hand with equal force. Thus, the fairness of the agreement is irrelevant if the court finds the plaintiffs fail to meet the criteria for class certification.

In their complaint, the plaintiffs requested certification of a class of "all present and future Alabama inmates who have been or may be assigned to work in chain gangs." Rule 23(a) of the Federal Rules of Civil Procedure sets forth the following prerequisites for class certification:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

As stated above, the exact size of the class is difficult to estimate given the fluctuations of the prison population, as well as the number of inmates who may be assigned to chain-gang labor in the future. However, having previously estimated the class size as numbering 2,700 inmates,[33] the court finds that the plaintiffs have clearly met Rule 23(a)(1)'s numerosity requirement. The second and third requirements of commonality and typicality are also clearly met. Here, the named plaintiffs have sought declaratory and injunctive relief in

---

33. See notes 30-31 and accompanying text.

their challenge to the DOC's practice of shackling five inmates together. The named plaintiffs, like many other members in the putative class, have been assigned to the chain gang in the past and could potentially be reassigned to the chain gang in the future; moreover, the requested declaratory and injunctive relief would inure to the benefit of all members of the putative class.[34] Though there certainly may be some factual differences between the individual class members and the nature and severity of their treatment on the chain gang, such individual differences do not defeat certification because there is no requirement that every class member be affected by the institutional practice or condition in the same way. See, e.g., Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985) (typicality not defeated by the varying fact patterns and varying degrees of injury underlying each class).

The fourth requirement, adequacy of representation, has also been met. In determining this issue, the court must inquire into "the adequacy of both the named representative and class counsel." 5 James Wm. Moore et al., Moore's Federal Practice § 23.25[3][a] at 23-113. "The determination that a party would adequately protect the interest of a class is factual and depends on the circumstances of each case."

---

34. Plaintiffs' memorandum in support of motion for class certification, filed July 7, 1996 (Doc. no. 28), exhibits 3-6 (affidavits of named plaintiffs Austin, Elliot, Hayes, and Guess).

Eastland v. Tennessee Valley Auth., 704 F.2d 613, 618 (11th Cir. 1983). Here, the court finds, based on the record before it, that Austin, Hayes, Elliot, and Guess, have not only demonstrated their commitment to this litigation, but have also demonstrated to the Magistrate Judge a "cooperative spirit" toward their attorneys.[35] The court is also satisfied with the adequacy of their counsel, which is an institutional public interest advocacy group that has experience in handling class-action suits.

Besides meeting the prerequisites of Rule 23(a), the putative class must also meet one of the types of actions described in Rule 23(b). Rule 23(b)(2) requires the court to be satisfied that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Class certification under Rule 23(b)(2) is particularly appropriate in the prison litigation context where only injunctive and declaratory relief are sought. See, e.g., Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), aff'd sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 915, 98 S. Ct. 3144 (1978). The court is therefore satisfied that the requirements of Rule 23 have been

---

35. Recommendation of the Magistrate Judge, at 52 n.62.

met and certifies the class of plaintiffs for the purposes of the chain-gang settlement agreement.

## III. SETTLEMENT OF TOILET-FACILITIES CLAIM

The plaintiffs first raised their allegations concerning the adequacy of toilet facilities for chain-gang inmates in their first amended complaint.[36] There, and in their subsequent amended complaints, the plaintiffs claimed that the only toilet facility provided to inmates assigned to chain-gang labor was a "portable chamber pot behind a make-shift screen next to the road."[37] The plaintiffs charged that the DOC did not provide inmates with toilet paper or with facilities for them to wash their hands after using the chamber pot and before eating lunch. They also stated that because the chamber pot was not always available, inmates were often forced to squat on the ground and to defecate in public. Either with or without the chamber pot arrangement, the prisoners were forced to relieve themselves while chained to the other inmates, which severely compromised their privacy.[38] The plaintiffs contend that these practices created unsanitary conditions and deprived them of

---

36. See amended complaint, filed May 17, 1995 (Doc. no. 7), ¶ 31.

37. Second amended complaint, filed September 19, 1995 (Doc. no. 37), ¶ 32.

38. Id.

their basic human dignity; they also claim that the prison officials' deliberate indifference to these conditions resulted in the infliction of cruel and unusual punishment upon them in violation of the eighth and fourteenth amendments.[39] The class members challenging the adequacy of the toilet facilities are identical to the class certified for the chain-gang settlement, discussed supra;[40] thus, the court does not need to repeat the settlement class inquiry here.

