

17. *Id.* at 314.

to inflict pain is not required to establish cruel and unusual punishment under the Eighth Amendment; rather, an unnecessary and wanton infliction of pain would suffice.¹⁸ The Court held that inadvertence or errors in good-faith judgment do not constitute cruel and unusual punishment.¹⁹ Thus, the infliction of pain or injury in the course of a security measure would not amount to cruel and unusual punishment merely because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable or unnecessary.²⁰

Moreover, the Court emphasized the importance, when assessing whether a use of force is an unnecessary and wanton infliction of pain, of giving due regard to differences in the kind of conduct against which an Eighth Amendment claim is brought.²¹ The Court distinguished the “conditions of confinement” cases from those involving a “use of force” to restore order in a prison disturbance.²² In the latter context, the Court reasoned that the competing interests of the safety of prison inmates and staff versus harming the inmates against whom force is used, are inadequately represented by the “deliberate indifference” standard of “conditions of confinement” cases like *Estelle v. Gamble*.²³ The Court emphasized the danger, in “use-of-force” cases, of engaging in hindsight criticism of decisions necessarily made in haste, under pressure and often without an opportunity for a second chance.²⁴

Based on these concerns and observations, the Court in *Whitley* developed a test that focuses on the mindset of the prison officials when they implement a security measure to resolve a disturbance. Under this test, whether such a measure inflicts unnecessary and wanton pain and suffering turns on whether the force was applied in a good-faith effort to maintain or restore discipline or whether it was applied maliciously and sadistically for the very purpose of causing harm.²⁵ The Court also suggested a non-exhaustive list of relevant factors for making this determination. Those factors include: the need for the force, the relationship between the need and the actual amount of force used, the extent of the injury inflicted, the extent of the threat to the safety of the staff and inmates, and any efforts made to temper the severity of the force used.²⁶

More importantly than the standard developed, the Court also espoused several broad principles applicable to security measures in an institution. Prison officials should be given “wide-ranging deference” in adopting and executing policies and practices that they believe are necessary to preserve

18. *Id.* at 319.

19. *Id.*

20. *Id.*

21. *Id.* at 320.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 320-21.

26. *Id.* at 321.

internal order and discipline and to “maintain institutional security.”²⁷ That deference also extends to prophylactic or preventive measures intended to reduce the incidence of any breach of prison discipline. Such deference does not, however, insulate from review those actions taken in bad faith and for no legitimate purpose.²⁸

A few years later, the Court, in *Hudson v. McMillian*, clarified that its holding in *Whitley* went beyond the prison riot situation and applied to a “lesser disruption” in the institution.²⁹ Both situations require quick actions and decisions on the part of prison officials and should, therefore, be accorded the wide-ranging deference discussed in *Whitley*.³⁰ The *Hudson* Court more broadly held that whenever prison officials are accused of using “excessive physical force” in violation of the Eighth Amendment, the core inquiry should be whether the force was applied in a good-faith effort to maintain order and restore discipline, or whether it was applied maliciously and sadistically to cause harm.³¹

IV. THE “CONDITIONS OF CONFINEMENT” CASES

The Supreme Court defined the applicable Eighth Amendment standard in cases involving conditions of confinement in four key cases: *Estelle v. Gamble*,³² *Rhodes v. Chapman*,³³ *Wilson v. Seiter*,³⁴ and *Helling v. McKinney*.³⁵ The *Estelle* case was decided in 1976. The claim in that case was that prison officials violated the Eighth Amendment by failing to provide adequate medical treatment to the plaintiff.³⁶ The Court began its discussion by noting that the Eighth Amendment does not merely proscribe physically barbarous punishments; it also embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency.³⁷ As such, penal measures that are incompatible with the evolving standards of decency, that mark the progress of a maturing society, or that involve the unnecessary and wanton infliction of pain, also violate the Eighth Amendment.³⁸ Based on these prin-

27. *Id.* at 321-22 (citing *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)). The Court in *Bell* elaborated that such deference is to be accorded not only because prison officials ordinarily have a better grasp on the institutional needs than a judge, but also because the operation of a correctional facility is peculiarly within the province of the legislative and executive branches and not the judiciary. *Bell*, 441 U.S. at 548.

28. *Whitley*, 475 U.S. at 321.

29. 503 U.S. at 6.

30. *Id.*

31. *Id.* at 6-7.

32. 429 U.S. 97 (1976).

33. 452 U.S. 337 (1981).

34. 501 U.S. 294 (1991).

35. 509 U.S. 25 (1993).

36. 429 U.S. at 98.

37. *Id.* at 102.

38. *Id.* at 102-03.

ciples, the Court held that the government has an obligation to provide medical care for those it incarcerates. That obligation is measured by asking whether prison officials were deliberately indifferent to a serious medical need of a prisoner.³⁹ This test reflects both objective (was the medical need serious) and subjective (were the prison officials deliberately indifferent to a known risk) components.⁴⁰

The Court first addressed the application of the Eighth Amendment to conditions of confinement in a prison in *Rhodes*. In *Rhodes*, the plaintiffs challenged the practice of double-celling inmates in an Ohio penitentiary.⁴¹ *Rhodes* was a case of first impression regarding whether, and to what extent, the Eighth Amendment limits conditions of confinement at a particular prison.⁴² The Court specifically considered the principles related to assessing claims that conditions of confinement constitute cruel and unusual punishment.⁴³ In this latter regard, the Court emphasized that the Eighth Amendment prohibits punishments that are physically barbarous, involve unnecessary and wanton infliction of pain, or are grossly disproportionate to the seriousness of the crime.⁴⁴ Additionally, the Court stated that no static test can exist to determine whether conditions of confinement are cruel and unusual, because the Eighth Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society.⁴⁵ In *Wilson*, the Court addressed the question of what, if any, culpable state of mind must be shown to establish a claim that conditions of confinement constitute cruel and unusual punishment.⁴⁶ Relying in part on *Estelle* and *Whitley*, the Court stated that a prisoner who claims an official inflicted cruel and unusual punishment, must establish some level of culpability on the official's part.⁴⁷ He or she must show that the corrections official acted wantonly.⁴⁸ This was a further refinement of the subjective component of the *Estelle* test.

According to the Court, wantonness does not have a fixed meaning and must be determined with due regard for the different types of conduct against which an Eighth Amendment claim is lodged.⁴⁹ For example, in emergency situations such as prison disturbances, wantonness consists of acting maliciously and sadistically for the intended purpose of causing harm.⁵⁰ However, in the context of medical care, where the state's responsi-

39. *Id.* at 104-05.

