UNSHACKLING THE PUNISHMENT CLAUSE: A CALL FOR THE END OF CONVICT SLAVERY

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> All day long they're singing
> my, my, my my, my, my my work is so hard
> Give me water,
> I'm thirsty,
> My work is so hard.[1]
>
> — the late Sam Cooke, American singer, songwriter, civil rights activist, and entrepreneur

> But there is no equality. You cannot guarantee that any two people will end up the same. And you can't legislate it, and you can't make it happen. You can try, under the guise of fairness and so forth, but some people are self-starters, and some people are born lazy. Some people are born victims. Some people are just born to be slaves. Some people are born to put up with somebody else making every decision for them.[2]
>
> — Rush Limbaugh, American radio talk show host

* Assistant General Counsel, Office of the General Counsel, Eleventh Judicial Circuit of Florida; J.D., University of Miami School of Law, 2002. This article is dedicated to the unsung African-American heroes of American history, who survived the ravages of slavery, middle passage, segregation, and racism. They paved the path for those who came after them, braving torture, imprisonment, and death courageously in the face of uneven odds. Surviving life in the lower echelons of society, they continued to push forward, and never looked back. Let their memories never be forgotten.

1. SAM COOK, Chain Gang (RCA Records 1960).

2. RUSH LIMBAUGH, The Rush Limbaugh Show (Premiere Radio Networks broadcast Oct. 8, 2010).

I. INTRODUCTION

In the 1994 film "The Shawshank Redemption," Tim Robbins plays a mild-mannered banker named Andy Dufresne, who is sentenced to two life sentences in 1947 for the murder of his wife.[3] In the midst of doing manual labor, Dufresne overhears a guard captain complain about being taxed on a future inheritance and offers him a legal solution to avoid the taxes. His popularity with the guards grows, and the warden proceeds to offer him special privileges as long as Dufresne continues to assist with providing advice and managing certain financial matters.

The warden devises a scheme to use the prisoners as labor for public works and launders the money received from kickbacks having Dufresne direct the proceeds to the account of a false identity. Dufresne later escapes from prison, and brings the entire illicit operation to a close by exposing the corruption to a local newspaper. The film is highly illustrative of the exploitative nature of convict slavery.[4]

Today, America still continues to lead the world in incarcerating offenders, exercising jurisdiction over 1,610,446 inmates in prison[5], and 785,556 inmates in jail in 2008[6], for a total of 2,396,002 overall confined behind bars. There were approximately 9.8 million people incarcerated in prisons and jails worldwide in 2008.[7] The overall population of the United States was projected to be 309,712,000 in 2010.[8]The world's 2010 projected population by comparison was 6,852,893,000.[9] Thus, the United States constitutes a mere 4.5% of the world population, even though it incarcerates nearly a quarter (24.44%) of the world's prison population. The reason I fail to aggregate the number of jail inmates is because we know that those individuals committed to the prisons are already convicted, whereas some of the jail inmates may only be pretrial detainees.[10]

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3. THE SHAWSHANK REDEMPTION (Columbia Pictures 1994).

4. Consider that in 1885, "90% of the prison population worked." Stephen P. Garvey, Freeing Prisoners' Labor, 50 STAN L. REV. 339, 370 (1998).

5. WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, U.S. DEP'T OF JUSTICE, PRISONERS IN 2008, NCJ 228417 (Dec. 2009), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

6. TODD D. MINTON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, JAIL INMATES IN MIDYEAR 2008 — STATISTICAL TABLES, NCJ 225709 (MAR. 2009), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/jim08st.pdf.

7. ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 8TH ED. (2008), available at http://www.kcl.ac.uk/depsta/law/research/icps/downloads/wppl-8th_41.pdf.

8. World Bank, Population Projection Tables by Country and Group, http://go.worldbank.org/KZHE1CQFA0 (last visited Sept. 1, 2010) [hereinafter Population Projection Tables].