After resolving the chain-gang claim through a settlement agreement, the parties were able to reach a second agreement on the toilet-facilities claim.[41] Recognizing that some of the plaintiffs' concerns had been remedied by the cessation of chaining inmates together, specifically the inmates' lack of privacy in the use of the toilet facilities, the parties agreed that the DOC would promulgate a standard operating procedure, which would apply to all outside work squads supervised by the DOC. This standard operating procedure would include the

---

39. Id. ¶¶ 33, 45.

40. The definition of the class sought to be certified by the plaintiffs did not change after the plaintiffs amended their complaint to incorporate the adequacy of toilet-facilities claim on May 17, 1995. See motion for class certification, filed May 18, 1995 (Doc. no. 8). The plaintiffs only sought to certify a separate class with regard to their hitching-post claim. See amended motion for class certification, filed March 11, 1996 (Doc. no. 74). Whether this putative class meets Rule 23(a)'s requirements for class certification will be discussed infra.

41. Stipulation, filed September 24, 1996 (Doc. no. 339).

following provisions: soap, water, and toilet paper will be provided to all inmates; there will be one portable toilet for every squad of 40 inmates; the portable toilet will be equipped with a heavyweight canvas screen; for medium custody inmates who labor on prison grounds (as opposed to those inmates who labor on public highways), and for whom no toilet facilities are available, reasonable efforts will be made to allow privacy for those who need to relieve themselves; and a shovel or other instrument will be provided to such medium security inmates for the purpose of digging a hole when an inmate must defecate and no toilet facility is available.[42] The agreement also states that within four to eight months after the court approves the settlement, the Commissioner will conduct an unannounced inspection of these toilet facilities, and will take any corrective action necessary to ensure compliance with the standard operating procedure. The results of such inspections, as well as any corrective measures, will be reported to the plaintiffs' counsel. The plaintiffs also agreed to dismiss their claim against the Commissioner without prejudice, and to waive their right to seek fees and costs.

The parties filed a joint motion for preliminary approval of the settlement agreement and attached a proposed order that set out the procedures for giving notice to the class, as well

---

42. Id. ¶¶ 1-4.

as the form of the notice itself.[43] However, the Magistrate Judge did not sign this order, and a search of the record reveals no further instructions regarding the notice to the class or a fairness hearing. Although the court concludes that the settlement agreement is legal and is not against public policy, see Piambino v. Bailey, 757 F.2d 1112, 1119 (11th Cir. 1985), the court is unable to evaluate the underlying fairness of the agreement without obtaining the views of the members of the class. The court will therefore enter an additional order instructing the parties to give the members of the class notice of the settlement agreement, and to review any objections members of the class may have to the agreement. Following this process, the court will conduct a fairness hearing.

## IV. CLASS CERTIFICATION AS TO REMAINING CLAIMS

Before addressing the two remaining claims in the litigation--the visitation policy for those inmates assigned to the "Alternative Thinking Unit" (ATU) and the use of the hitching post--the court will address whether the putative class meets the class certification requirements set out in Rule 23, and if so, how many classes should be certified. The Magistrate Judge found that two classes of inmates should be

---

43. Joint motion for preliminary approval of proposed stipulation and notice to class members, filed September 27, 1996 (Doc. no. 344).

certified: (1) present and future Alabama inmates who have been or may be assigned to work in chain gangs; and (2) present and future Alabama inmates who have been or may be placed on the hitching post.[44] The court agrees that two classes should be certified pursuant to Rule 23. However, for the reasons that follow, the court will redefine the first class to include only those present and future Alabama inmates who have been or may be assigned to the ATU, a shock incarceration program in Alabama's penal system.