40. See *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

41. 452 U.S. at 339.

42. *Id.* at 344-45.

43. *Id.* at 345.

44. *Id.* at 346.

45. *Id.*

46. 501 U.S. at 296.

47. *Id.* at 302.

48. *Id.*

49. *Id.*

50. *Id.*

bility does not obviously clash with other equally important government obligations, deliberate indifference constitutes wantonness.⁵¹ Therefore, the very high state of mind standard, namely, malice, prescribed by *Whitley*, was not necessary in “conditions-of-confinement” cases as long as the conduct was harmful enough to satisfy the objective component of an Eighth Amendment claim.⁵² Consequently, the Court held in *Wilson* that a prisoner who brings a conditions-of-confinement case must, at the very least, allege and prove that the official acted with deliberate indifference.⁵³

Finally, the Court’s most recent discussion of the constitutionality of a condition of confinement is contained in *Helling v. McKinney*.⁵⁴ The inmate in that case filed suit, claiming an Eighth Amendment violation based on his having been exposed to environmental tobacco smoke when he was celled with an inmate who smoked five packs of cigarettes a day.⁵⁵ In affirming the Court of Appeals decision to remand the inmate’s case for trial, the Supreme Court made several statements relevant to conditions-of-confinement claims. The Court initially noted the indisputability of conditions of confinement claims being subject to scrutiny under the Eighth Amendment.⁵⁶ Further, the Court held that any claim of inhumane prison conditions should be analyzed according to the deliberate indifference standard articulated in *Estelle*.⁵⁷ More importantly, the Court explained a condition of confinement need not be presently causing injury to support an Eighth Amendment claim but may be scrutinized if it is “sure or very likely” to cause serious illness and needless suffering in the future.⁵⁸ As the Court stated, it would be odd to deny an injunction to an inmate who proves an unsafe, life-threatening condition simply because nothing has yet happened to him.⁵⁹ Finally, the Court reiterated its view that an inmate must establish both an objective and subjective violation of the Eighth Amendment to prevail on a conditions-of-confinement claim.⁶⁰

V. THE “USE OF DEADLY FORCE” CASES

The Supreme Court has yet to address the appropriate standard to be applied in claims involving the use of deadly force to prevent a prison escape. Several United States Courts of Appeal, however, have done so. In all these cases, the appellate courts, while presented with different factual contexts,

51. *Id.*

52. *Id.* at 302-03.

53. *Id.* at 303.

54. 509 U.S. 25 (1993).

55. *Id.* at 28.

56. *Id.* at 31.

57. *Id.* at 32.

58. *Id.* at 33.

59. *Id.*

60. *Id.* at 35.

applied the *Whitley* standard⁶¹ in assessing whether the use of force to prevent an escape violated the Eighth Amendment.

The Seventh Circuit, in *Kinney v. Indiana Youth Center*,⁶² addressed whether the Fourth or the Eighth Amendment applied to the use of deadly force to thwart an escape attempt. In *Kinney*, a corrections officer in a guard tower observed the plaintiff, an inmate, walking briskly toward two closed gates in the perimeter fence. After yelling twice at the plaintiff in an effort to get him to stop, the officer picked up a shotgun.⁶³ After “[thinking] twice about it,” she put down the shotgun and grabbed a .22 caliber rifle. As the plaintiff started to go over the top of the second gate, the officer yelled to the plaintiff to stop or she would shoot.⁶⁴ The inmate looked at her, grinned, and jumped from the top of that gate. At that point, the office fired two shots in an effort to wound the plaintiff. Instead, one of the bullets struck the plaintiff in the mouth, causing severe injury.⁶⁵

The plaintiff filed a complaint pursuant to 42 U.S.C. § 1983, alleging violations of his Fourth, Fifth, Eighth, and Fourteenth Amendment rights.⁶⁶ The district court granted summary judgments to the defendants, explaining that the plaintiff was a convicted person whose right to be free from excessive force was governed by the Eighth Amendment standard established in *Whitley*.⁶⁷ According to the district court, under that standard the plaintiff was unable to show that the officer’s shooting him during the escape amounted to cruel and unusual punishment.⁶⁸ The Court of Appeals concluded that the Eighth Amendment applies because it is that Amendment that has been historically applied to excessive force claims arising after conviction.⁶⁹ Borrowing from *Whitley*, the Seventh Circuit noted that a prisoner in the act of escaping might pose a serious threat to the community, which justifies prison officials taking reasonable measures to prevent the escape.⁷⁰ The court also looked to the five factors discussed in *Whitley* as relevant in the escape context.⁷¹ Whether the particular measures taken to prevent an escape unnecessarily inflict pain and suffering, ultimately depends on whether the force was applied in a good-faith effort to maintain or restore discipline, or was done maliciously and sadistically for the very purpose of causing

61. As explained previously, the *Whitley* standard assesses the use of force by asking whether the force was applied in a good-faith effort to maintain or restore discipline or whether it was applied maliciously and sadistically for the very purpose of causing harm. 475 U.S. at 321-22.

62. 950 F.2d 462 (7th Cir. 1991).

63. *Id.* at 464.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 464-65.

69. *Id.* at 465.

70. *Id.*

71. *Id.*

harm.⁷² Applying the *Whitley* standard, the Seventh Circuit concluded that based on the officer's actions, and the absence of any evidence to the contrary, as a matter of law the office acted in a good faith effort to prevent the escape.⁷³

In *Gravelly v. Madden*,⁷⁴ the Sixth Circuit also addressed whether the Fourth or the Eighth Amendment use-of-force standard should apply to the use of deadly force to kill an escapee who had escaped from a minimum-security prison farm detail. In *Gravelly*, an inmate escaped from a minimum-security prison. Four days later, a corrections officer and other law enforcement officers raided a residence where they determined the escapee was hiding.⁷⁵ When the escapee exited onto a rear landing, the officers observed an object in his hand. The officers ordered the escapee to stop, but he jumped from the landing and began to run away. They again ordered him to stop, and, when he did not, the corrections officer fired a single shot, killing the escapee.⁷⁶

The escapee's family filed a lawsuit under 42 U.S.C. § 1983, claiming violations of the Fourth, Eighth, and Fourteenth Amendments.⁷⁷ The district court denied the cross-motions for summary judgment, and the corrections officer appealed the denial of his summary judgment motion, which was based on qualified immunity.