9. *Id.*

10. See Houchins v. KQED, Inc., 438 U.S. 1, 37-38 (1978) ("Some inmates in Santa Rita, a sub-

The facts are not shocking, and are fairly well known — similar numbers were already provided by the media more than two years ago.[11]

The concept of enslaving prisoners is not new; it stems from the "Punishment Clause" in the Thirteenth Amendment to the United States Constitution[12] — a clause that is well known among legal scholars[13], but not to the American public. With the passage of the Thirteenth Amendment, and its ratification in 1865, compulsory service had seemingly come to an end. But what if America returned to a policy of extracting forced labor from the 1.6 million incarcerated individuals?

To even entertain such question, we would have to define the contours of both the Eighth and Thirteenth Amendments. Particularly with regard to Eighth Amendment jurisprudence, the question of what constitutes cruel and unusual punishment has never been fully answered with a proper requisite amount of legal precision and certainty. On the other hand, when Justice Samuel Freeman Miller delivered the majority opinion in the *Slaughter-House Cases*, he made it abundantly clear that the Thirteenth Amendment served a narrow purpose, not a broad one.[14]

If Justice Miller was right, then those who would argue that all slavery was abolished would be engaging in an expansive reading that gains no support from the clear text of the Punishment Clause. "[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have

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stantial number are pretrial detainees. Though confined pending trial, they have not been convicted of an offense against society and are entitled to the presumption of innocence. Certain penological objectives, i.e., punishment, deterrence, and rehabilitation, which are legitimate in regard to convicted prisoners, are inapplicable to pretrial detainees. Society has a special interest in ensuring that unconvicted citizens are treated in accord with their status.")

11. See, e.g. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations'*, N.Y. Times, Apr. 23, 2008, at A1.

12. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly **convicted,** shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (emphasis added).

13. Ryan S. Marion, *Note, Prisoners for Sale: Making the Thirteenth Amendment Case against State Private Prison Contracts*, 18 WM. & MARY BILL RTS. J. 213, 214-215 (2009) (pointing out that the federal courts interpreted the *Slaughter-House Cases* to interpret the Thirteenth Amendment as intending to prohibit slavery on the basis of race only).

14. SLAUGHTER-HOUSE CASES, 83 U.S. 36, 72 (1872) ("And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent. But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it.").

said."[15] Therefore, without resorting to judicial activism, can any court truthfully interpret this amendment in a way that prohibits convict slavery? Perhaps the answer may lay in the Eighth Amendment instead.

Four fundamental justifications for punishment are retribution, deterrence, incapacitation, and rehabilitation. It is my belief that that there has been an unspoken fifth justification: profitable use. Critics would decry this justification for ethical reasons because profitable use at first glance seems tantamount to exploitation which would result in the suffering of others.[16] This begs the question, however, how one can maintain a position that is opposed to suffering, but support retribution, deterrence and incapacitation, which also involve various degrees of suffering to others. Even including rehabilitation[17], all forms of punishment necessarily involve varying degrees of freedom deprivation and imposition on offenders; therefore, profitable use cannot be excluded as a justification on this basis.

One could also argue that profitable use is not a proper justification because it is immoral. If moral reprehensibility were the standard, then consider that retribution also has been historically attacked on this ground before. Turning to the Judeo-Christian equivalent of retribution, *lex talionis*, the Law of Talion:

> If anyone injures his neighbor, whatever he has done must be done to him: fracture for fracture, eye for eye, tooth for tooth. As he has injured the other, so he is to be injured. Whoever kills an animal must make restitution, but whoever kills a man must be put to death.[18]

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15. Gibbons v. Ogden, 22 U. S. 1 (1824) (holding that the power to regulate interstate commerce was granted to Congress by the Commerce Clause).

16. Arguments about the suffering of prisoners are points best addressed to the Eighth Amendment of the Constitution. The question of whether enslaving convicted offenders constitutes cruel and unusual punishment necessarily depends on how the framers of the Constitution, and the drafters of the Thirteenth Amendment, felt about forced convict labor. That the Founders were not troubled by the existence of slavery and even wrote the Three-Fifths Compromise into the Constitution, and that the drafters specifically made an exception for convicted criminals from the ban against slavery, is a pretty obvious indicator that neither thought prisoner enslavement was cruel and unusual.