As stated, the plaintiffs originally filed this lawsuit to challenge the DOC's use of chain gangs.[45] Two days later, the plaintiffs amended their complaint to include allegations that inmates "who refuse to go out on the chain gang are tied to a post with their hands handcuffed above their heads and are forced to stand on an uneven surface in an open-air cell all day in the hot sun."[46] The plaintiffs later moved to amend their complaint to allege that the DOC's use of the "hitching post," the restraining bar to which the inmates who refuse to work are handcuffed, violates the eighth and fourteenth

---

44. Recommendation of the Magistrate Judge, at 48.

45. Complaint, filed May 15, 1995 (Doc. no. 1).

46. Amended complaint, filed May 17, 1995 (Doc. no. 7), ¶ 20.

amendments.[47] The hitching post is a horizontal bar "made of sturdy, nonflexible material," located on the prison grounds, and positioned "no more than 50 feet from an officer."[48] According to the DOC's regulations, an inmate will be placed upon the hitching post either for refusing to work or otherwise disrupting a work squad.[49] Thus, the use of the hitching post applies to all inmates who are assigned work duties in prison, whether these duties include labor in chain gangs or other forms of work.[50]

---

47. Plaintiffs' motion for leave to amend, filed on September 9, 1995 (Doc. no. 37). This motion was granted in an order entered January 6, 1998 (Doc. no. 399).

48. Plaintiffs' exhibit 12 (Administrative Regulation 429, dated October 26, 1993). According to the regulations, each facility should actually have two bars: "one mounted 57 inches from the ground for taller inmates and one at 45 inches for the shorter inmates." Id.

49. Id. However, as discussed infra, testimony at the evidentiary hearing conducted by the Magistrate Judge indicated that inmates have been placed on the hitching post for reasons other than refusal to work.

50. The Magistrate Judge explained the application of the policy as follows:

> "Certification of a class of inmates assigned to the chain gang does not overlap completely with a class of inmates placed on the hitching post, however, because the two populations are not necessarily the same. [The evidence] reveals that the only restriction applicable to the hitching post is that its use is limited to inmates who refuse to work. An inmates's work assignment, location within the institution, and

(continued...)

By contrast, the plaintiffs' claim regarding visitation privileges affects a smaller group of inmates. The plaintiffs first raised their visitation-privileges claim in their revised second amended complaint.[51] There, they stated that "Chain gang inmates are denied any visitation for the entire length of their stay on the chain gang."[52] The plaintiffs claim that this practice "violates their right to freedom of association under the First and Fourteenth Amendments to the United States Constitution."[53] The plaintiffs' allegations imply that every inmate assigned to chain-gang labor is denied visitation. However, during oral argument before this court on the DOC Commissioner's objections to the Magistrate Judge's recommendation, the parties made clear that not all inmates assigned to chain-gang labor were placed in the ATU, and only ATU inmates were denied visitation for the entire period of

---

50. (...continued)
> classification are not factors which affect his or her eligibility for placement on the hitching post once an officer determines that he or she has refused to work."

Recommendation of Magistrate Judge, at 47.

51. Plaintiffs' motion for leave to amend, filed February 23, 1996 (Doc. no. 59). The Magistrate Judge granted the plaintiffs' motion. See stamped order, entered on March 26, 1996.

52. Plaintiffs' motion for leave to amend, filed February 23, 1996 (Doc. no. 59), ¶ 42.

53. Id. ¶ 54.

their placement within the unit, or 90 days.[54] Thus, the issue is whether all present and future inmates who are assigned to the ATU and all present and future inmates who are denied visitation privileges for 90 days should be certified as two separate classes. Although the plaintiffs requested class certification in a slightly different form, this court is permitted under Rule 23(c)(4) of the Federal Rules of Civil Procedure to shape class definition so as to limit the class to the claims raised.[55] "Rule 23(c)(4) empowers courts to define an appropriate class, whether by accepting the proposed class, limiting the class to certain issues, or creating subclasses. Thus, a complaint's proposed class definition does not bind the court, and Rule 23(c)(4) provides [the court] with some

---

54. Transcript of oral argument on objections to the Magistrate Judge's recommendation, held May 14, 1997, at 5-8. It appears that the terms "chain gang" and "ATU" were used interchangeably during the proceedings before the Magistrate Judge. See plaintiffs' pretrial brief, filed September 16, 1996 (Doc. no. 326), at 13 (challenging the denial of visitation privileges to inmates assigned to the ATU or "chain gang dorm."). In fact, the distinction is not even apparent in the DOC's policies. See plaintiffs' exhibits 14 and 15 (referring to "ATU 'Chain Gang' Orientation").

55. Rule 23(c)(4) of the Federal Rules of Civil Procedure provides:

> "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

latitude in redefining the class." 5 James Wm. Moore et al., Moore's Federal Practice § 23.05[3] (3d ed. 1997).