In addressing which amendment should govern the excessive force claim, the appeals court first rejected the Fourth Amendment's applicability.⁷⁸ In doing so, it explained that the use of force to recapture an escaped convict creates a different problem than the use of force to apprehend a non-violent fleeing felon. According to the Sixth Circuit, the Fourth Amendment does not come into play when attempts are made to recapture the escaped convict because the escaped convict has already been seized, tried, convicted, and incarcerated.⁷⁹ The *Gravelly* court concluded that the Eighth Amendment applied because the escapee had already been seized, tried, convicted, and imprisoned.⁸⁰ It thereafter applied the *Whitley* test to conclude that the use of force was not cruel and unusual punishment under the Eighth Amendment.⁸¹

The third case, *Brothers v. Klevenhagen*,⁸² is slightly different because the escapee was an arrestee being transported to jail on a felony arrest war-

72. *Id.*

73. *Id.* at 466.

74. 142 F.3d 345 (6th Cir. 1998).

75. *Id.* at 347.

76. *Id.*

77. *Id.*

78. *Id.* at 348.

79. *Id.*

80. *Id.*

81. *Id.* at 349-50. *But see Gravelly*, 142 F. 3d at 350 (Kennedy, J., concurring) (arguing the Fourth Amendment should apply to the recapture of an escaped inmate).

82. 28 F.3d 452 (5th Cir. 1994).

rant. He made his escape attempt in the sallyport⁸³ area of the jail. After shouting several times to stop, the officers shot and killed him as he attempted to roll under the descending outer door.⁸⁴ The decedent's estate filed suit based on excessive force claims under 42 U.S.C. § 1983. The district court granted summary judgment to the defendants and plaintiff appealed.

The Fifth Circuit considered whether the Fourth or Fourteenth Amendment applied to the use of force in this case.⁸⁵ Initially, the court rejected the plaintiff's argument that the Fourth Amendment applied to the use of deadly force in this case. It did so because at the time of the decedent's escape he was not a suspect, but rather was in custody.⁸⁶ The court, relying on *Valencia v. Wiggins*,⁸⁷ ruled that the Fourth Amendment does not provide the appropriate constitutional standard for assessing use of force after the incidents of arrest have been completed.⁸⁸ The Fifth Circuit thereafter concluded that because the decedent had already been arrested, released from the arresting officer's custody, and was in detention, he was in effect a pretrial detainee, and the Fourth Amendment did not apply to the use of force. As a result, the court considered the Fourteenth Amendment to provide the proper standard.⁸⁹ In doing so, and with virtually no discussion, the court applied the *Whitley* standard.⁹⁰

Absent a definitive decision by the Supreme Court, this trilogy of cases creates the current constitutional standard applicable to the use of force to prevent escapes. That standard, as developed in *Whitley* and expanded in *Hudson* to all uses of force by prison officials, looks to the motivation of corrections officials for the action they took. This motivation, whether it be a good-faith effort to maintain order and restore discipline, or a malicious and sadistic purpose of causing harm, is determined by looking at such factors as the need for the force, the connection between the need for the force and the amount of force used, the extent of the injury, the extent of the threat to inmates and staff, and any efforts to temper the severity of the force used. As discussed above, no court has decided the constitutionality of electric fences as a means of preventing escape.⁹¹

83. The sallyport is a secure area at the rear of the jail where incoming prisoners are unloaded and escorted into the building.

84. *Brothers*, 28 F.3d at 454.

85. *Id.* at 455-56.

86. *Id.* at 455.

87. 981 F.2d 1440 (5th Cir. 1993).

88. *Brothers*, 28 F.3d at 456.

89. *Id.*

90. *Id.* at 457.

91. As such, no constitutional standard has been developed or applied in the electrified fencing context.

VI. APPLICABLE STANDARD

The threshold issue for any court in deciding the constitutionality of electrified fencing is to determine the appropriate legal standard to apply. As demonstrated from the preceding discussion, when presented with an Eighth Amendment issue, a court will have to choose between the use-of-force standard and the conditions-of-confinement standard as developed by the Supreme Court.⁹² It is this author's belief, elaborated in the discussion below, that electrified fencing would violate the Eighth Amendment. The ultimate question of the constitutionality of such fencing is significantly impacted by the choice of standard applied, as the *Whitley* standard is considered more deferential to corrections officials than the deliberate indifference standard.⁹³

As seen from the decisions of the cases discussed, the Supreme Court considers the nature of the conduct at issue and the relevant state of mind in determining the standard under which corrections officials' decisions should be assessed. Both standards contain a subjective component. This subjectivity focuses on the state of mind of corrections officials as it relates to critical decisions that affect inmates' physical health and safety. The standards diverge, however, when it comes to how the corrections official's state of mind is viewed in relation to the particular situation in which such decisions are made.⁹⁴ For example, in situations that allow for contemplation and deliberation, or that lack a degree of urgency, the Court applies the deliberate indifference standard. It does so to allow for a more balanced assessment of the competing needs of the inmate and the institution when such allowance can be reasonably accommodated. On the other hand, in circumstances that create little opportunity to deliberate, such as a prison disturbance or a violent inmate, the Court is more willing to allow prison officials to forgo considered deliberation and act with reasonable dispatch to address the more immediate needs of the situation.⁹⁵ In doing so, the inmate's concerns of per-

92. The use of electrified fencing to prevent prison escapes is conceivably within the ambit of the Eighth Amendment and, therefore, clearly falls under one or the other of these standards. Of course, if a court considering the constitutionality of electrified fencing were to rule that the Eighth Amendment does not cover it, the alternative analysis would be under the substantive due process clause of the Fourteenth Amendment. *See County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998). In that instance, it is likely a court would apply a deliberate indifference standard as opposed to a conscience-shocking standard. This is so because the deliberate indifference standard governs situations where the governmental agency has time to reflect on its decisions as compared to the rapidly developing situation where the officer has little time to reflect before reacting to the situation. *See id.* at 851 (deliberate indifference implies that it should apply only when actual deliberation is practical, such as in the custodial situation of a prison where forethought about a prisoner's welfare is feasible).

93. *See Jeffrey M. Lipman, Eighth Amendment and Deliberate Indifference Standard for Prisoners: Eighth Circuit Outlook*, 31 CREIGHTON L. REV. 435, 449-50 (1998).

94. *See Hudson v. McMillian*, 503 U.S. 1, 8 (1992).