17. Take the example of the drug user who undergoes rehabilitation and detoxification. The painfulness associated with withdrawal is a form of suffering. To be fair however, it is posited that the benefits of ending the long-term suffering of addiction far outweigh the temporary painful suffering of withdrawal. Hence the practice is ethically condoned.

18. *Leviticus* 24:19-21 (New International Version); *see also Deuteronomy 19:21* (New International Version) ("Show no pity: life for life, eye for eye, tooth for tooth, hand for hand, foot for foot."); *Exodus* 21:22-25 (New International Version).

The death penalty by extension is the product of righteous community anger[19], and is primarily grounded in retribution — one supporter explains executions are an indispensable component of American beliefs, particularly because the possibility of death is mentioned three times in the Fifth Amendment.[20]

But which is worse to a person — slavery or death? We know Patrick Henry's answer: "I know not what course others may take; but as for me, give me liberty or give me death!"[21] However, would a person facing execution, or life in prison make the same statement? Slavery as punishment is still undoubtedly less harsh than death itself, and is still no more a deprivation of liberty than imprisonment.

There is a school of thought that retribution has suffered from a lack of a logical explanation for punishment because it seldom focuses on the good to be gained from punishment, and usually presupposes that punishment is an "intrinsic justice" to crime.[22] This categorization of punishment with justice as being inextricably intertwined rejects most of the consequentialist analysis.[23] Retributivists take the moral high ground, finding their philosophy to be inherent within the very nature of justice itself, but seldom explain why.

The quintessential deontologist and retributivist Immanuel Kant puts forth punishment for the sake of punishment because justice requires that once an offender is found guilty, he or she must be held accountable and be punished appropriately and immediately, because justice demands it.[24] The resulting good that could come from incapacitation, deterrence, or rehabilitation is of no consequence to Kant — retribution is paramount above all else.[25]

By contrast, a proponent of profitable use can absolutely argue the good to be gained from punishment. Actions do have consequences. In this respect, profitable use makes a convincing case because retribution is often times characterized as being irrationally grounded in emotion and revenge.[26] Punishment can be expensive. Profitable use has potential to not only offset

19. It is therefore, not surprising that the product of that anger often results in many blacks ending up on death row.

20. DON ERLER, LONE STAR STATE OF MIND: A FORMER POLITICAL THEORIST EXPLORES REAL WORLD ISSUES 86 (Lexington Books 2002).

21. Patrick Henry, Address at Virginia Convention (Mar. 23, 1775), *available at* http://liberty-online.hypermall.com/henry-liberty.html.

22. LEO ZAIBERT, PUNISHMENT AND RETRIBUTION 133 (MPG Books Ltd. 2006).

23. There is the argument to be made, that while it rejects it, it cannot be said that it entirely rejects consequentialist considerations.

24. FREDERIC G. REAMER, HEINOUS CRIME: CASES CAUSES, AND CONSEQUENCES 89-90 (Columbia University Press 2005).

25. *Id.*

26. RUDOLPH JOSEPH GERBER & JOHN M. JOHNSON, THE TOP TEN DEATH PENALTY MYTHS 142 (Praeger Publishers 2007).

and avoid great operational expense, but it may actually result in gain. With the fast growing privatization of the prison industry, how can one not consider it a profitable use when the state's ability to compel involuntary servitude is delegated to a private entity?[27]

One can use the example of a parent's punishment of a child who has exhibited bad behavior. The parent could ground the child — an example of deterrence, because presumably the child will conform his or her behavior to avoid this fate in the future. The act of grounding can serve as incapacitation as well, in that limiting the child's movements may serve to avoid the child getting into further trouble when away from home. Parents may also order the child to perform additional services, i.e. do additional chores. Although assigning extra chores could be viewed in the light of deterrence, one can hardly dismiss that it also serves the purpose of profitable use. The parents benefit because additional work has been reassigned to the child, lessening their own workload somewhat.

In the military, enlisted personnel who commit minor infractions are often punished by being assigned mess hall duty or kitchen police duty. This type of punishment can be of benefit in that soldiers are forced to perform additional menial tasks filling manpower needs. In the workplace, workers who either fail to perform assigned tasks in a timely fashion, or those who commit minor violations of workplace rules, may be punished by being assigned additional tasks they are expected to complete without additional pay. To avoid insubordination, the workers comply, and the employer is able to benefit from increased work output with reduced expenditures. Profitable use is better equipped to explain this kind of punishment because it can easily show its contribution to a readily identifiable good.