Having established the parameters of these two classes, the court will next determine whether they satisfy the elements of Rule 23 of the Federal Civil Rules of Procedure. In order to represent a class of allegedly similarly-situated individuals, the proposed named plaintiffs must demonstrate that "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a).

Here, Rule 23(a)(1)'s requirement of numerosity has clearly been satisfied for both classes. The Magistrate Judge noted that neither the plaintiffs nor the DOC Commissioner presented evidence reflecting the number of inmates who have been placed on the hitching post since 1993, but that the Commissioner's trial exhibits, "which do not purport to reflect the totality of those inmates," indicate that over 200 inmates have been placed on the hitching post.[56] This evidence, combined with the fact that any inmate assigned to work duty is eligible for placement on the hitching post, and that the

---

56. Recommendation of the Magistrate Judge, at 50.

number of the inmates placed on the hitching post has increased constantly during this litigation,[57] renders the class so numerous so as to make joinder impracticable. With regard to the number of inmates assigned to the ATU, it is likewise difficult for the court to pinpoint an exact number based on the evidence before it. The Magistrate Judge stated that "well over 2,000 inmates have been assigned to the chain gang and have had their visitation rights suspended for the time that they served on it."[58] As discussed above, it appears that not all inmates assigned to chain-gang labor were in the ATU; some were placed on the chain gang for disciplinary violations. However, even assuming that some percentage of inmates placed on the chain gang were not assigned to the ATU, it is clear that the number of inmates placed in the ATU, or who are eligible for placement in the ATU, or who have been placed in the ATU during the course of this litigation, is sufficient to meet Rule 23(a)'s numerosity requirement. See Bradley v. Harrelson, 151 F.R.D. 422, 426 (M.D. Ala. 1993) (Albritton, J.) (The "common-sense approach" to class certification "has led courts to certify classes in cases ... which involve issues of

---

57. The court denied the plaintiffs' motion for a preliminary injunction to enjoin the Commissioner's use of the hitching post. See Order, entered March 6, 1997 (Doc. no. 379).

58. Recommendation of the Magistrate Judge, at 50.

common concern to inmates even when the potential class size is ... somewhat undefined.") (citations omitted).

Rule 23(a)(2) and (3)'s requirements of commonality and typicality "tend to merge." Wyatt v. Poundstone, 169 F.R.D. 155, 164 (M.D. Ala. 1995) (Thompson, J.) (citing General Tele. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n.13, 102 S. Ct. 2364, 2370 n.13 (1982)). "Both requirements serve to ensure that the 'maintenance of a class action is economical' and that the 'named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" Id. However, there is no requirement that the named plaintiffs' injuries be identical to those sustained by the class members; it is sufficient under Rule 23 that the harm complained of be common to the class. Hassine v. Jeffes, 846 F.2d 169, 177 (3d Cir. 1988). Thus, although inmates in the two classes may have had different experiences on the hitching post or when assigned to the ATU, the members of each class are bringing the same constitutional challenge to the same set of policies and procedures implemented by the DOC. Moreover, the named plaintiffs' claims are identical to the class members' claims. The Magistrate Judge found that when the case was filed, the named plaintiffs were assigned to chain-gang labor and were

being denied visitation.[59] When they amended their complaint to include the hitching-post claim, the plaintiffs added two named plaintiffs, Warren Leatherwood and Kervin Goodwin, both of whom had been placed on the hitching post.[60] The court therefore finds the claims of the named plaintiffs are common and typical of the class.

The court has already examined the issue of adequacy of representation in its discussion of class certification for purposes of the settlement agreement. The court reaffirms its findings that the class representatives and their counsel will adequately and diligently represent the class members' interests. Thus, the plaintiffs have met all of Rule 23(a)'s requirements for class certification of the two classes.

In addition to the above four elements, the class must meet one of the three conditions stated in Rule 23(b) that make a class action the preferable mode of handling the lawsuit. The plaintiffs have sought certification under Rule 23(b)(2), which states "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

---

59. Id. at 51.

60. See plaintiffs' motion for leave to amend, filed February 23, 1996 (Doc. no. 59). The Magistrate Judge granted the plaintiffs' motion. See stamped order, entered on March 26, 1996.

Here, the plaintiffs have brought a constitutional challenge to published policies and procedures, as well as the Commissioner's means of implementing such policies and procedures. The plaintiffs seek only injunctive and declaratory relief regarding these policies and procedures. As stated in the court's discussion regarding class certification for purposes of the settlement agreement supra, class certification under Rule 23(b)(2) is particularly appropriate in the prison litigation context where only injunctive and declaratory relief are sought. See, e.g., Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), aff'd sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied, 438 U.S. 915, 98 S. Ct. 3144 (1978).