95. *See id.* at 6.

sonal safety and health become minimized relative to the pressing needs of the institution.⁹⁶

The Supreme Court has not yet decided what standard to apply to the escape situation. The lower Federal Courts of Appeals, however, have unanimously applied the more deferential *Whitley* standard, and there are compelling reasons to support that line of cases. A prison escape attempt is often a quickly developing situation fraught with potential danger to the public.⁹⁷ Actions taken by prison officials during an actual escape reflect nearly spontaneous decisions made in haste and under some degree of stress. The *Whitley* standard is ideally suited for evaluating those decisions and conduct.⁹⁸

The application of the *Whitley* standard to active escapes, even if well reasoned, does not compel the same result in the case of the use of electrified fencing. The decision to implement a particular security device and the decision to use a particular level of force to thwart an active escape attempt are distinctly different. The decision to construct and utilize an electrified fence is made with deliberation under circumstances that do not create immediate threats to the safety of other inmates, staff, or the public, and, therefore, do not compel quick action. While decisions made during the heat of escape are born of certain urgencies, decisions about methods and approaches to prevent future escapes are made under controlled circumstances.

The more appropriate standard, therefore, is that applied to conditions-of-confinement situations. An electrified fence is undoubtedly a condition of confinement. More importantly, it is a situation that reflects a controlled, considered decision by corrections officials as to what action to take to address a particular concern. Such a decision is properly held to the deliberate indifference standard.

Such a decision is reached by balancing the needs of the prison institution, the safety of the public, and the costs of alternative measures against the risk to inmate injury from being unnecessarily electrocuted. The reasons enunciated for implementing electrified fencing include its efficiency, effectiveness, and low cost.⁹⁹ The obvious concerns include serious injury or death caused by coming in contact with lethal levels of electricity.¹⁰⁰ Such a considered decision-making process falls squarely within the type of situation in which the Supreme Court has applied the deliberate indifference standard.

96. *See id.*

97. *See Kinney v. Indiana Youth Center*, 950 F.2d 462, 465 (7th Cir. 1992).

98. *See Gravely v. Madden*, 142 F.3d 345, 349 (6th Cir. 1998).

99. *See Kit Miniclier, Lethal Electric Fence Touted at Costly Facility*, THE DENVER POST, June 18, 1999, at B-01; Oscar Avila, *New Missouri Prison to Have Deadly Electrified Fence*, THE KANSAS CITY STAR, Jan. 31, 1997, at C-2.

100. *See Prison to Get Deadly Electrified Fence*, ST. LOUIS POST-DISPATCH, Jan. 31, 1997, at 14-A ("It's a lethal fence. If you touch it you're going to be killed.") (quoting the superintendent of the prison at Cameron, Missouri).

The decision to use electrified fencing is closely analogous to the decision to install a guard tower, stock it with firearms, and man it with personnel trained to prevent an escape. There can be no doubt that the failure to adequately train those personnel to properly use the firearms and understand the appropriate circumstances under which to use deadly force would be assessed under the deliberate indifference standard. While the actual use of force to thwart an escape would be assessed under the *Whitley* use-of-force standard, the preliminary decision to provide the means for applying deadly force as a condition of confinement would more properly be measured by the deliberate indifference standard.

VII. CONSTITUTIONALITY UNDER THE CONDITIONS-OF-CONFINEMENT STANDARD

Having determined that the conditions-of-confinement standard is the proper one to assess the constitutionality of the decision to implement electrified fencing as a method to prevent escape, this section will address the constitutionality of such a measure under that standard. It will be shown that the use of electrified fencing as it currently exists satisfies both the objective and subjective elements of the Supreme Court's test for conditions-of-confinement claims. As such, electrified fencing violates the Eighth Amendment.

Before addressing the constitutionality of electrified fencing under the objective-subjective standard, this section will discuss the nature of electrified fencing, how it is typically utilized, and the reasons for its use. One of the key goals in any penal institution is confinement and the concomitant prevention of escape.¹⁰¹ Escape thwarts the primary goal of confinement as punishment and protection.¹⁰² It also creates, especially in the case of high-level security facilities, safety concerns for the public. It is difficult to argue that corrections officials are not uniquely situated to determine the most effective methods to deter or prevent escape.¹⁰³ Confinement and prevention of escape are classic examples calling for correctional expertise. The use of fences, towers, walls, and other techniques have historically been left to the discretion of prison officials.¹⁰⁴

Additionally, the funding of various elements of confinement, including the costs of security measures, is well within the ambit of the political and legislative processes. Decisions regarding the expense related to walls as opposed to fences, for example, are traditionally left to the legislative and executive branches of government.

101. See JEANNE B. STINCHCOMB & VERNON B. FOX, INTRODUCTION TO CORRECTIONS 265 (1999).

102. *Id.* at 259-61.

103. *Id.* at 217-59 (discussing expertise of corrections officials regarding physical confinement and escape issues).

104. *Id.*

These legislative and executive concerns have fueled the decision to install electrified fencing as a method of preventing escapes. Electric fencing has been touted as a highly effective, yet low-cost, method of confining high security risk inmates.¹⁰⁵ It virtually eliminates the need for manned guard towers.¹⁰⁶ For example, when the California Department of Corrections sought financial support for its Statewide Electrified Fence Project in 1993, it asserted a salary savings of \$45 million per year based on the reduction of staff in guard towers.¹⁰⁷ As another example, when Colorado installed an electrified fence at the state's newest prison in Sterling, the State saved \$1 million in construction costs by eliminating guard towers that were no longer needed and \$750,000 per year in wages to staff the towers.¹⁰⁸

Because it is beyond the scope of this article to discuss all the various configurations of electrified fencing, the system used in California will serve as the primary example. The system used by the California Department of Corrections consists of about eighteen strands of stainless steel, horizontal, electrified wire which are installed on insulators attached to metal fence posts.¹⁰⁹ This electrified fence is placed between two parallel chain link perimeter security fences.¹¹⁰ The electrified wires are spaced at various distances from each other with the top strand one foot higher than the two perimeter fences.¹¹¹ This is done to make it difficult to bridge the gap between the perimeter fence and the electrified wires during an escape attempt.¹¹² The lowest strand is positioned to prevent an inmate from crawling under the fence.¹¹³ There are also stainless steel detection rings attached to the lower strands, which trigger an alarm.¹¹⁴ The electrified fence is divided into zones for location monitoring and for emergency response.¹¹⁵ Alarm panels are located in the central control room, which is continuously staffed.¹¹⁶ These panels display alarm status, location of the putative escapee, and other conditions that are then conveyed to outside patrol vehicles and watch commanders.¹¹⁷

105. See *California DOC's Electrified Fences Cause Unexpected Hurdles*, Making Corrections Technology Work for You (LRP Publ'n), Nov. 1997, Vol. 1, No. 11, at 1.

106. *Id.*

107. *Id.* See also Kit Miniclier, *Owens Dedicates Sterling Prison: Lethal Electric Fence Touted at Costly Facility*, THE DENVER POST, June 18, 1999, at B-01.