This article attempts to further clarify the Punishment Clause of the Thirteenth Amendment to the Constitution. To date, scholarly treatment of this provision has been scant. In addition, this article intends to explore whether this clause serves a proper current purpose by analyzing the previously proposed philosophical "justification" for it: profitable use, against the Eighth Amendment's prohibition against cruel and unusual punishment.

Part II examines slavery and racism in America from a general perspective. Part III delves into the specific development of the peonage system historically, leading to the establishment of the convict lease system. Part IV explores the application of the Eighth Amendment to convict slavery particularly with

27. Marion, *supra* note 13, at 233. ("Given the history of its criminal punishment philosophy and the constitutional imperative to prevent private exploitation of citizens, it is appropriate to question this relatively new privatization trend in American criminal justice.").

respect to the return of chain gangs. Part V contrasts the commercial forced labor methods employed in Maricopa County with the convict labor system of Federal Prison Industries, Inc. In Part VI, I discuss how libertarians Robert Nozick and John Locke would view punishment as profitable use, and whether such a framework can truly stand muster. Part VII concludes the article reasoning that we are a society that can no longer tolerate a constitution that still allows slavery to continue, and thus we must take active steps to eradicate this by amending our constitution.

II. GENERAL OVERVIEW OF SLAVERY IN AMERICA AND THE AFTERMATH

Historically, the Bible has always lent support to the institution of slavery.[28] Coupled with the religious philosophies of Thomas Aquinas, Augustine, and John Calvin, it is little wonder that convict slavery was an integral part of early America.[29] Aquinas saw slavery as part of the natural order of creation;[30] Augustine felt that slavery was due to the sinfulness of the slaves.[31] Calvin, through the Protestant work ethic, sparked the fire of capitalism in America — it stands to remain entirely possible that profitable use is an inevitable extension of Calvinist principles.

Calvin proposed that God's grace fell to those who worked hard.[32] Leading by example, Calvin literally worked himself to death, fearing the consequences of "the Lord find[ing him] idle."[33] The children of Japheth came to be equated with descendants of the continent of Europe, the children of Sem with those from Asia, and the cursed slave children of Ham with Africa.[34] This interpretation allowed

28. *Genesis* 9:20-27 (New International Version) (Noah curses Canaan, son of Ham, and decrees that Canaan shall serve as a slave to Shem and Japeth); *Deuteronomy* 20:10-16 (New International Version) ("When you march up to attack a city, make its people an offer of peace. If they accept and open their gates, all the people in it shall be subject to forced labor and shall work for you."); *Exodus* 22:2-3 (New International Version) (providing that if a thief is unable to make restitution, then he must be sold into slavery as compensation); *Leviticus* 25:44-46 (New International Version) ("Your male and female slaves are to come from the nations around you; from them you may buy slaves. You may also buy some of the temporary residents living among you and members of their clans born in your country, and they will become your property. You can bequeath them to your children as inherited property and can make them slaves for life, but you must not rule over your fellow Israelites ruthlessly.").

29. JAMES CONE, LIBERATION AND THE CHRISTIAN ETHIC IN ON VIOLENCE: A READER 354 (Bruce B. Lawrence & Aisha Karim eds., Duke University Press 2007).

30. *Id.*

31. *Id.*

32. Alister E. McGrath, *A Life of John Calvin:* A STUDY, IN THE SHAPING OF WESTERN CULTURE 240 (Basil Blackwell Inc. 1990).

33. W. ROBERT GODFREY, JOHN CALVIN: PILGRIM AND PASTOR 195 (Crossway Books 2009).

34. Jan Nederveen Pieterse, *White on Black: Images of Africa and Blacks,* IN WESTERN POPULAR CULTURE 44 (Yale University Press 1992).

religion and the slave trade to co-exist peacefully in America; it also justified Jim Crow, the black codes, and the subsequent convict lease system and peonage to be vigorously pursued post-Reconstruction. After the civil rights movement in the 1950's and 1960's, considerable gains were made towards ending the racism that had entrenched itself within America. Some of those gains would not last long however.