The court finds that the requirements of Rule 23 have been met and will certify the following two classes of plaintiffs:

(1) A class defined as all present and future Alabama inmates who have been or may be assigned to the ATU.

(2) A class defined as all present and future Alabama inmates who have been or may be placed on the hitching post.

## V. VISITATION-PRIVILEGES CLAIM

The plaintiffs' first claim concerns the DOC's visitation policy for those inmates assigned to the ATU. The ATU, briefly described above as a shock incarceration program, is designed

for repeat offenders or recidivists, and parole violators. Prisoners are placed in the ATU either by DOC classification, if they are a repeat offender or have violated a term of parole, or by an Alabama trial court judge during sentencing. According to the Commissioner, "The entire purpose of the ATU unit is oriented around creating a respect for authority, instilling self-discipline...."[61] Inmates assigned to the ATU are segregated from the general inmate population and are placed in a separate ATU dormitory, also referred to as the "chain gang dormitory."[62] The ATU inmates are assigned to at least eight hours of physical labor per day.[63] All visitation is denied to ATU inmates for 90 days, although at the time the visitation claim was filed, visitation to ATU inmates was generally denied for 180 days.[64] In contrast, inmates assigned to the general prison population at Alabama prisons receive

---

61. Transcript of the hearing before the Magistrate Judge, held October 7-11, 15, 1996 (hereinafter "transcript of the hearing before the Magistrate Judge"), at 867-68.

62. Transcript of pretrial conference before the Magistrate Judge, held June 19, 1996, at 26.

63. Although some inmates are placed on what was previously referred to as the "chain gang" for disciplinary reasons, other inmates are assigned to hard labor as part of their ATU sentence. See transcript of oral argument on objections to the Magistrate Judge's recommendation, held May 14, 1997, at 7.

64. Joint stipulation of facts, filed on September 23, 1996 (Doc. no. 337).

visitation on weekends.[65] As alternatives to visitation, ATU inmates may make collect phone calls and exchange written correspondence with outsiders.[66] According to the Commissioner's expert witness, Alabama is the only state to implement a blanket, time-based denial of visitation policy.[67]

As explained in further detail below, the plaintiffs contend that these alternatives to visitation are inadequate substitutes for visitation, and also claim that the 90-day denial of visitation violates their right to freedom of association. The Magistrate Judge agreed, and concluded that the DOC's visitation policy for ATU inmates unreasonably impinged upon the plaintiffs' first-amendment rights. The Commissioner has objected to the Magistrate Judge's conclusion on the following grounds:

(1) Convicted felons retain no first-amendment right to freedom of association;[68]

---

65. Id.

66. ATU inmates receive no stamps from the DOC for non-legal mail. Id.

67. Transcript of the hearing before the Magistrate Judge, at 1152 (testimony of Gary DeLand).

68. Objections to the Magistrate Judge's recommendation, filed February 27, 1997 (Doc. no. 376), at 46.

(2) The Magistrate Judge incorrectly concluded that the DOC Commissioner had not stated a clear objective for the denial of visitation;[69]

(3) The Magistrate Judge erred in finding the visitation policy violated the plaintiffs' first-amendment right because of lack of alternative means of expression;[70]

(4) The Magistrate Judge erred in finding the DOC Commissioner's exhibits concerning alternatives to visitation "irrelevant";[71]

(5) The Magistrate Judge erred in finding that permitting ATU inmates to have visitors would not burden the DOC;[72] and

(6) The Magistrate Judge's conclusion that restrictions placed on ATU inmates, aside from the denial of visitation policy, were sufficient to accomplish the prison administrators' penological objectives was erroneous and violates the degree of deference required by the Supreme Court.[73]

---

69. Id.

70. Id. at 51.

71. Id. at 2-3.

72. Id. at 56.

73. Id. at 57.

As will be discussed further below, the court will sustain all but the DOC Commissioner's first and fifth objections to the Magistrate Judge's recommendation.