108. See *id.*

109. See *California DOC's Electrified Fences Cause Unexpected Hurdles*, *supra* note 105.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

Some states have required, through statute or regulation, that certain safety measures be employed. For example, in an effort to prevent accidental electrocution, the California Code of Regulations provides in subsection 3270.1 that safety precautions be taken, including, but not limited to, the posting of warning signs on the inner and outer perimeters, a visual inspection of the electrified fence at least once per shift, regular inspection by an outside patrol, the presence of a staff member trained in de-energizing the fence, and the insulation of the electrified fence between two security fences.¹¹⁸ The applicable Missouri statute provides, in pertinent part, that “[a]ll reasonable and necessary precautions consistent with industry standards shall be taken . . . to protect the safety of the local community and department personnel.”¹¹⁹ Alabama’s code provides, in relevant part, that at the time of installation there “shall be posted universal danger signs on all sides of the system, clearly visible to inmates and the public displaying the warning ‘deadly voltage.’”¹²⁰ Like California, the Alabama statute further requires an electrified fence to be placed between double security fences.¹²¹ The relevant statute in Arkansas states that universal danger signs clearly visible to inmates and the public must be placed on all sides of the system and warn of deadly voltage in both English and Spanish.¹²² The fences in Arkansas are required to be located between double, twelve-foot high perimeter fences.¹²³ Additionally, the corrections department in Arkansas must provide “perimeter patrol for the safety of the local community.”¹²⁴

Having discussed the nature of electrified fencing systems as they currently exist, the first issue is whether electrified fencing is potentially harmful enough to satisfy the objective test under the Eighth Amendment.¹²⁵ This requires an analysis of the cruel and unusual aspects, if any, of electrified fencing when measured against the evolving standards of decency that mark the progress of a maturing society.

All current or imminent fencing systems utilize a lethal level of electricity.¹²⁶ For example, the electrified fence at the prison in Cameron, Missouri, operates with 5,100 volts, twenty times the voltage needed to kill a human.¹²⁷

118. Cal. Code Regs. tit. 15, div. 3, art. 21, subs. 3270.1 (2000).

119. MO. REV. STAT. § 217.141 (1999).

120. ALA. CODE § 14-3-71 (2001).

121. *Id.* at § 14-3-72.

122. ARK. CODE ANN. § 12-28-106(a) (2001).

123. *Id.* at § 12-28-106(b).

124. *Id.* at § 12-28-106(c).

125. The objective test is the approach used to determine whether a condition of confinement is “sufficiently serious” to trigger the Eighth Amendment’s prohibition against cruel and unusual punishment. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

126. The one notable exception is the fence installed at the Sterling Correctional Facility in Sterling, Colorado. The Sterling fence is designed to give an inmate a “jolt powerful enough to knock him to the ground” on the first touch. If the fence is touched again within a certain amount of time, the fence is programmed to deliver a “fatal jolt” of electricity. Mini-clier, *supra* note 107.

127. Oscar Avila, *New Missouri Prison to Have Deadly Electrified Fence*, THE KANSAS

In fact, prison officials refer to the fence at Cameron as the “Intimidator.”¹²⁸ The fences used in California carry a 5,000-volt charge, which is also lethal to humans.¹²⁹ Furthermore, some states have statutes authorizing or requiring the installation of electrified fences at certain correctional institutions. These statutes call for high or lethal levels of voltage. In Missouri, for example, the statute requires installation of “high voltage” electrified security fences.¹³⁰ Alabama’s statute authorizes installation of “high voltage” fences.¹³¹ Arkansas law not only allows for installation of “high voltage” electrified fences, it also requires signs that warn of “deadly voltage.”¹³² In California, the authority for electrified fencing is contained in a California Department of Corrections regulation that provides, in relevant part, for a “high voltage” fence installed for the “lethal infliction of injury” to any inmate trying to escape.¹³³

It is evident that the law sanctions the deadly levels of electricity in the electrified fencing systems currently in use. That begs the question of whether there is something inherently cruel and unusual in the amount of electricity alone that is being used. One commentator, in criticizing the approach, has stated that such a system is the equivalent of “giving someone a death sentence for trying to escape.”¹³⁴ There is merit to that characterization. While it is true that such fences are generally installed only at high security institutions that house serious criminals, even such inmates pose widely varying risks of escape and safety threats to the public. A “one size fits all” approach to the use of deadly force is always problematic.¹³⁵

The Eighth Amendment is defined, in part, by evolving standards of decency that mark the progress of a maturing society.¹³⁶ While some would argue that deadly force is never an acceptable means of preventing escape, it is widely accepted even in our modern society.¹³⁷ All methods of causing death, however, are not acceptable. For example, at one point in our history, the use

CITY STAR, Jan. 31, 1997, at C-2.

128. *Id.*

129. *California DOC’s Electrified Fences Cause Unexpected Hurdles, Making Corrections Technology Work for You* (LRP Publ’n), Nov. 1997, Vol. 1, No. 11, at 1.

130. MO. REV. STAT. § 217.141 (1999).

131. ALA. CODE § 14-3-70 (2001).

132. ARK. CODE ANN. § 12-28-106(a) (2001).

133. CALIF. CODE OF REGS., tit. 15, div. 3, art. 2, subsec. 3270.1 (2001).

134. Avila, *supra* note 127, at C-2 (quoting Dick Kurtenbach, ACLU Executive Director for Kansas and Western Missouri).

135. The legitimate use of deadly force by law enforcement and corrections officers has historically been viewed as dependent upon the particular circumstances under which it is used. *See, e.g.*, Timothy P. Flanagan & Robert Homant, “Suicide by Police” in *Section 1983 Suits: Relevance of Police Tactics*, 77 U. DET. MERCY L. REV. 555, 559 (2000).

136. *Estelle v. Gamble*, 429 U.S. 97, 107 (1976).

