

A New Way Forward for Alabama Prisons

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This chapter has descriptions of violence and sexual assault.

Abstract

Blankenship delves into the harrowing realities and historical evolution of Alabama's prison system, offering a critical lens on Alabama's prisons from their inception to the present day. The narrative begins with a vivid description of the dire conditions within the prisons, where systemic violence, neglect, and deprivation prevail, underscoring the urgent need for comprehensive reform. It traces the roots of the current crisis back to the state's early reluctance to establish a penitentiary system, coupled with a persistent failure to address the underlying issues of overcrowding, inadequate healthcare, and violence. The chapter highlights the historical role of federal interventions in attempting to rectify these chronic problems, detailing landmark lawsuits and judicial rulings that have shaped the state's correctional landscape. Despite these efforts, the chapter illustrates how Alabama's prisons remain plagued by a cycle of violence and neglect, largely due to a lack of political will and societal indifference toward the plight of people in prison. The analysis then shifts to a forward-looking perspective, proposing a new paradigm for Alabama's prison system that emphasizes humane treatment, a genuine commitment to rectifying past injustices, and equipping people in prison for re-entry as productive citizens. By weaving together historical insights, legal analysis, and contemporary accounts of prison life, this chapter aims to provide a comprehensive understanding of the complexities and challenges facing Alabama's penal system while advocating for a more just and humane approach to correctional management.



Dates covered in this chapter

There is a place in Alabama where citizen caretakers care for other citizens, and many of those citizens work to provide for each other. Despite the hot weather in Alabama, which can last for up to seven months and can get to over 100 degrees with humidity factors in the 80-percentile range, citizens do not have air conditioning. The heat and humidity are ideal conditions for bacterial skin conditions that cause constant itching. Citizens are provided with coarse

and cheap clothing, and rules prohibit them from wearing their own clothing (Lindsay & Rush, 2016, p. 255).

Rules also prohibit fighting. Even so, daily fights are so common they are usually only recorded when someone is seriously injured or killed. Often the reports reflect one citizen being beaten by three or more citizens while caretakers look on.

Rules prohibit citizens from bringing any person or anything into this place that might hurt other citizens. Even so, many citizens have weapons made from every available material. An effective weapon, for example, is a sock filled with locks. Citizens routinely stab or cut other citizens. When citizens or caretakers attempt to intervene, they are sometimes cut or stabbed. Screams from victims are so common that citizens sometimes hear victim screams in their sleep (U.S. Dept. of Justice, 2019, 2). Routinely, citizens who do not immediately die from violence are transported, often by helicopter, to nearby hospitals.

Weapons are also used to coerce male citizens to perform sexual acts with other male citizens.

Rules have been established to prohibit any addictive or poisonous drugs from the place. Even so, inspections by caretakers consistently produce cigarettes laced with drugs, methamphetamines, and drugs that cause extreme paranoia, severe hallucinations, and violent nausea. Deaths from drug overdoses are common.

Even though citizens are separated into different buildings based on whether they are male or female, caretakers are not. Male caretakers rape, fondle, and expose themselves to women citizens. They coerce women to engage in oral sex. Male caretakers engage in voyeurism, forcing women to disrobe, shower, and use the toilet while they watch. Caretakers sexually harass women, subjecting them to a daily barrage of sexually explicit verbal abuse. Caretakers trade sex acts for necessities, such as feminine hygiene products and laundry services (U.S. Dept. of Justice, 2014).

In one instance, in a building for men, a caretaker brutally hit, kicked, and struck a male citizen with an expandable baton. Two nurses saw the caretaker beat the citizen, and two other nurses could hear the beating from a nearby room. The citizen did not antagonize the caretaker before the beating, and his hands were handcuffed behind his back. During the beating, all four of the nurses heard the caretaker yell something to the effect of, "I am the reaper of death, now say my name!" Eventually, the citizen begged the caretaker to kill him. At one point, a nurse observed the caretaker place his right foot on the side of the citizen's face to grind his head onto the floor. The caretaker then paced

the floor with the prisoner's blood on his clothing, threatening healthcare workers to keep quiet (U.S. Dept. of Justice, 2019, 11).¹

INTRODUCTION

Alabama authorizes correctional officers to use violence on a continuum up to and including death (Ala. Code 1975, § 13A-3-27). It protects their violence with nearly impregnable immunity (*Ex parte Ala. Dep't of Corr.*, 2016). Until recently, the Alabama Constitution has authorized people in prison to be treated so that correctional officers can exact the treatment on behalf of the people of the State of Alabama. Alternatives to violence, such as segregation or isolation, are rare. As a result, correctional officers, left with very few tools to encourage non-violence, resort to violence (U.S. Dept. of Justice., 2020, p. 10). The natural progression is that some correctional officers use force as a form of retribution and others for the sole purpose of inflicting pain up to the point of self-identifying as reapers of death (U.S. Dept. of Justice 2020, p. 10).

Some correction officers are not satisfied acting alone. They informally deputize certain prisoners as “strikers” and extend to them the authority to assault other prisoners with hoe handles, broomsticks, or homemade knives. Other prisoners are deputized as “flunkies” and armed to break up fights in the dormitories. Strikers and flunkies often mistreat other people in prison who do not have the favor of corrections officers. Rapes and assaults are everyday occurrences (Yackle, 1989, 80-81, 257). In 1923, the legislature arranged for state-run executions. Ed Mason, an inmate, was provided building materials and forced to make an electric chair for executions. Mason painted the chair with yellow paint leftover from striping Alabama highways. The chair became known as “Yellow Mama” (Lindsay & Rush, 2016, p. 12).

In the early history of its statehood, when delegates from the Alabama Territory convened in Huntsville to draft a constitution and establish a state government for admission into the United States, the concept of a state prison was notably absent. The Constitution of 1819 recognized certain rights for individuals accused of crimes, yet it failed to address the issue of establishing a state correctional facility. This oversight marked the beginning of a complex history of prisons in Alabama, a history that has been punctuated by federal interventions and a recurring failure to learn from past mistakes. Despite possessing the authority to establish the function of prisons, Alabama has faced challenges in balancing the goals of habitable confinement, funding, and successful re-entry. Recent amendments to the Alabama Constitution affirm the right to self-determination, a principle embodied by people who were in prison but now exemplify the potential for personal transformation. This chapter explores the evolution of Alabama's approach to incarceration, highlighting the shifts towards humanizing reform in forging a new, more hopeful direction for its prison system.

ALABAMA PRISONS FROM THE BEGINNING

In the 1820's and 1830's, Alabamians did not want a state prison. They preferred the administration of justice to be left in the hands of local citizens or their officials (Alabama Dept. of Corrections, 2019). Under this so-called “home rule,” justice was swift and harsh, often carried out through staged hangings in the public squares rather than through extended incarceration. These festive spectacles attracted large crowds from miles around, eager for the entertainment atmosphere the settlement's merchants created. Flogging, branding, and other mutilation and humiliation events were also made public. Hanging offenses included murder, rape, robbery, burglary, stealing slaves, rustling livestock, counterfeiting, and treason (Alabama Dept. of Corrections, 2019).

Slaves had few legal rights and were treated harshly. Punishments were often more severe for Blacks, disproportionate to the crime, and those who administered the punishment did so without fear of repercussions. When the first state penitentiary was built in 1839, Alabamians demanded that it be self-sufficient. They were willing to surrender some people to state prison, but they were unwilling to pay more taxes to do it. As such, home rule continued until the conclusion of the Civil War in 1865.

The prison population in Alabama increased significantly due to several factors, including that Blacks had been historically punished through home rule rather than being formally charged in the criminal justice system. For those who did end up being formally charged, Alabama's criminal justice system was harsh, and Alabama's high rate of poverty often translated into no meaningful defense. As the prison population grew, the number of prison beds did not. This led to a number of problems, including overcrowding, poor sanitation, violence, and inadequate medical care. In response, Alabama did little to remedy abuses. Federal courts adopted a “hands off” doctrine when faced with state prison abuses. However, in 1964, in *Cooper v. Pate*, the U.S. Supreme Court deviated from that doctrine by holding that a state prisoner may bring an action under the federal Civil Rights Act of 1871. The shift away from the “hands off doctrine” made federal intervention into how states ran their prisons possible. Within a decade, the federal courts had effectively taken over Alabama prisons.