The court makes two preliminary remarks before addressing the plaintiffs' constitutional claims. First, although the parties have stipulated that visitation is "generally denied" to ATU inmates for 90 days, it is not clear from the record that visitation is automatically restored after 90 days. Rather, the information provided to the inmates, as well as the representations made by the DOC Commissioner's counsel and experts, indicates that the denial of visitation can be reinstated after the 90 days expires if an inmate has not "graduated" from the ATU program or is assigned to another term of the ATU.[74] The "orientation" to ATU inmates at Limestone Correctional Facility warns the inmates: "Behave, if you want another job and more privileges and the opportunity for programs. If you don't behave, you could stay here indefinitely."[75] According to Gary DeLand, the Commissioner's expert, the denial of visitation serves as an incentive for

---

74. According to the Commissioner's counsel, the ATU program is for "90 days, and assuming that the inmates perform well on the chain gang for 90 days, then they graduate from the program, are reclassified and are--with every effort for them to go to minimum custody or work release." Transcript of pretrial conference before the Magistrate Judge, held June 19, 1996, at 24.

75. Plaintiffs' exhibit 16.

inmates to behave while assigned to the ATU so as to "earn back" the visitation privilege:

> "Certainly a prisoner who found ways to delay or manipulate the system and not make all of his work assignments would also know, perhaps, that the visiting might be if affected by that process to encourage a prisoner to get through that process and get off the chain gang at the appropriate time, and have his visiting restored to him, it would certainly seem a legitimate approach on the part of prison administrators."[76]

In addition, the Commissioner himself testified that he did not know whether visitation was automatically restored to inmates after 90 days, even though they had received a judicial sentence to the ATU for more than 90 days.[77] Although the record is somewhat unclear, the court will assume, for the sake of evaluating the plaintiffs' constitutional claim, that visitation is automatically restored after 90 days, and will limit its holding to this understanding of the DOC's policy.

---

76. Transcript of the hearing before the Magistrate Judge, at 1123.

77. During the hearing before the Magistrate Judge, the following exchange took place between plaintiffs' counsel and the DOC Commissioner:

> "Q. And so those prisoners who are sentenced for more than ninety days do not receive visitation, do they, for the whole period of the amount they're sentenced by the judge?
>
> "A. I don't know."

Id. at 880.

Second, the court notes that the constitutional claim before it is very limited in nature: the plaintiffs have only brought a first-amendment claim; they have not challenged the DOC's visitation policies under the eighth or fourteenth amendments, or pursuant to any other enumerated or unenumerated constitutional right. Nor does any party in this litigation seek to advance the rights of non-incarcerated friends or family who may wish to visit those inmates placed in the ATU. See Thornburgh v. Abbott, 490 U.S. 401, 407, 109 S. Ct. 1874, 1878 (1989) ("nor do [prison walls] bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'") (citations omitted). The court therefore does not address whether the ATU visitation policy is in violation of the eighth or fourteenth amendments, or other constitutional rights, or whether it violates the constitutional rights of those free individuals seeking visitation with ATU inmates.

A. Standard of Review

"Inmates clearly retain protections afforded by the First Amendment," O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 107 S. Ct. 2400, 2404 (1987) (citations omitted), because "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84, 107 S. Ct. 2254, 2259 (1987). However, the fact of

incarceration, as well as the existence of valid penological objectives such as deterrence of crime, rehabilitation of prisoners, and institutional security, necessarily results in infringements of the rights and privileges retained by prisoners. O'Lone, 482 U.S. at 348, 107 S. Ct. at 2404 (citing Pell v. Procunier, 417 U.S. 817, 822-23, 94 S. Ct. 2800, 2804 (1974); Procunier v. Martinez, 416 U.S. 396, 412, 94 S. Ct. 1800, 1810-11 (1974)). However, a restriction that interferes with an inmate's constitutional right must be "reasonably related to legitimate penological interests." Turner, 482 U.S. at 79, 107 S. Ct. at 2261. The Turner Court established a four-prong inquiry for determining the constitutionality of a prison regulation:

> (1) Whether a valid, rational connection between the prison regulation and the legitimate governmental interest exists;
>
> (2) Whether there are alternative ways for the prisoner to exercise the implicated constitutional right;
>
> (3) What impact would accommodation of the implicated constitutional right have on the prison administration; and
>
> (4) Whether the regulation is an exaggerated response to prison concerns.