137. *See Tennessee v. Garner*, 471 U.S. 1 (1985) (holding use of deadly force to prevent felon from escaping is legitimate under the proper circumstances); *Kinney v. Indiana Youth Auth.*, 950 F.2d 462 (7th Cir. 1991) (holding deadly force to prevent escape of inmate proper under the circumstances).

of electricity was widely accepted as a humane method of execution.¹³⁸ It has, however, fallen into disuse recently as the more humane method of lethal injection has become accepted.¹³⁹ Based on experience, electricity has proven to be an arguably inhumane way to take someone's life.¹⁴⁰ While never having been declared a violation of the Eighth Amendment by the Supreme Court, the electric chair has recently been rejected by society as an uncivilized method of execution.¹⁴¹

Even if the use of electricity as a method of execution is considered within the evolving standards of decency, such a method is far removed from the uncontrolled application of electrical current via a fence. The electric chair is utilized under controlled circumstances to achieve an arguably humane death.¹⁴² The electrified fence, on the other hand, delivers its voltage in an uncontrolled manner, and under circumstances that could cause inhumane suffering and death. One need only conjure up situations involving water, incomplete contact with the fence or other circumstances which could result in prolonged or excessive suffering prior to death or severe and disabling injuries. In our modern world, electricity is a crude, and sometimes inefficient method of death.¹⁴³ This makes the use of electricity to prevent prison escapes, which, unlike capital punishment, is outside the realm of the prisoner's sentencing, even more cruel and unusual.

Supporters will undoubtedly contend that no one should be surprised when it comes to using deadly force to prevent an escape. It is true, as discussed above, that the few courts that have examined the issue have upheld the use of deadly force to prevent a prison escape.¹⁴⁴ Additionally, numerous

138. See *In re Kemmler*, 136 U.S. 436 (1890) (discussing the State of New York's legislative conclusion that execution by electricity was the "most humane and practical method known to modern science").

139. Currently, of the thirty-eight states that have the death penalty, only eleven recognize electrocution as a valid method of execution. Of those eleven states, only two, Nebraska and Alabama, use electrocution exclusively. The other nine states allow the condemned inmate to choose between the electric chair and lethal injection. IRA J. SILVERMAN, *CORRECTIONS: A COMPREHENSIVE VIEW* 45 (2d ed. 2001).

140. It is interesting that execution by lethal gas replaced electrocution in some states because it was considered more humane, less painful and more dignified than the electric chair. See *Gray v. Lucas*, 463 U.S. 1237, 1246 (1983) (Marshall, J., dissenting from denial of writ of certiorari). See also Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un) Constitutionality of the Methods of Execution*, 6 B. U. PUB. INT. L. J. 153, 167-69 (1996) (discussing botched executions via the electric chair in which inmates' reactions evidenced prolonged pain and suffering).

141. See *supra* note 139.

142. The inmate is placed in the electric chair where belts are fastened around his chest, groin, legs, arms and head to secure him to the chair. Electrodes are placed on shaved locations on his head and legs. The electrode on his head is attached to a moistened sponge to increase conductivity. A helmet is also placed on the inmate's head. The first jolt of electricity is applied at 2,000-2,200 volts. Following delivery of the first charge, a doctor waits for the body to cool and checks for a heartbeat. If the inmate is still alive, another jolt of electricity is applied. Harding, *supra* note 140, at 166.

143. See *supra* note 140.

144. See *supra* notes 62, 74 and 82.

states have statutes that expressly authorize the use of deadly force to thwart an escape attempt.¹⁴⁵ Nearly all of these statutes use such terms as deadly force or deadly physical force as the type of force authorized against inmates attempting to escape.¹⁴⁶

These statutes do not, however, support the indiscriminate use of lethal electricity against escaping inmates. Almost all of the statutes that allow for deadly force to be used to prevent an escape limit its use to situations where the officer “reasonably believes it necessary” to prevent or terminate the escape.¹⁴⁷ Such qualifying language distinguishes traditional uses of deadly force, such as discharging a firearm, from the indiscriminate application of lethal voltage via an electrified fence. The use of firearms or other means of deadly force in a particular situation, by its nature, calls for the application of human judgment or discretion. Fences, unlike humans, cannot think, assess circumstances, or exercise judgment. It is well-settled law that deadly force may never be used indiscriminately.¹⁴⁸ Its authorized use, even in the

145. See, e.g., ALA. CODE § 13A-3-27(h) (2001); ALASKA STAT. § 11.81.410(b) (Michie 2001); ARIZ. REV. STAT. § 13-414 (2001); ARK. CODE ANN. § 5-2-613 (2001); COLO. REV. STAT. § 18-1-707(8)(a) (2000); FLA. STAT. § 776.07(2) (2000); GA. CODE ANN. § 17-4-20(c) (2000); IOWA CODE § 704.8 (2001); KAN. STAT. ANN. § 503.090(3) (2001); MONT. CODE ANN. § 45-3-106 (2000); NEB. REV. STAT. § 28-1412(4) (2001); N.J. REV. STAT. § 2C:3-7C (2001); OKLA. STAT. tit. 21, § 732 (2000); PA. CONS. STAT. tit. 18 § 508(c)(2) (2000); S.C. CODE ANN. § 24-13-30 (2000); S.D. CODIFIED LAWS § 24-2-6 (Michie 2001); TEX. PENAL CODE ANN. § 9.52 (Vernon 2000); UTAH CODE ANN. § 64-13-32(2) (2000); WASH. REV. CODE § 9A.16.040(1)(c)(iii) (2001).

146. See, e.g., ALASKA STAT. § 11.81.410(b) (Michie 2001) (guard may use deadly force to prevent escape); ARK. CODE ANN. § 5-2-613 (2001) (correctional officer is justified in using deadly physical force to prevent an escape); FLA. STAT. § 776.07(2) (2000) (correctional officer is justified in the use of force, including deadly force, to prevent an escape); GA. CODE ANN. § 17-4-20(c) (2000) (correctional officer is authorized to use deadly force to prevent an escape).

147. See, e.g., ALA. CODE § 13A-3-27(h)(1) (2001) (officer may use deadly force to prevent escape when he “reasonable believes it necessary”); COLO. REV. STAT. § 18-1-207(8)(a) (2001) (guard is justified in using deadly force when he “reasonably believes it necessary” to prevent an escape); IOWA CODE § 704.8 (2001) (correctional officer is justified in using “reasonable” deadly force which is “necessary” to prevent an escape); MONT. CODE ANN. § 45-3-106(2) (2000) (guard is justified in the use of force likely to cause death if she “reasonably believes [it] to be necessary” to prevent an escape); OR. REV. STAT. § 161.265 (1999) (guard is justified in using deadly force when he “reasonable believes it necessary” to prevent an escape).