FEDERAL INTERVENTION INTO ALABAMA PRISONS: NEWMAN, PUGH, AND JAMES

Alabama prisoners filed a civil rights lawsuit claiming that their U.S. Constitutional rights had been violated by inadequate medical care. On October 4, 1972, Judge Frank M. Johnson found that medical care in Alabama prisons was so inadequate that it resulted in cruel and unusual punishment, which violated the Eighth Amendment of the U.S. Constitution. He further found that approximately 10% of the people in Alabama

prisons were psychotic and another 60% mentally disturbed enough to require treatment and ordered Alabama to undertake extensive changes to provide people in prison adequate medical care (*Newman v. Alabama*, 1972).

Within a year of Johnson's order, Jerry Lee Pugh was incarcerated for a parole violation and assigned to live in a dormitory that housed over two hundred people though it was only designed for eighty. Tensions ran high, and Pugh became convinced that violence was imminent. Prisoners brandished nightmarish weapons - sharp blades up to 16 inches long, steel bars as long as thirty-six inches, as well as hatchets and pick handles. Pugh's repeated requests to be transferred to safer quarters were denied by corrections officers who, for their own safety, stayed well away from the dormitory after dark. Prisoners locked inside were left to fend for themselves. When violence finally erupted that summer, Pugh was badly beaten and, by his account, left for dead under a bunk. Other people in prison rescued him after order was restored. Medical records showed that Pugh suffered multiple lacerations and fractures; a part of his skull was crushed. Without the benefit of an attorney, Pugh hammered out a civil rights complaint on an old prison typewriter and filed it (Yackle, 1989, p. 51). The case was assigned to Judge Johnson.

Attorney Robert D. "Bobby" Segall represented Pugh. Segall was creative in fashioning a legal theory on which to proceed. He argued that the practice of housing large numbers of prisoners in crowded dormitories without regard to the violent propensities of individuals made brutality the common currency of prison life. The fault lay not solely with the inmates who fought with each other in the dormitories, but with the penal authorities who knew or should have known, that the consequences of their policies would be violence, injury, and, in some instances, death. The conditions in Alabama's prisons, conditions ascribable to deliberate decisions by state penal officials, thus ensured that prisoners would be subjected to assault on a routine basis. The obvious vehicle was the Eighth Amendment's prohibition on cruel and unusual punishment. Segall proposed that Alabama penal authorities punished prisoners in violation of the Eighth Amendment by placing them in threatening circumstances without safeguarding them from attack (Yackle, 1989, p. 52). The lawyer claimed that Alabama had a responsibility to protect individuals it placed in situations where they were likely to experience violence, especially when it simultaneously stripped them of the right to self-defense and the ability to escape.

The immediate problem was identifying some standard against which prison conditions could be measured. At what point does the risk of violence trigger Alabama's duty to protect? As he reflected on that question, Segall believed that he could best explain what was wrong with the Alabama prison system by explaining what must be done to set things right. He could best provide Judge Johnson with a standard for judgment by describing a state of affairs in which prison violence would be unlikely to occur and then contrasting such a regime with the status quo. The effect would be to merge two matters that lawyers typically hold apart: what must be shown to win a lawsuit and

what the winner obtains in victory. Anticipating the kind of order that he would ask Judge Johnson to issue after judgment,

Segall laid in place, at least temporarily, the linchpin connecting what may be called the negative version of his case (the claim that the conditions of confinement produced unconstitutional violence) and a more affirmative version of the case (a claim that, in order to be free from unconstitutional violence, prisoners were entitled to something positive—something that, if granted, would prevent violence) (Yackle, 1989, 53).

Segall formulated the contention that prison inmates had a constitutional right to “rehabilitation.” If, Segall reasoned, the elimination of prison violence would be attained only by reducing prisoners’ frustration in confinement, and if prisoners’ frustration could be reduced only through educational and vocational programs, then “rehabilitation [became] a prerequisite to the elimination of violence and, thus, a constitutional right” (Yackle, 1989, pp. 52-53).

Plausible as such an idea was, it failed. He could not persuade the penal expert he consulted. Despairing that he would not convince the judge of his “rehabilitation” theory without an expert witness who would testify in support, Segall reoriented his thinking around a simpler “right to protection” theory. He proposed that “[w]hen a state denies people their liberty and forces them to live in confined quarters and without self-defense, ... that state assumes a corresponding duty to protect people [in prison] from physical and mental harm...” (Yackle, 1989, 52-53).

Ultimately, Segall's choice to pursue the right-to-protection theory and forgo the rehabilitation theory was prudent. A new complaint filed by a different prisoner, Worley James, squarely presented the rehabilitation claim. Judge Johnson found that assertions of an Eighth Amendment violation based upon some generalized obligation of the state to provide rehabilitative services to all prisoners had not stated a claim upon which relief could be granted; however, the court ruled that certain other claims were sufficient to proceed to trial. These included assertions that Alabama inflicted cruel and unusual punishment by impairing prisoners' efforts at self-rehabilitation and, in violation of due process requirements, engaged in arbitrary and capricious housing assignments of inmates among the few housing units with limited available educational, vocational, and health treatment facilities (*James v. Wallace, 1977*).

After the trial wherein the James and Pugh cases were consolidated, Judge Johnson issued his findings in favor of Alabama prisoners, comprehensively directing the state to undertake specific measures meeting "minimum constitutional standards" to address overcrowding, segregation and isolation shortcomings, classification issues, mental health care, protection from violence, living conditions, food service, education/recreation/vocational/work opportunities, physical facilities, correspondence and visitation, and staffing (including staff numbers, training and

reductions in racial and cultural disparities) (*Pugh v. Locke, 1976*). As Judge Johnson entered his order containing these sweeping reforms of Alabama prisons, he was surely mindful of Governor George Wallace defiantly standing in the schoolhouse door to block a federal court order ending the racial segregation of Alabama schools. Rather than directly monitor compliance with his prison order, he appointed a committee of 39 respected Alabamians to mobilize and maintain public support. This so-called Human Rights Committee (HRC) was to monitor the implementation of his order. It was authorized to "inspect facilities and records, interview prisoners, and review any plans developed by the defendants" (Yackle, 1989, pp. 103-104). Unfortunately, members of the HRC were met with hostility, stonewalling, and inaction. Progress was further slowed by leading politicians such as the Alabama Attorney General and Governor Wallace, who, while joining in a chorus of being hard on crime, took turns resisting federal intervention and pointing fingers at each other and prison leadership (Yackle, 1989, pp. 136-137).

Following Alabama's Appeal, U.S. Circuit Court of Appeals Judge James Coleman approved of the steps taken by Judge Johnson to ensure prisoners had adequate food, clothing, shelter, necessary medical attention, and personal safety. He observed that many of the steps viewed in isolation may have exceeded constitutional mandates but, when considered in totality, were justified by the need to eradicate Eighth Amendment violations. While Judge Coleman affirmed that the Eighth Amendment does not require a state to provide rehabilitative, educational, and vocational opportunities, he agreed that, if offered, such programs are to be available impartially and with equal access to prisoners on an objective standard of basic utility to the individual (*Newman v. Alabama, 1977*).

Although the HRC failed to accomplish all the goals set for it by the court, it can be credited, at least in part, to a systemwide prison school district, a prison industries division, and "good time" credit to incentivize inmates (Conrad, 1989, pp. 313-316). Regardless of its successes or promise of future successes, Judge Coleman asserted that "the Committee undoubtedly did impermissibly intrude and had every appearance of impermissibly intruding upon functions properly belonging to the daily operation of the Alabama prison system" and ordered it to be disbanded (*Newman v. Alabama, 1977, 289-290*).