482 U.S. at 89-90, 107 S. Ct. 2261-62. The overarching principle in this test is a recognition that federal courts are "ill equipped to deal with the increasingly urgent problems of

prison administration and reform," and, accordingly (and especially when reviewing state penal system policies), should defer to the expertise of prison authorities. Id. at 85, 107 S. Ct. at 2259 (quoting Procunier v. Martinez, 416 U.S. at 405, 94 S. Ct. at 1807.

The Magistrate Judge applied the Turner test to the ATU visitation policy.[78] The Commissioner argues that Turner is inapplicable because prisoners retain no first-amendment right to visitation. Although the Supreme Court has not yet addressed this issue,[79] the Court has held that there is no due-process right to "unfettered visitation." Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460, 109 S. Ct. 1904, 1908 (1989) ("it [cannot] seriously be contended, in light of our prior cases--that an inmate's interest in unfettered visitation is guaranteed directly by the Due Process Clause.").[80] There is split authority in the federal courts on

---

78. Recommendation of the Magistrate Judge, at 75-76.

79. The Court has recognized, however, that prisoners retain first-amendment associational rights, which must, at times, "give way to the reasonable considerations of penal management." Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 132, 97 S. Ct. 2532, 2541 (1977) (holding that prison's ban on union meetings was rationally related to legitimate penological objective of security in prison administration).

80. The regulation at issue in Thompson was the suspension of visitation privileges without a hearing for two visitors who had violated the institution's visitation policy regarding the importation of contraband into the institution.
(continued...)

whether a first-amendment right to visitation exists. Compare Bazzetta v. McGinnis, 902 F. Supp. 765, 770 (E.D. Mich. 1995) (holding that no first-amendment right of association exists for prisoners), aff'd, 124 F.3d 774 (6th Cir. 1997), opinion supplemented by, 133 F.3d 382 (6th Cir.) (clarifying that the issue before the court was only the constitutionality of restrictions on contact visits), cert. denied, __ U.S. __, 118 S. Ct. 2371 (1998); White v. Keller, 438 F. Supp. 110, 115 (D. Md. 1977) (no first-amendment right of association for prisoners), aff'd, 588 F.2d 913 (4th Cir. 1978); Thorne v. Jones, 765 F.2d 1270, 1274 (5th Cir. 1985) (no first-amendment right to "mere physical association"), with Robinson v. Palmer, 619 F. Supp. 344, 347 (D.D.C. 1985) (noting the "varying results" courts have reached in determining whether inmates have a first-amendment right to visitation and assuming that such a right does exist), aff'd in relevant part, 841 F.2d 1151, 1156 (D.C. Cir. 1988); Laaman v. Helgemoe, 437 F. Supp. 269, 322 (D.N.H. 1977) (holding that a total denial of visitation would violate the three constitutional strictures of the inmates' first-amendment right to familial association and

---

80. (...continued)
However, in his concurring opinion, Justice Kennedy noted that the Court's holding did not foreclose a claim that a "prison regulation permanently forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause in a way that the precise and individualized restrictions at issue here do not." Id. at 465, 109 S. Ct. at 1911 (Kennedy, J., concurring).

communication and the eighth-amendment right to be free of cruel and unusual punishment).

The Eleventh Circuit Court of Appeals has recognized that there is no "absolute" right to visitation, but that the mechanics of visitation are subject to the discretion of prison authorities implementing legitimate penological objectives. Caraballo-Sandoval v. Honsted, 35 F.3d 521, 525 (11th Cir. 1994) ("[A]s to the First Amendment [right to freedom-of-association] claim, inmates do not have an absolute right to visitation, such privileges being subject to the prison authorities' discretion provided that the visitation policies meet legitimate penological objectives."). The court will infer from the language used in Caraballo-Sandoval that the Eleventh Circuit has recognized that inmates retain some constitutional right to visitation, although that right may be curtailed by prison administrators, and that the Turner four-prong inquiry is the appropriate standard to review the limitation placed on the constitutional right.[81] The court therefore finds that the Magistrate Judge was correct in applying the Turner test to the visitation policy at issue here and overrules the Commissioner's first objection. The court will proceed to examine the Magistrate Judge's application of

---

81. See also Pope v. Hightower, 101 F.3d 1382, 1385 (11th Cir. 1996) ("The right at issue in the present case may be defined expansively as the First Amendment right to communicate with family and friends.").

the Turner test to determine if the plaintiffs' constitutional rights have been violated.