148. An excellent example of the rule against the indiscriminate use of deadly force is the prohibition of spring guns and booby traps to protect one’s home. See Stuart P. Green, *Castles and Carjacks: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1, 33 n.142 (discussing potential liability for the use of a spring gun or booby trap). See also *Falco v. State*, 407 So. 2d 203, 208 (Fla. 1981) (stating the use of a deadly mechanical device is an unjustifiable use of deadly force because it removes the element of discretion or judgment from the decision to use deadly force); *Katco v. Briney*, 183 N.W.2d 657 (Iowa 1971) (admitted burglar allowed to recover damages for injuries incurred when shotgun booby trap went off in abandoned house); *Allison v. Fiscus*, 100 N.E. 2d 237 (Ohio Ct. App. 1951) (plaintiff’s right to damages recognized for injuries received when he feloniously entered a warehouse and was injured by a trap consisting of two sticks of dynamite).

context of prison escapes, contemplates a degree of human judgment as to the propriety of such an extreme measure under the particular circumstances existing at the time. This is clearly reflected in the application of the *Whitley* standard to the escape situation in *Kinney v. Indiana Youth Center*.¹⁴⁹ As the Seventh Circuit explained, a prisoner in the act of escaping may pose a serious threat to the community, prompting prison officials to take reasonable measures to prevent the escape.¹⁵⁰ The question of whether the prisoner constitutes a serious threat to the community contemplates some level of human assessment. Furthermore, the reasonableness of any measures used depends on the circumstances as a whole. Such circumstances-based justification for deadly force to prevent an escape supports the theory that deadly force is not permissible when lesser force would effectively frustrate the escape attempt.¹⁵¹ Circumstances can be assessed and weighed only by a human being at the time of the escape. The existing law, statutory or otherwise, simply provides no support for the indiscriminate and purely mechanical application of deadly force as administered via electrical fences.

Apart from what the law authorizes in terms of deadly force, the recommended practices within the corrections profession generally dictate that the use of deadly force is not permissible when lesser force would be effective.¹⁵² While it is clear that deadly force may be used in response to some escapes, it is not so clear as to all escapes.¹⁵³ Such factors as the dangerousness of the escapee,¹⁵⁴ the ability to escape,¹⁵⁵ and the security level of the institution¹⁵⁶ are considered by corrections officials as critical to the decision whether to use deadly force to thwart an escape. These correctional practices are generally consistent with the law and reinforce the importance of the human factor in the decision to use deadly force to prevent an escape.

The indiscriminate use of lethal levels of electricity to prevent escape is excessive, inhumane, and inconsistent with current societal views on state-sanctioned electrocution. There can be little doubt that a court assessing an Eighth Amendment claim based on electrified fencing would conclude that by its very nature it meets the objective component of a conditions-of-confinement claim.

In addition to the issue of whether the use of a lethal electrified fence to prevent an escape satisfies the objective component of a conditions-of-confinement claim, is whether it meets the subjective element of such a claim. In other words, does the use of electric fencing reflect deliberate in-

149. 950 F.2d 462 (7th Cir. 1991).

150. *Id.* at 465.

151. See MICHAEL MUSHLIN, RIGHTS OF PRISONERS Vol. 1, 58-59 (2d ed. 1993).

152. *Id.*

153. WILLIAM C. COLLINS, CORRECTIONAL LAW FOR THE CORRECTIONS OFFICER (2d ed. 1997).

154. *Id.*

155. Federal Bureau of Prisons Rule PS 555.12, at 4 (1996).

156. *Id.* at 5.

difference on the part of corrections officials?¹⁵⁷ It is difficult to maintain that there is not some point at which the way the fence is utilized would demonstrate deliberate indifference. For example, utilizing an electrified fence without warning or notice would certainly constitute the wanton infliction of pain prohibited by the Eighth Amendment. However, there is no indication that such an approach has been or will be taken. Rather, at least some states have prescribed certain precautionary measures, whether by statute, regulation, or practice, to minimize the risk of accidental or incidental harm to inmates. It is impossible at this point to foresee all the various permutations as to how these fences will be installed or what cautionary measures and warnings will be employed. As a practical matter, a court is unable to assess the constitutionality of a particular fencing system without examining the particular circumstances in that case. Nonetheless, for purposes of this discussion, existing standards and approaches will be examined to determine the constitutionality of electrified fencing systems as they currently exist.

As discussed earlier, the common method used is to place the electrified fence between two non-electrified fences topped with razor wire.¹⁵⁸ This is done to provide some warning of the presence of the electrified fence and also to create a safety barrier to prevent accidental contact. Another common practice is to post signs that warn of the presence and danger of the electrified fence.¹⁵⁹ In Missouri, the statute broadly provides that “[a]ll reasonable and necessary precautions consistent with industry standards shall be taken by the department to protect the safety of the local community and department personnel.”¹⁶⁰ Arkansas goes one step further and provides for “perimeter patrol for the safety of the local community.”¹⁶¹

The regulation and implementation of safety measures in American penal institutions is primarily focused on the prison staff and the public. Although the safety of those individuals is certainly important, the apparent lack of equal concern for the safety of the inmates reflects deliberate indifference.

Furthermore, all of these precautions assume certain things about the inmate population, such as their ability to read or comprehend English or Spanish, or their mental capacity to understand warnings or grasp the dangerous nature of electrified fencing. Unfortunately, many inmates cannot read or have low cognitive functioning.¹⁶² Inmates such as these are not necessarily immune from the desire to escape. It is not inconceivable that some

157. *See supra* notes 51-53 and accompanying text.

158. *See supra* notes 109-117 and accompanying text.

159. *See supra* note 109-117 and accompanying text.

160. MO. REV. STAT. § 217.141 (1991).

161. ARK. CODE ANN. § 12-28-106(c) (2001).

162. *See Note, Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L. J. 296, 300-02 (1998) (Seventy percent of inmates perform at the lowest two levels on the literacy scale used by the National Center for Education Statistics.).

inmates will come in contact with the fence despite warnings and physical barriers.

In addition, there will always be inmates who believe they can defeat the system and escape, regardless of the dangers posed by the fencing.¹⁶³ Those inmates may attempt an escape notwithstanding the warnings and precautions.¹⁶⁴ It is not an uncommon practice in more traditional prison escape situations for corrections officers who are monitoring the wall or fence to at least shout a warning before firing a shot at an escaping inmate. With an electrified fence there would likely be no one present at the time of the escape to provide that one last chance to abort the escape before the lethal force is delivered.¹⁶⁵ While the absence of a warning is not a litmus test for the unconstitutional use of force, it is at least a relevant circumstance.¹⁶⁶ Electrified fencing provides no specific warning immediately before the application of deadly force, although there may be universal, general warnings.