When Governor Fob James took office in 1979, he took proactive steps to address prison issues and was more willing to cooperate with the federal mandates (Taylor, 1990, p. 188). On February 2, 1979, as compliance with his order lagged, Judge Johnson appointed Governor James to serve as the temporary receiver of Alabama's prison system. James' main solution was to bring the prison system into federal compliance through new and self-sufficient prisons (Taylor, 1990, pp. 186-199). To address overcrowding, Governor James increased the capacity of Alabama prisons from 4,241 when he took office to more than 10,100 (Taylor, 1990, p. 200). Unfortunately, he did not address the institutional dysfunction in managing the prisons.

In May 1979, the Alabama prison litigation was transferred to U.S. District Judge Robert E. Varner. Overcrowding and understaffing continued in Alabama prisons. With the state's continued failure to comply with the court's decree that its prisons meet minimum constitutional standards, on July 15, 1981, Judge Varner ordered Alabama to release 1,000 prisoners who were least deserving of incarceration. Judge Varner also instructed that the next 250 prisoners least deserving of incarceration would be paroled six months earlier than planned.

For about a year, Attorney General Charles Graddick unsuccessfully fought against releasing prisoners to relieve overcrowding. Then, on August 9, 1982, Judge Gerald B. Tjoflat, sitting on the newly formed U.S. Court of Appeals for the Eleventh Circuit, granted Alabama's motion for a stay of the prisoner release order (*Newman v. Alabama*, 1982). Over 1,000 prisoners were released, but the release of additional prisoners seemed unlikely.

With Judge Varner unable to order prisoner releases, the parties began negotiations toward ending federal court supervision of the Alabama prisons. On January 18, 1983, Judge Varner approved a consent agreement and conditionally dismissed a large portion of the case. Roughly ten months later, as a contempt sanction for Alabama's breach of the consent agreement, Judge Varner ordered the Attorney General to pay the court one dollar per day for each state inmate held in any penal institution wherein overcrowded conditions have existed for a specified number of days. Judge Varner further ordered Alabama to release from confinement the number of inmates by which state facilities were overcrowded. On September 10, 1984, Alabama's appeal of his order succeeded (*Newman v. Graddick*, 1984). Judge Hitch Roney upheld the January 1983 consent decree from attack by the state's Attorney General and held that Judge Varner should hold more hearings to consider modifications of earlier orders, given recent precedent interpreting the Eighth Amendment. Prisoner release orders would be warranted only if another trial were held to assess current prison conditions against these more recent standards. Moreover, the contempt findings were also set aside relieving the Alabama Attorney General from having to pay the dollar-per-day sanction.

After Roney's ruling, the parties negotiated a settlement stating that Alabama was in "sufficient compliance" to "permit" the parties to recommend that the *Pugh* and *James* cases be dismissed - subject to being reopened if Alabama's prison conditions deteriorate. The agreement also provided three additional years of monitoring (Yackle, 1990, p. 250). Judge Varner approved the agreement and dismissed the case on November 27, 1984.

After Governor James' receivership ended, Judge Varner approved an Implementation Committee (IC) made up of four Alabama citizens to monitor the implementation of the plan for improvements in the prison system. The IC would monitor three areas: state prisoners in county jails, mental healthcare for inmates, and conditions in isolated confinement. Further, the IC would report to the federal court, and if any party felt that

the IC's actions were jeopardizing their rights, they could apply to the federal court for relief. In retrospect, the IC was repeating the past. It took on responsibilities that might have been performed years earlier had Judge Johnson's appointment of the HRC in 1976 not been resisted so harshly by Alabama officials and ultimately disbanded by Judge Coleman.

Like the HRC, the IC had its successes. It attempted to reduce prison overcrowding by implementing a Supervised Intensive Restitution (SIR) program (releasing certain property crime offenders to live and work in the community, remitting a portion of their earnings to their prior victims). Before long, officials' threats to end the SIR program led Judge Varner to take further action.

ALABAMA HAS BEEN CONDEMNED TO REPEAT THE PAST

Briefly reviewing history suggests that external interventions and extrinsic motivations do not effectively work to reform prisons in Alabama. Attempts by Judge Johnson to oversee prison reform through the HRC and attempts by Judge Varner to oversee prison reform through the IC were a microcosm of the larger Alabama corrections system, which still yearned for “home rule.” In response to the abuses that carried over in the 1800s from “home rule,” Alabama’s first prison was completed in 1841. At the conclusion of the Civil War, Alabama adopted the practice of leasing people in prison to private companies for forced labor to offset the skyrocketing prison population while profiting from prison labor. In 1898, 73% of Alabama’s annual state revenue came from leasing people in prison (Perkinson, 2010). Within 30 years, the barbarism associated with leasing people in prison, also referred to as “convict leasing,” again resulted in some prisoners being returned to overcrowded prisons. Around 1893, Alabama's solution was to build a reformatory for prisoners under 16. Even though leasing people in prison was outlawed, it continued in various forms through 1927 when prisoners returned to overcrowded prisons en masse (Alabama Dept. of Corrections, 2019). Thus, the cycle continued. Have a problem, build a prison. Alabama went from one prison in 1841 to 27 prisons in 2014 (Alabama Dept. of Corrections, 2014), and it is building new prison facilities in 2024 (Alabama Dept. of Corrections, 2021). Even so, severe overcrowding, extreme violence, insufficient mental health care, and a lack of overall resources persist. This reality summarizes the conditions of Alabama's prisons in the 1970s when Judge Johnson effectively took them over and continues to define prison conditions today.

Three decades after Judge Johnson’s intervention ended in 1989, state officials are confronted with these same issues. Looking back on the federal court intervention, Segall commented, “I feel like, after a certain period of time, it was like the case never existed” (Lyman, 2021). State Senator Cam Ward, an active participant in Alabama criminal justice policy, aptly describes the situation as *déjà vu*.

The problems enumerated in federal District Judge Frank Johnson's order closely parallel the issues raised in the Department of Justice's April 2019 investigation report. Both documents paint a grim picture of violence and a generally unsafe and disorderly environment in state prisons, compounded by a lack of essential resources and staff (Lyman, 2021).

Much like the recent DOJ reports, Judge Johnson's findings in the 1970s concluded that Alabama prisons were violating inmates' constitutional rights.

Governor James' changes led to improvements in security and medical and mental health care and improved professionalism for correctional officers. A court-ordered cap on the number of inmates allowed into the system gave time for the state to improve the training of correctional officers. Ward gave James credit for taking on the issue. "It was much easier for politicians to say, 'We're doing this because we have to do this,'" he said. "And that's a problem. Whereas, the thing about James is, when he became governor, he said, 'This is something we've got to fix'" (Lyman, 2021). However, progress did not go beyond minimum standards. Rehabilitation remained limited. Training opportunities often involved farm work, which did little to prepare people in prison for jobs outside of prison.

Despite improvement, the gains did not last. Tough-on-crime laws and a warehousing model for inmates repeated an overcrowding crisis. When federal oversight ended in December 1988, there were 12,440 inmates in state prisons. By 1996, a year before the state opened its last prison to date, the number had topped 21,000. Alabama's current prison system grapples with escalating violence, to the extent that it now faces the looming possibility of federal intervention again in another federal action filed in 2020 (*United States v. State of Alabama, et al.*, 2020). Recent years have witnessed a staggering 200% increase in reported homicides within Alabama prisons. Prisoners describe an unrelenting atmosphere of fear and hostility that seems eerily reminiscent of the conditions Jerry Pugh endured when he was wounded back in August 1973 (Lyman, 2021).

One significant yet often overlooked challenge in addressing prison reform in Alabama is the shared characteristic among the state's residents, including people in prison, its governors, attorney generals, and corrections leadership—a deeply ingrained sense of fierce independence and strong determination. This attribute, while commendable, can lead to resistance against external influences and motivations. The spirit of self-determination, a hallmark of Alabama's culture, is as prevalent within the walls of its prisons as it is in the state's leadership. Much like their fellow Alabamians, people in prison hold an aversion to being motivated by external influences (Downs, 2014).