### B. Valid, Rational Connection to Legitimate Governmental Interests

"[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." Turner, 482 U.S. at 89-90, 107 S. Ct. at 2262. In addition, the governmental objective must be "a legitimate and neutral one." Id. In discussing this first factor of the Turner analysis, the Magistrate Judge found that the Commissioner failed to articulate a legitimate penological interest served by denying visitation privileges to ATU inmates.[82] The Commissioner objects to the Magistrate Judge's conclusion, and argues that the DOC has advanced several reasons in support of the visitation policy.

Examining the record, the court finds that the Commissioner, his predecessor, and the expert testifying on behalf of the DOC offered two distinct justifications for the denial of visitation policy. The former Commissioner of the DOC testified during his deposition that the purpose of the policy was to send a message to inmates about the nature of prison life, specifically that prison would not be a place

---

82. Recommendation of the Magistrate Judge, at 75.

where they would receive benefits or privileges. He also stated that the DOC had not consulted with any health professionals regarding the effect of such a policy on inmates. The former Commissioner testified as follows:

> "Q. What is the purpose in denying the visitation?
>
> "A. The same purpose in denying all privileges....
>
> "Q. What is the purpose of denying the visitation?
>
> "A. Because it's a privilege.
>
> "Q. But what is the purpose in taking away that privilege?
>
> "A. All privileges for the same reason.
>
> "Q. And what is the reason?
>
> "A. To send a very clear message that as a repeat offender or a judicial entry, the prison system is not going to be, for you, an entitlement system, at least for a while."
>
> "Q. What do you mean when you say it's not going to be an entitlement system?
>
> "A. No benefits, no privileges.
>
> "Q. Now, in taking away visitation, did you consult with any health professionals regarding the emotional and psychological effect that that can have on somebody?
>
> "A. No."[83]

---

83. Corrected exhibits in support of plaintiffs' (continued...)

The Commissioner's correctional expert testified that the severity of the environment of the ATU would likely have a "useful purpose":

> "Certainly the chain gang would be a less than pleasant assignment for most prisoners who would be on it, and if the State of Alabama would like to ensure that prisoners understand when they come back that the circumstances they will be in are such that it will require them some degree of discomfort, or some degree of loss of privilege that they will have to earn back, that that serves a useful purpose."[84]

Although the expert did not explicitly state what "useful purpose" the policy served, the court can infer from his remarks, as well as those of the former Commissioner, that the primary purpose of the policy is to make prison conditions as austere as possible so as to deter inmates from committing future crimes or to violate the conditions of their parole. The DOC Commissioner offered a second objective served by the policy: to remove distractions from the inmates while they were participating in a program designed to teach respect for authority and to instill self-discipline. The Commissioner

---

83. (...continued)
opposition to defendants' motion for summary judgment, filed June 17, 1996 (Doc. no. 136), exhibit 2 (deposition of Ronald Eugene Jones), at 418-19. The Magistrate Judge quoted portions of the above deposition testimony in her discussion of the visitation claim. See recommendation of the Magistrate Judge, at 77-78. Neither the plaintiffs nor the Commissioner objected to the Magistrate Judge's use of this deposition testimony.

84. Transcript of the hearing before the Magistrate Judge, at 1123 (testimony of Gary DeLand).

stated, "the individual [needs] to concentrate solely on those things and does not need outside distractions while that period is going on."[85] Thus, the court finds that two separate objectives are advanced by the visitation policy: one, to create an extremely austere environment, so as to increase deterrence; and, two, to remove distractions from inmates so as to increase rehabilitation. The only evidence the Commissioner provided in support of the policy was the testimony of the plaintiffs' witness, Gary Montgomery. According to the Commissioner, Montgomery "testified that being placed in the ATU will help him not return to prison."[86] However, Montgomery's testimony went to his experience with the ATU program as a whole, and not specifically to the visitation policy at issue here. When asked about this distinction, Montgomery stated, "Just the experience of prison itself will keep me from going back to prison."[87]

Thus, the plaintiffs contend that the DOC Commissioner did not produce any evidence showing that the denial of visitation

---

85. Transcript of the hearing before the Magistrate Judge, at 867-68 (testimony of the DOC Commissioner).

86. Objections to the Magistrate Judge's recommendation, at 51. Montgomery was sentenced to a four-month term on the ATU by the circuit court for failing to report or pay fees while on a sentence of probation. Transcript of the hearing before the Magistrate Judge, at 584-85.

87. Id. at 590.