Perhaps the most troubling aspect of any electrified fencing system is its indiscriminate application of deadly force irrespective of the circumstances. While that is also problematic from an objective point of view, it is even more disconcerting in the context of the subjective state of mind of the corrections officials. Such an approach evidences deliberate indifference to the consequences of an inmate contacting the fence. The mere installation of barrier fences and warning signs is insufficient in light of the lethal levels of electrical current involved. Moreover, one of the stated purposes of the fencing system is to eliminate the need to manually monitor the perimeters.¹⁶⁷ It is reasonable to conclude, therefore, that little or no human monitoring of the interior of the fencing will occur. Prison officials have essentially turned an inanimate killer loose with virtually no human oversight or control. This is overwhelming evidence of deliberate indifference to the safety and well-being of all inmates. The State's failure to take effective steps necessary to prevent inmates from contacting electrified fences is reflective of a desire to inflict unnecessary and wanton pain. For example, there are more effective measures that could be implemented such as alarms on the barrier fences that would alert corrections officials that someone is getting near the electrified fence. This would be particularly useful in light of lack of manned guard towers by which corrections officers traditionally monitor perimeter fences. Even low, non-lethal levels of electricity applied to the barrier fence would

163. Recently, six Alabama inmates escaped by using a broom handle to prop up an electric fence while they slid under. *See High Profile Escape Misleading*, Corrections Professional (LRP Publ'n) Apr. 6, 2001, Vol. 6, No. 14.

164. At the time of the Alabama escape, there were universal danger signs posted that were clearly visible to inmates. *See* ALA. CODE § 14-3-71 (2001).

165. One of the reasons touted for the installation of electrified fences is the elimination of the need for manned guard towers. *See supra* note 89 and accompanying text.

166. *See Tennessee v. Garner*, 471 U.S. 1, 12 (1985) (deadly force may be used, in the appropriate circumstances, to prevent escape, if, where feasible, some warning has been given).

167. *See supra* note 106 and accompanying text.

provide an effective, non-deadly warning to approaching inmates. The current practice of warning signs and barriers alone leaves too many opportunities for an inmate to be unnecessarily electrocuted. For example, illiterate and mentally incompetent inmates along with those that cannot read English or Spanish will not be able to comprehend warning signs. Additionally, inmates who desire to use the electrified fence as a weapon against other inmates will be able to do so with only the minimal hindrance of a chain link fence standing in their way. Such a situation is analogous to providing inmates with relatively unfettered access to loaded weapons that could be used to harm other inmates. This suggests deliberate indifference to inmate health and safety by corrections officials. Placing untrained and ill-tempered corrections officers in a guard tower with the authority to use deadly force indiscriminately to prevent apparent escape attempts would surely fail to pass constitutional review. The indiscriminate use of lethal levels of electricity to prevent escape is not only deliberate indifference, it is barbaric and inhumane.

Two additional arguments support the conclusion that correctional officials who utilize electrified fencing act with deliberate indifference to inmate safety. First, there are effective, but far less deadly, alternatives to electrified fences that can be implemented. Second, the risk of escape is not enough to justify such an extreme approach. Correctional officials who use electrified fencing in the face of less dangerous alternatives and decreasing escape statistics act with deliberate indifference to the safety of all inmates.

The traditional methods of preventing escape include high walls or chain link fencing topped with razor wire.¹⁶⁸ Newer methods such as electronic alarm systems on the fences to indicate contact with, or movement of, the fence have also been employed. Another recent innovation is razor mesh fencing, which consists of razor material in straight bands that form diamond shaped openings.¹⁶⁹ It has been described as “virtually impossible to climb” and equally difficult to cut.¹⁷⁰ At the United States Penitentiary in Marion, Illinois, a new electronic detection fencing developed by the Israelis is being used in conjunction with the traditional two-chain link fence system.¹⁷¹ Each chain link fence at Marion is topped with razor wire and several rolls of razor wire are also located between the two fences.¹⁷² Marion houses some of the most dangerous and notorious prisoners in the federal system, yet it has not experienced a single escape attempt since 1983.¹⁷³

168. JEANNE B. STINCHCOMB & VERNON B. FOX, INTRODUCTION TO CORRECTIONS 263-64 (5th ed. 1999).

169. Making Corrections Technology Work for You (LRP Publ'n), Feb. 1998, Vol. 2, No. 3.

170. *Id.*

171. Personal information gained from tour of the maximum-security prison at Marion, Illinois on July 12, 2001.

172. *Id.*

173. *Id.*

This suggests that corrections officials have reasonable security measures available that are both highly effective and far less deadly than electrified fencing. Many high-security level institutions, such as Marion, are still relying on these non-deadly alternatives as their primary methods of escape prevention. The use of a far more deadly and dangerous alternative that is arguably only incrementally more effective further demonstrates the deliberate indifference of prison officials to the safety and well-being of all inmates.

Additionally, it is curious that corrections officials have chosen to utilize such an extreme measure to prevent escape at a time when escapes are a decreasing concern at correctional institutions. The Criminal Justice Institute reports that prison escapes are substantially less common today than ten years ago.¹⁷⁴ In 1990, 2,583 inmates escaped from United States prisons whereas only 1,047 escaped in 1999.¹⁷⁵ Again, when viewed in light of the decreasing incidence of escape, the use of electrified fencing shows a deliberately indifferent attitude toward the safety of all inmates.

A combination of the foregoing considerations suggests that prison officials who use electrified fences act with deliberate indifference to inmate safety and health. The indiscriminate use of lethal levels of electrical voltage in the face of reasonable, less deadly alternatives, combined with inadequate precautions to minimize inmate contact with such fences and the decreasing risk of inmate escape, adds up to nothing short of deliberate indifference. Consequently, the use of electrified fencing systems, as currently implemented, satisfies the subjective component of a conditions-of-confinement claim under the Eighth Amendment.

VIII. CONCLUSION

The use of electrified fencing to confine prisoners and prevent escape is growing in popularity. It is both cost-effective and efficient in accomplishing its purpose. There is, however, a cost that transcends any monetary and safety advantage: violation of the Eighth Amendment right to be free from cruel and unusual punishment. Against a backdrop of society's current standards of civilized behavior, and its striving toward civilized progress, electrified fencing stands out as a symbol of regression to a time of more barbaric and inhumane approaches to punishment and confinement. The State clearly has the authority to take reasonable steps to confine inmates, prevent escape, and protect the public from dangerous criminals. Such authority, however, is not without limits. It must be exercised within the bounds of the Eighth Amendment. The use of electrified fencing as a method of confinement and escape prevention crosses the line from a legitimate correctional method to

174. The Corrections Professional (LRP Publ'n), April 16, 2001, Vol. 6, No. 14.

175. *Id.*

cruel and unusual punishment. As such, it is an unconstitutional condition of confinement under the Eighth Amendment to the United States Constitution.