Alabama's history and motto, "We dare defend our rights," embody the state's longstanding tradition of valuing independence and the willingness to stand up for its beliefs, even in the face of unpopularity. This pervasive attitude of self-reliance and

skepticism towards outside motivation is a critical factor to consider in reform initiatives. Recognizing and engaging with this deeply embedded spirit of autonomy among all Alabamians, including those behind bars, is essential for the effective implementation of reforms aimed at improving the state's correctional system. Rather than expecting reform to result from federal litigation or other external influences, intrinsic motivation could be explored. Perhaps Alabamians can look to their own Constitution for that motivation.

ALABAMA'S GOAL TO PUNISHMENT AND BEYOND

Alabama has the power to establish criminal laws as a fundamental aspect of its role in maintaining social order, protecting the safety and well-being of its citizens, and upholding the principles of justice. In the context of people who have been convicted, Alabama has referred to that government function as a legitimate penological goal (*Ex parte Henderson*, 2013).

A penological goal is clearest when a citizen criminally harms another and remains an immediate threat to harm again. In that circumstance, the foremost goal is incapacitation. Prison serves as a barrier, ensuring that as long as the citizen is an imminent threat to harm other citizens, they are deprived of the capacity to do so, often by remaining in housing that keeps them away from those they might harm.

Another goal of prison is to deter future crime by making people who may consider breaking the law afraid of the consequences. Although a stated penological goal, studies consistently conclude that punishment severity shows weak to no deterrent effects for crime (Dölling, 2009).

A third goal of prison is retribution, which punishes people for committing crimes and makes them pay for the harm they have caused. After 15 years as a federal prosecutor and another decade as a defense attorney, Matt Martens studied the government's threat or use of physical force to punish people convicted of crimes. Provided that the conviction was accurate, he concluded that retribution is a legitimate penological goal. He goes further to conclude that failing to punish the guilty is immoral. Justice demands that impartial due process be observed, that the verdict speaks accurately, and that the punishment be proportional (Martens, 2023, p. 161). A punishment is just because it is deserved, but it cannot be an end in itself: it must be proportionally constrained to the penological goals of deterrence and rehabilitation. What makes a punishment deserved is its correspondence to the severity of the wrong committed (Martens, 2023, p. 156).

Especially since punishment has not shown a deterrent effect, proportionality is a maximum that may be imposed rather than an absolute that must be imposed. The goal is restoration, which can be pursued through a punishment up to a maximum that corresponds to the severity of the crime but may necessitate less than the maximum

punishment that proportionality permits (Martens, 2023, p. 28). In other words, the point of proportional punishment is not only case-specific but society-wide. A just punishment makes a statement—both to the victim and society—about the wrong the person who violated the law has done. The hope is that the statement will serve its instructional ends both to the offender and the broader society so that the offender will change his ways and others will be dissuaded from such conduct, all in anticipation of a more just social order. The end of punishment, the goal, is a more just social order.

Punishment can serve the good end of social order by deterring people before they harm, incapacitating them from doing future harm, and reforming them so that they no longer desire to harm (Martens, 2023). A just punishment, however, is constrained by a requirement of proportionality to the end it serves and to the crime to which it responds. The severity of the crime limits the severity of the punishment (Martens, 2023).

According to Alabama Governor Bagby, in 1840

The ‘great objective’ of [prison] was to ‘reform’ criminal offenders. An 1888 report on the prisons similarly insisted that imprisonment itself was the punishment for crime and that any ‘other or different punishment’ within a penal institution was ‘unjust.’ Another report by W.H. Oakes in 1914 argued that it was ‘futile’ to subject criminal offenders to ‘indignities’ that would cause them to ‘hate’ the very law it was hoped they should respect and to turn out men who were as much the enemies of society as the ‘law could make [them]’ (Yackle, 1989, p. 9).

Considering the insufficient evidence that imprisonment deters crime, crimes committed in prison and those committed after release may be partly due to the focus on punishment. Recidivism merely measures the tendency of a person convicted of breaking the law to break the law again. A different goal might frame a system subjecting prisoners to different treatment. Treatment that might recognize that they are citizens and neighbors rather than felons or convicts.

Alabama citizens have a right to “life, liberty and the pursuit of happiness” (*Alabama Const. Art. I, § 1*). A criminal conviction authorizes the violation of those rights. Imprisonment itself, the confinement itself, violates all three as punishment. Any additional abuses resulting from the conditions of confinement are additional punishments for crimes which people in prison have not been convicted and for which they have not been sentenced. Someone sentenced to prison is not sentenced to prison plus any of those conditions highlighted in the beginning of this chapter—beating, stabbing, rape, terror, etc. A punishment that degrades someone tells a falsehood about them, suggesting that what they have done has emptied them of their humanity (Martens, 2023). Encouraging people in prison to determine to regain their life, liberty, and to pursue happiness would be a different goal that recognizes people in prison are

still citizens. Citizens who will, for the most part, learn something in prison. Something that makes Alabama better—or not.

ISOLATION, DETERRENCE, AND PUNISHMENT AS A BAD RETURN ON INVESTMENT

Prisons are instruments that publicly denounce crime. Beyond their physical walls and barred cells, prisons stand as public declarations, signaling society's disapproval of transgressions and communicating what it means, in part, to be an Alabamian. Yet, building a prison as a communication tool is limited in its effectiveness. What happens inside prisons, however, can maximize Alabama's return on investment.

Deterrence is a simple yet powerful idea: the fear of punishment should make people think twice before breaking the law. In practice, it does not have the desired effect. Many people, for example, fear that they will have to pay a fine for speeding, but they speed anyway. Yet, not everyone sees prisons solely as a tool for deterrence. Some see prison as a tool for retribution and punishment. For them, when a citizen commits a crime, they owe a debt. Not a debt that can be paid in coins or notes, but a debt that must be paid in time and freedom, maybe even suffering. Prisons, in their eyes, are places where people pay back society for the wounds they inflict upon it.

Carceral time and suffering, however, is an expensive form of punishment, and it can have several costly consequences for people in prison and their families. Even though some Alabamians have a hunger for retribution, they resist paying for it. They expect people in prison to suffer while earning enough to be self-sufficient. Since Alabama's first prisons, an expectation of the institution has been self-sufficiency. To the degree that Alabamians see self-sufficiency as personal responsibility, they value it and detest freeloading.

When Alabama's first penitentiary was established, the idea was to employ inmates in various trades and labor activities that would generate enough revenue to offset the costs of running the institution. This was not a unique idea: many American prisons of the era aimed for self-sufficiency, both as an economic strategy and as a part of the penitentiary's reformative mission. The belief was that hard work and discipline would reform prisoners and make them productive members of society upon release.

People in Alabama prisons were forced to work in a variety of trades, from blacksmithing to shoemaking. The prison also had its own cotton mill and brickyard. However, achieving true self-sufficiency proved challenging. While the labor did generate revenue, the prison often grappled with financial issues, and at times, the state had to step in to provide additional funds.

After the Civil War, Alabamians took advantage of a provision in the 13th Amendment which ended slavery "except as a punishment for crime whereof the party shall have

been duly convicted...” which was paralleled in the Constitution of Alabama of 1901 (*Alabama Const., art. I, § 32*). This resulted in leasing people in prison to plantations, mining companies, and industry.

As horrific as slaves were treated, people in prison who were leased to the mines of Birmingham were arguably treated worse resulting in Alabama's prison system being the most profitable in the nation. To mines and Alabama, mostly Black prisoners provided, respectively, sources of cheap labor and state revenue. By 1883, a significant percentage of the workforce in the Birmingham coal industry was made up of leased prisoners. But to the families and communities from which the prisoners came, leasing people was a living symbol of the dashed hopes of fairness. Indeed, the lease — the system under which the prisoners labored for the profit of the mining company and the state — demonstrated Alabama's reluctance to let go of slavery and its insistence that prisons be profitable no matter what the human cost. Despite the efforts of prison officials, progressive reformers, and labor unions, the state refused to stop leasing people in prison to coal mines (Curtin, 2000).

The strongest opposition to leasing people in prison came from Birmingham mine workers who opposed leased prisoners driving down wages and breaking union strikes. One of the greatest obstacles to ending leasing people in prison was the fact that the state made much profit from it. The practice continued in Alabama and other states and territories until the 1960s when it was finally eradicated. Even then, people who had been subjected to leasing were forced back into state penitentiaries and jails.

Leasing people in prison was only one of many failed schemes intended to make Alabama prisons profitable. In 2021, Alabama spent over \$650 million on corrections. Only a small portion of funding was self-generated, and over 83% of correction costs were subsidized by the state (Gorski, 2023). Perhaps, rather than considering the cost of corrections as a short-term expense, it could be considered a long-term investment with a sustainable return.

INVESTING IN A RIGHT TO SELF-DETERMINATION RESULTS IN A SUSTAINABLE RETURN ON INVESTMENT

Other than prison, there is no place that Alabamians would tolerate this treatment of its citizens. Alabamians do not just tolerate the treatment; they invest in it. For all of the discussions around penological goals and self-sustainability, what Alabamians measure is recidivism.

Consider, for example, Derrick Ervin. Ervin served 13 years in an Alabama prison. After release, he returned to his home community, where he now owns and operates a successful business with contracts in 37 states and benefits the community by providing services and creating jobs (Deweese, 2021). His impact as a husband and father is not

measured. Neither his impact on the economy nor his impact on the people he employs is measured to determine the economic impact his reentry has had on the economy. Economic impact, in this instance, is the effect that reentry has on the financial and material well-being of a region and can include quality of life measures.

Were Ervin's personal recidivism to be measured the count would be zero, but what about the positive economic impact he has had and is having on Alabama? How can Alabama taxpayers, or leaders for that matter, know what return they are getting on their prison tax dollar investment? The return on investment (ROI) is a measure of the profitability of an investment both in tangible and intangible value. To know whether or not Alabama's corrections system is profitable, the impact must be measured on a broader scale. Recidivism is not a measure of profit; it only measures cost. The ROI for rehabilitation and successful reentry remains, for the most part, invisible because it is not measured.

Some studies have found that investments in certain programs that address the mental health or substance abuse problems of people in prison may get a ROI of over \$5 per taxpayer dollar spent (Executive Office of the President, 2016). The ROI for programs that help people in prison develop marketable skills or trades may be much higher. For Ervin, his recidivism rate is zero. His economic impact is comparatively staggeringly high, we just do not know how high it is because it is not measured.

If Alabamians demand that prisons be self-sufficient, then the return on investment must be accurately measured in its entirety. Simply measuring the societal impact of Derick Ervin, and people like him who are determined to be productive members of society demonstrates that supporting people's right to self-determination is sustainable.

A NEW WAY FORWARD

Segall argued to Judge Johnson that “[w]hen a state denies people their liberty and forces them to live in confined quarters and without self-defense, ... that state assumes a corresponding duty to protect these people from physical and mental harm” (Yackle, 1989, 52-53). The argument held more significance than Judge Johnson acknowledged.

Self-defense is one of the oldest recognized natural rights. It predates the Second Amendment by more than a millennium. It is clearer to conceptualize it as a natural right by considering the pre-government person who cannot rely on the police power of government. Natural rights precede government. Faced with a challenge to their life or liberty, a person had a natural right to protect themselves, even if that meant harming others. The Second Amendment recognized that natural right and extended it to the legal right of securing ‘arms’ for the ends of self-defense.

Likewise, liberty is a natural right dating back to antiquity. Liberty has been referred to as the chief natural right because all other rights hinge on it. The natural right of self-defense is not limited to protecting one's life. It may also be used to justify force, reasonably, in response to an attempt to violate one's liberty. There is a natural right to forcibly resist another who attempts to violate one's liberty. For example, the natural right of liberty was not created for American slaves by the 13th Amendment. The slave was naturally liberated, always liberated. The 13th Amendment is positive law that freed the slave from the wrongful violation of their natural right of liberty.

The punishment of a crime illustrates how a government may violate natural rights when a government function authorizes the violation. Government may assert, for example, that public safety is a government function and, since punishment for criminal behavior is designed to make the public safe, violations of natural rights to the ends of achieving that government function are authorized because the violation is aligned with the end of that government function (Blankenship, 2023).

Section 36 of the Alabama Constitution provides that those individual rights declared in it "shall forever remain inviolate." "Inviolate" in this context is a misnomer. For example, in addition to the Second Amendment, the Alabama Const, Art. I, Sec. 26 (a) provides that "[e]very citizen has a fundamental right to bear arms in defense of himself or herself and the state." The very next sentence of Sec. 26(a) provides that "[a]ny restriction on this right shall be subject to strict scrutiny." The declaration itself anticipates a restriction violating the right. It is not inviolate. People in prison are citizens but their right to "bear arms in defense" may be violated to further legitimate government function, namely safety. However, as Alabama limits the right to bear arms for the person in prison, Segall argued, it assumes a corresponding duty to protect inmates from physical and mental harm.

Segall's positive "right of protection" faced a structural obstacle. The right most reasonably flows from the natural right to self-defense. The challenge with resting a right to protection on the right to self-defense was that many citizens, and by extension many courts, held the opinion that people incarcerated because they had been duly convicted of a crime did not have the rights of a citizen. Instead, their rights were more aligned with that of a slave. When Segall made his argument, both the U.S. Constitution and the Alabama Constitution prohibited slavery except for those duly convicted of a crime (*U.S. Const. Amend. 13*) (*Alabama Const. Art. 1, § 32*). As such, people in prison were not asked to work, they were forced to work.

Although part of the small set of U.S. Supreme Court opinions now viewed as wrongly reasoned or decided, this attitude is illustrated in the U.S. Supreme Court opinion that started when Dred Scott was born around 1799 as a slave in Virginia. After being taken to states where slavery was not legal, Scott sued to be recognized as a free citizen based on the legal theory of "once free, always free." As a citizen, Scott would have certain rights guaranteed by the U.S. Constitution. The U.S. Supreme Court rejected Scott's

arguments and ruled that he was not a citizen, could not become a citizen, and had no rights—not even the right to sue in federal court (*Dred Scott v. Sandford*, 1857).

The *Dred Scott* decision was eventually overturned by the Thirteenth Amendment which ended slavery. However, Dred Scott did not completely close the door on slavery as it permits slavery “as a punishment for crime whereof the party shall have been duly convicted” (*U.S. Const. Amend. 13*). Thus, the attitude persisted that people in prison have no rights and the only limit on how they are treated is that their treatment cannot be cruel and unusual (*U.S. Const. Amend. 8*).

Under the Alabama Constitution, enslaved people in Alabama had no rights and very few legal protections. The law generally prohibited brutal cruelty and death. For example, an overseer named Flanigin whipped a slave named Jacob and beat him with the whip handle. Shortly thereafter, Jacob died. The physician who performed the postmortem stated that the body evidenced stripes and blows inflicted “with great violence,” which, altogether, could have caused death. The jury found Flanigin guilty of second-degree murder. On appeal, Judge Collier affirmed the conviction as Flanigin’s treatment was brutally cruel (*State v. Flanigin*, 1843).

With this structural obstacle, only the Eighth Amendment protection against cruel and unusual punishment was available for Segall to build a “right of protection.” Where the citizen who is not in prison has no positive right of protection, Segall argued, the right arises when the government restricts a citizen’s ability to defend themselves. As such, the positive right of protection only arose when a person in prison was in imminent threat of or suffered unusual, cruel, or brutally cruel treatment. In 2022, however, when Alabama finally closed the door on Dred Scott, there was a new way forward.

ALABAMA FINALLY CLOSED THE DOOR ON SLAVERY

Alabama’s Constitution was amended in 2022 to remove the prohibition on slavery and involuntary servitude as punishment for a crime. The change was approved by voters in a statewide referendum (Swetlik, 2022). The previous language of the Alabama Constitution stated “That no form of slavery shall exist in this state; and there shall not be any involuntary servitude, otherwise than for the punishment of crime, of which the party shall have been duly convicted.” The new language of the Alabama Constitution states, “That no form of slavery shall exist in this state; and there shall not be any involuntary servitude” (*Alabama Const. Art. I, § 32*).

The 13th Amendment overturned *Dred Scott* except it continued to authorize Alabama, and states like it, unfettered treatment of people in prison until the treatment crossed the outer limits of unusual, cruel, or brutally cruel. However, once Alabama closed the door on slavery and involuntary servitude, it extended the same rights to all people

whether in prison or not. Now, to violate those rights, Alabama must demonstrate a legitimate government function.

Arguing for a right to rehabilitation based on the Eighth Amendment's prohibition of cruel and unusual punishment posed a more formidable challenge than establishing a basic right to protection for people in prison. People who are duly convicted of a crime and therefore can be classified as slaves do not have rights. We do not have to speculate about how the right to rehabilitation claim based in the Eighth Amendment fared. George Taylor pursued the claim in *Worley James v. Wallace*. There were certainly implications that Alabama intended to rehabilitate people it held in prisons. The officers in charge of them were often given the title of correctional officer, that is an officer charged with correcting something, making it right. Alabama expressly states that one of its functions is rehabilitation and successful reentry.

Even though rehabilitation was mentioned in both state and federal law, no court had grounded a legal right to rehabilitation in the Constitution. Under the Eighth Amendment, “educational, vocational, and other beneficial programs for prisoners could be sought as a remedial right for prison conditions that currently constituted cruel and unusual punishment” (Yackle, 1989, 58) but could not be asserted as a positive right.

Taylor asserted the right to rehabilitation as a positive right that citizens detained for the purposes of rehabilitation were constitutionally entitled. In essence, if people were incarcerated for correction, they must be provided correctional programs and guidance. He also asserted the right to rehabilitation as remediation for violations of the Eighth Amendment in that Alabama had “failed ... to eliminate those conditions which make impossible the...rehabilitation...of [prisoners]” (Yackle, 1989, p. 59). Restated, people in prison are entitled to a right to rehabilitation or “they must not allow the conditions of incarceration to obstruct the voluntary and personal initiatives aimed at rehabilitation.” Prisoners have a “right ‘not to be deprived’ of an opportunity to rehabilitate themselves” (Yackle, 1989, p. 61).

Judge Coleman “disparaged the very idea of ‘rehabilitation’ in prison, declaring that prison inmates *did* deteriorate and that ‘no power on earth’ could prevent it” (Yackle, 1989, p. 135). At the time of Coleman’s order, people in Alabama prisons could be treated progressively worse as long as their treatment did not become unusual, cruel, or brutally cruel. Once the door on slavery was closed, once the Constitution of Alabama no longer permits another class of persons without the rights of citizens, Judge Coleman’s finding cuts the other direction. Alabama is only authorized to protect citizens in the enjoyment of life, liberty, and property. Not exerting its general powers to prevent people in prison from deteriorating then is usurpation and oppression (*Alabama Const. Art. I, § 35*) and exceeds the function of government.

Alabama is authorized to violate the rights of people as long as the violation is authorized by a government function, such as penological goals. However, since people in prison

are citizens, prison is a rehabilitative bridge back to society rather than just a place of confinement and punishment. If an emphasis is placed, from the very beginning, on inviting people back into society, it results in fostering the desire to control one's own actions, honing marketable skills, and nurturing a sense of community belonging.

This is not to assert that the function of government is limited to people in prison. The function extends to victims of crime. Instead of focusing only on the people in prison, this view considers the broader harm caused by crime. Consider automobile theft. The person who stole the automobile may be caught and sentenced to prison, but the victim is still without an automobile. Broader rehabilitative efforts seek reconciliation with victims and the broader community affected by the criminal act. While prisons are not always the venues for this reconciliation, they may serve as the starting point for these restorative journeys.

Further, government function extends beyond people in prison and victims to include corrections officers and prison staff, emphasizing the importance of offering alternatives to coercion, violence, and lethal force. This government function may be informed by recognizing that correctional practices not solely focus on punishment. Merely aiming to coerce people in prison to be law-abiding falls short of addressing the root causes of criminal behavior, which often include factors such as substance abuse, mental health, and deficits in education or vocational skills. The government's function extends to equipping people in prison with the necessary tools and support for overcoming these challenges, facilitating their successful reintegration into society as contributing members.

Now that the door is closed on *Dred Scott*, on slavery, the government function may re-focus on people in prison, victims, and the ripple effect they have on families, communities, and the state. What might best accomplish this re-focusing is turning to the Alabama Constitution to find a positive legal right of self-determination for all citizens.

A POSITIVE RIGHT TO SELF-DETERMINATION

At least 85% of all State prisoners will be released at some point (Hughes & Wilson, 2023). In Alabama, they will return to almost every neighborhood. They will stay in a sister's spare bedroom, an outbuilding on their brother's farm, or reentry housing. The Alabama Department of Corrections touts its mission as “[d]edicated professionals providing public safety through the safe and secure confinement, rehabilitation, and successful reentry (*Alabama Dept of Corrections, 2013*). Rehabilitation and successful reentry help to ensure that people in prison are not simply punished for their crimes, but also allowed to become productive members of society.

But rehabilitation is a government function that cannot be forced onto inmates. Alabama can force someone to sit in a classroom, but it cannot make them learn. It can force them to meet with a counselor, but it cannot make them do the interpersonal work necessary to improve. "The question of whether prisoners should derive advantages from the programs designed for their rehabilitation is a topic that stands at the intersection of justice and governance. Simultaneously, it also addresses the state's responsibility in compelling inmates to partake in programs that they may resist. This dilemma becomes especially pertinent when considering methods such as "drug aversion therapy" and various "behavior modification" schemes" (Yackle, 1989, 57). The introduction of these techniques has prompted a reexamination of the principles surrounding coerced rehabilitation and has challenged many proponents of these initiatives to reconsider their positions.

Rejecting Segall's theory that Alabama had a duty to protect people in prison because it had taken from them, as a condition of confinement, their right to self-defense, Judge Johnson, in part, rejected a positive right to rehabilitation "on the ground that persons convicted of felonies do not acquire by virtue of their conviction a constitutional right to services and benefits unavailable as of right to persons never convicted of criminal offenses" (Yackle, 1989, p. 62). Where this rationale cuts against a positive right of rehabilitation, it supports a positive right of self-determination for all citizens, convicted of crimes or not.

Citizens who are not confined to prison have an individual right to self-determination. Reframing the right constitutionally, it flows from the natural right of liberty. Citizens can freely pursue their economic, social, and cultural interests without interference from the government unless there is a legitimate government basis for the interference. To the degree that Alabama, as a condition of prison confinement, deprives citizens of their right of self-determination, they are entitled to accommodations unless the deprivation serves some penological function. Accommodation would be considered on a case-by-case basis and may be rehabilitative (such as education or vocational training) but is much broader.

Although illustrative, this individual right is something different than the *community* right to self-determination set out in Alabama Const., Art. I, Sec. 2 which provides:

That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient.

This principle is re-stated throughout international law as a compelling rule that cannot be excepted or ignored, a *jus cogens* rule: that people, based on respect for the principle of equal rights and fair equality of opportunity, have the right to freely choose their

sovereignty and international political status without interference from a foreign sovereign.

Much like the right to keep and bear arms safeguards the natural rights to life and liberty, rehabilitative resources safeguard the natural right of self-determination for people in prison. In cases where a citizen's liberty is legitimately violated through incarceration or through the conditions of confinement, they possess a constitutional right to the opportunity to self-determine.

SEARCHING THE ALABAMA CONSTITUTION FOR A RIGHT OF SELF-DETERMINATION

The United States Constitution is the supreme law of the land creating a system of limited power. It “establishes a government of enumerated powers, with such being supplemented by implied powers. The state governments are quite the opposite in that such are governments of general powers. Thus, one could properly view one of the primary purposes of a state constitution as placing limitations upon the broad inherent powers of the state government” (Brewer & Cole, 1997, p. iii). Alabama’s general powers are the inherent powers to regulate behavior and enforce order within its territory for the betterment of the health, safety, morals, and general welfare of its citizens. General powers are exercised by the legislative and executive branches of Alabama through the enactment and enforcement of laws.

Alabama has the power to compel obedience to these laws through whatever measures it sees fit, provided those measures do not infringe upon any of the rights protected by the United States Constitution or its own Constitution. Otherwise, the limits on unreasonably arbitrary or oppressive state power are the citizen's vote, expression, and protest. Methods of enforcement can include legal sanctions and physical coercion. As a limitation on general powers, Alabama’s Constitution establishes the objective of state government in its Declaration of Rights,

That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression (*Alabama Const. Art. 1, § 35*).

And excepts the Declaration of Rights from general powers,

That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate (*Alabama Const. Art. 1, § 36*).

Even though these declared rights are expressly stated, when citizens are convicted of a crime, certain rights are legitimately violated to the extent the violation protects citizens in the enjoyment of life, liberty, and property. People in prison, however, do not stop being citizens, and so Alabama’s violation of their rights must also align with Alabama’s objective of protecting them in the enjoyment of life, liberty, and property. Any actions that are not so aligned are a usurpation and oppression and offend the Alabama Constitution.

The Declaration of Rights in the Alabama Constitution affirms a “right to self-determination” by expressing the nature of the right and establishing protections against the violation of the right. A citizen that is “free” (*Alabama Const. art. I, § 1*) is not under the control of another and is able to act as they determine. A citizen that is “independent” is free from outside control and not dependent on another’s authority. Once a person has life, what they choose and how they act in pursuit of happiness is theirs to determine. Alabama’s “sole object and only legitimate end” is to protect its citizens as they determine what their life will be, how they will be happy, and how they will create and maintain property (*Alabama Const. Art. I, § 35*). Also, inherent in the right of self-determination is the right to not be happy or not have property or to do nothing. Self-determination is recognized as the right to experience the outcomes and consequences resulting from one’s personal decisions.

The right to self-determination is natural in that it exists pre-government. Were a person to find themselves on an island void of the jurisdiction of any government power, that person would have the natural right to make choices to maximize their enjoyment of life, liberty, and to pursue what makes them happy. As they establish property, it is theirs. Were a government to subsequently be established, its power to violate this right to self-determination would extend only to the degree that a government function authorized the violation.

The legal right to self-determination is a cornerstone of the Declaration of Rights in the Alabama Constitution, highlighting the importance of personal freedom and independence to Alabamians. It can be defined as the constitutionally recognized right of an individual to freely make personal decisions regarding their life, liberty, happiness, and property without undue interference or control by the government.

FURTHER DEFINING THE RIGHT TO SELF-DETERMINATION

Edward Deci and Richard Ryan co-created self-determination theory (SDT). Even though SDT is a psychological motivation theory, it is instructive in understanding what a legal right to self-determination is, what government functions are related to it, and what effects it might have on the results of corrections (Ryan & Deci, 2018). SDT is based on the idea that people are motivated by three basic psychological needs: autonomy, competence, and relatedness. Autonomy is the need to feel like people are in control of

their own lives and that their actions are their own. Competence is the need to feel like people are capable of doing things and that they are mastering their environment. Relatedness is the need to feel connected to others and to feel like they belong.

These psychological needs are threaded through the Declaration of Rights of the Alabama Constitution. Declaring that citizens are equally free and independent underscores the principle of autonomy among individuals (Ala. Const. Art I, § 1). This autonomy is further emphasized by protecting citizens right to life, liberty, the pursuit of happiness, and access to courts (Ala. Const. Art I, § 10), alongside the mandate that citizens be compensated for their labor (Ala. Const. Art I, § 32), which collectively affirms citizen competence. The right to assemble (Ala. Const. Art I, § 25) along with right to speak and write amongst each other (Ala. Const. Art I, § 4) supports relatedness, highlighting the importance of social connections among citizens. Relatedness is also protected as citizens worship together (Ala. Const. Art I, Secs. 3, 3.01), hunt, fish, and harvest wildlife together (Ala. Const. Art I, § 36.02). Moreover, Section 35 articulates that the primary role of government is to safeguard the citizens' enjoyment of life, liberty, and property, reinforcing the notion of competence by stating that any deviation from these objectives constitutes usurpation and oppression. These constitutional provisions affirm all three SDT psychological needs: autonomy, competence, and relatedness.

SDT proposes that when people's basic psychological needs are met, they are more likely to be engaged in activities and to experience intrinsic motivation. Intrinsic motivation is the desire to do something because people enjoy it and find it rewarding. Extrinsic motivation, on the other hand, is the desire to do something because people expect to receive an external reward or avoid punishment.

[T]hose who persist in criminal behavior feel that their lives are largely out of their own hands, controlled instead by correctional and probation officers. ... [D]esisters assumed a full sense of responsibility over their lives and charted out concrete plans for their futures (Petrich, 2020, p. 360).

Both those who persisted in criminal behavior and those who desisted from criminal behavior exercised self-determination.

To Alabamians not confined to prison, SDT has several implications for education, parenting, and the workplace. For example, SDT suggests that teachers and parents create environments that support student and child autonomy, competence, and relatedness. SDT also suggests that employers should create workplaces that promote employee autonomy, competence, and relatedness. This is not a call for anarchy nor an invitation to disregard law and order. It is, however, recognizing that people in prison who determine to choose opportunities to improve themselves not be deprived of those opportunities. Likewise, people in prison who choose not to improve themselves have those opportunities as well.

Ronald McKeithen was found guilty of first-degree robbery. After some time in prison, he fashioned a birthday card for his grandmother by drawing on a piece of scrap cardboard and mailing it to her. Impressed with how good it looked, she wrote Ronald back and encouraged him to keep drawing. Growing up, Ronald’s school did not have art supplies. There were no art supplies in his home. Encouraged by his grandmother’s affirming words, Ronald took the occasional art class offered in prison, saved art supplies, and bartered with other prisoners for their leftover art supplies. Ronald continued to draw cards for his grandmother. Eventually, he added writing and painting (McKeithen, 2023). Ronald now lives in Birmingham, where he works as the Re-entry Coordinator and Advocate at Alabama Appleseed. Both Ed Mason and Ronald McKeithen were provided materials in prison. Ed Mason was provided the materials for a chair for execution, and he made one. Ronald was provided materials for art, and the art he made has been displayed in exhibitions, businesses, and homes where it communicates a recurring theme of mother and child, family and community—the essence of life. The economic impact he has on his community is measurable. Ronald’s impact on society is immeasurable.

Beyond life, liberty, and happiness, the right to self-determination is a constitutionally recognized positive right of people to freely make personal decisions and efforts to determine their autonomy, competence, and relatedness without undue interference or control by the government. When there is a legitimate government function to violate the right, the violation should not deprive people of opportunities to better themselves. As such, there is a constitutionally required function for Alabama to support people in prison in their determination to reintegrate into and contribute to society to the degree Alabama has violated their right of self-determination.

A BLUEPRINT FOR A WAY FORWARD

To address the continuing challenges facing Alabama prisons, Governor Kay Ivey established The Governor’s Study Group on Criminal Justice Policy (the “Study”) which began meeting in July 2019. Justice Champ Lyons, Jr., who chaired the group delivered the Study’s recommendations to Governor Kay Ivey on January 30, 2020. The recommendations suggested a shift in prison policy away from seeing people in prison as slaves and toward seeing them as autonomous human beings who have the right to determine, to the greatest degree practical, their own future. In seven instances, the recommendations support a right to self-determination.

- **Expand Mental Health Services** for people who struggle with mental health issues and who are vastly overrepresented in Alabama’s county jail population (17% compared to 5% of the general population). Since traditional forms of punishment are less likely to be effective with this population, research suggests that it is more effective to connect these arrestees with appropriate mental health services to

address the underlying cause of their criminal behavior (Lyons, Jr., 2020). This recommendation is aligned with self-determination in that it requires early assessment to determine potential treatment options. Then dedicated case managers would work directly within county jails, offering assistance to people after arrest who grapple with mental illness. The case manager's primary objective would be to guide these individuals toward the right mental health services, ultimately reducing the likelihood of them being re-arrested (ISTC, 2023).

- **Expand in-custody educational programs** like those currently provided by J.F. Ingram State Technical College (ISTC) which offers a range of educational and career-oriented programs, along with critical soft skills training, exclusively to people within the Alabama corrections system (Lyons, Jr., 2020). ISTC plays a pivotal role in bridging the employment gap in the state by offering technical training across 20 different career fields. Additionally, ISTC provides adult education and comprehensive GED preparation, ensuring that inmates are well-prepared to succeed in today's dynamic workforce. Provided that students have autonomy in their course of study, this recommendation is aligned with self-determination in that it expands student choices to become more competent and connected to others. Further, this recommendation is a prime opportunity to study the economic impact of rehabilitation efforts. Research suggests that investing in correctional education reduces reincarceration costs. The return on investment, however, is better measured by the broader economic impact made by people who contribute to their communities after release. People who complete college courses, for example, are eligible for higher-paying jobs compared to people without a college education (Davis et al., 2014, p. 18).
- **Provide identification documents** to people before they are released from prison such as a non-driver photo identification card. This recommendation is aligned with self-determination in that it removes a barrier to successful reintegration into society — and thereby increases the likelihood that they will become productive, law-abiding citizens (Lyons, Jr., 2020).
- **Expand pre-release supervision** by releasing inmates nearing the end of their sentence to help them adjust to life outside prison while being supervised. The expansion would reduce the likelihood of recidivism and thereby promote public safety (Lyons, Jr., 2020). This recommendation is aligned with self-determination as it facilitates a transition to independent, autonomous living.
- **Expand hours for parole officers** to provide greater access on nights and weekends. Many parolees work jobs that have schedules that are not flexible due to specific working hours and other requirements. But those job requirements often make it more difficult for a parolee to check in with their parole officer as required to avoid going back to jail or prison. These parolees find themselves in a catch-22: They are trying to better themselves and society by working; but by working, they are more likely to break the terms of their parole. Expanding parole officer access resolves the catch-22 (Lyons, Jr., 2020). This expansion is aligned with self-determination as it

broadens employment opportunities for parolees while reducing the anxiety around parole revocation and actual recidivism with the potential of enhancing competence, autonomy, and relatedness.

- **Redesignate existing executive-level leadership positions** to be responsible for inmate or parolee rehabilitation. These newly redesignated executive-level roles would be specifically charged by state law with responsibility for the development, implementation, and improvement of programs to reduce recidivism (Lyons, Jr., 2020). This redesignation is aligned with self-determination as the needs of people in prison to self-determine are based on a case-by-case analysis and in a constant state of flux.
- **Further study of community corrections** such as alternative courts (drug courts, veterans courts, etc.) and the pretrial diversion programs administered by district attorneys' offices and municipal governments. Several alternative courts and diversion programs across Alabama work extremely well and help divert people from further illegal activity. But in many places, these programs are unavailable, underfunded, or simply inaccessible. These programs hold enormous potential for the State because they guide low-level offenders into programs that address underlying factors that often results in criminal activity—substance abuse, lack of educational attainment, and lack of employment (Lyons, Jr., 2020). Community corrections aligns with self-determination as it offers opportunities to determine for themselves whether to participate in programming that benefits autonomy, competence, and relatedness.

HOPE FOR ALABAMA TO DETERMINE A WAY FORWARD

A system in which people in prison become more violent in prison and then commit new crimes upon release from prison only to return to prison is not sustainable (Lyons, Jr., 2020). Excepting some motivations like mental illness and developmental disabilities, a criminal act is self-determined. It is a choice followed by a criminal act. People are active agents in their own lives. Self-determination theory is a useful perspective for understanding how people's ability to make choices can be either encouraged or discouraged through the ideas that (a) people perform better and act more independently when they are motivated by their own desires (intrinsic motivation); (b) intrinsic motivation is more likely when individuals have their basic psychological needs met, including feelings of competence (like self-confidence), relatedness, and autonomy; and (c) environmental conditions can either support or hinder the fulfillment of these needs (Petrich, 2020, p. 354). In simpler terms, SDT suggests that when individuals feel motivated by their own desires, they tend to perform better. The environment can encourage confidence, connection to others, and freedom to make positive choices.

To the contrary, when the conditions of prison confinement force action through coercive language, punishments/rewards, surveillance, or pressuring evaluations and deadlines; uses shame or rejection; or makes people feel incompetent in an overly challenging or chaotic environment it leads to maladaptive outcomes (Petrich, 2020, p. 356). Is it possible that the conditions of confinement in Alabama prisons cause or contribute directly to recidivism because “those who persist in criminal behavior feel that their lives are largely out of their own hands, controlled instead by correctional and probation officers” (Petrich, 2020, 360)? Expanding choices for people in prison expands their options to self-determine to desist from crime and become productive citizens and neighbors.

The Study heard, time and again, how important the idea of “hope” is to people in prison (Lyons, Jr., 2020). Self-determined people, that is, people who assume a full sense of responsibility over their lives and chart out concrete plans for their future are more likely to desist from offending again (Petrich, 2020, p. 360). To that end, they recommended that, in conjunction with increased educational and technical training opportunities, the idea of enhanced early release incentives be provided to those who successfully participate in educational programming. The Study believed this program could give hope to people, which could positively affect their mental health and decrease the likelihood of their involvement in violent incidents and illegal activity while incarcerated so that they can go on to live productive lives outside of prison walls (Lyons, Jr., 2020).

Alabama's struggle with prison reform serves as a reminder that the lessons of the past can guide its path forward. It's an opportunity to learn from history and ensure that the mistakes of the 1800s, 1900s, and 2000s are not repeated. This resolution will be over months rather than days. What can be done immediately, however, is to shift the goal of prison from punishment to encouraging the Alabama citizens in its prisons not just to desist from further crime but to join other Alabamians who want to paint a better future.

KEY TERMS

Civil Rights Act of 1871 – attaches personal responsibility to anyone acting on behalf of a state to violate the constitutional rights of another.

Convict Leasing – forced labor that provided people in prison to private parties and companies for profit.

Deterrence – the action of discouraging people from breaking the law through instilling fear of the consequences.

Jus Cogens Rule – a compelling rule which cannot be excepted or ignored and usually prohibits egregious conduct, such as crimes against humanity, genocide, slavery, and human trafficking.

Penal – relating to, used for, or prescribing the punishment of people who break the law.

Recidivism – the tendency of a person who has been convicted of breaking the law to break the law again.

Retribution – to punish people for committing crimes and make them pay for committing crimes.

Right to Self-Determination – control over one's own life (autonomy), mastery of one's own environment (competence), and connection to others (relatedness) that should not be infringed unless explicitly authorized by a government function.

Right to Rehabilitation – a legal requirement that sentencing and correctional policies be compatible with rehabilitative prison conditions. American courts have not acknowledged a positive Federal right to rehabilitation, but they have recognized it in a negative way as the right to counteract the deteriorating effects of imprisonment.

DISCUSSION QUESTIONS

1. How would you compare Alabama's prison system to other states?
2. How would you characterize the series of court case decisions' effects on the prison system in Alabama?
3. Why is it important to understand recidivism and understand that former prisoners can also have a positive effect on their communities?
4. What are the author's recommendations for a more equitable and just prison system?
5. Is prison reform likely to pass in the Alabama state legislature? What are the political obstacles that make prison reform unlikely?
6. Why is the court system the most likely avenue for seeking reform in the courts? Is using the courts for relief (justice) the only avenue for reform? Why is that a good strategy? Why is it a bad strategy?

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NOTES

1. In this narrative, this place is Alabama prisons. Citizen caretakers are correctional officers who care for people in prison. Citizens are the people in prison, and the facts are based on an amalgamation of investigations of Alabama prisons by the U.S. Department of Justice.
2. The Department of Justice reports were summarized at the beginning of this chapter.