In the 1980's, conservatives blamed the lack of respect for authority, lack of discipline, lack of motivation, and ultimately the inability to succeed on drug use.[35] It was believed that all of these things had led to the spread of social liberalism — the rise of large government whose benevolence promoted idleness, and that such a government had allowed its citizens too much moral freedom.[36] If any group displayed these characteristics the most, it was the slum dwellers and their ilk. Drug addiction went from being characterized as a form of illness, to a lifestyle of immorality. The new emerging profile for a drug courier was that of the profile of the African-American.[37] This was the one immigrant group that had not come here by choice and that struggled the most with attaining any degree of political and socioeconomic success.

They had been brought by the Transatlantic African slave trade — a grand economic scheme which had irreversible social consequences. The earliest record of African slaves in the New World occurred around 1502.[38] It is estimated that roughly ten million Africans were shipped to the Americas as slaves. Slavery had been conducted with a harshly renewed effort during a time period where colonization and expansion intensely demanded a pool of cheap labor. Yet during the sixteenth century, slavery had dwindled as a practice and was seldom inflicted on races other than the Africans.

Indentured servitude still existed, but unlike slavery, servitude was not for life.[39] Indentured servants had rights and privileges guaranteed by law.[40] It seemed that cultural and political forces constrained the extent of any greed-motivated attempts to abuse or corrupt this form of contractual labor.[41] Yet

35. John J. Dilulio, *Crime*, in SETTING DOMESTIC PRIORITIES: WHAT CAN GOVERNMENT DO? 111-112 (Henry J. Aaron & Charles L. Schultze eds., The Brookings Institution 1992).

36. Samuel Freeman, *Liberalism, Inalienability, and Rights of Drug Use*, IN DRUGS AND THE LIMITS OF LIBERALISM: MORAL AND LEGAL ISSUES 110 (Pablo de Greiff ed., Cornell University Press 1999).

37. FLOYD D. WEATHERSPOON, AFRICAN AMERICAN MALES AND THE LAW: CASES AND MATERIALS 234-235 (University Press of America 1998).

38. RICHARD SPILSBURY, SLAVERY AND THE SLAVE TRADE 15 (Heinemann Library 2010).

39. LAURA F. EDWARDS, SCARLETT DOESN'T LIVE HERE ANYMORE: SOUTHERN WOMEN IN THE CIVIL WAR ERA 49 (Board of Trustees of the University of Illinois 2000).

40. *Id.* at 49-50.

during African slavery, legal rights were not afforded and millions were stripped of their identity. Slave marriages were not recognized, and children were taken from their parents to be sold like any other domesticated animal.[42] In hindsight, the African slave trade has been designated as part of a series of crimes against humanity.[43]

In American history however, the experience has been downplayed, with some portion of the blame being placed on the victims. As one commentator noted, "[T]he obsession of many black leaders and intellectuals, as well as whites in the West, with these past travesties invariably distorts their perceptions of current black problems so that they are incapable of making a dispassionate, objective analysis."[44] It is true and well acknowledged, that the slaves were supplied by African elites, thus Africans had betrayed fellow Africans. Slavery and racism came to be justified by "logical" and allegedly scientific rationales.[45] Rather than characterizing the fact that somewhere between two to four million Africans died during middle passage as horrendous acts of large-scale genocide, history has relegated these atrocities to obscurity, and rendered them an unfortunate side effect of the cost of the slaver business.[46]

There is no memorial necessarily commemorating the great multitude of lives lost.[47] To understand the extent of the genocide, consider the Zong massacre in 1781, where Captain Luke Collingwood made a decision based on pure greed and lack of respect for human dignity.[48] He realized that he had taken on too many African slaves as cargo, and that many of them would die by the time he reached his destination.[49] Foreseeing that this would constitute a non-compensable loss, he decided to execute them at sea in order to collect the insurance money he would be awarded as compensation for each slave who died at sea.[50] Captain Collingwood then proceeded to murder 131 slaves by throwing them overboard

41. *Id.* at 50.

42. JONATHAN D. MARTIN, DIVIDED MASTRY: SLAVE HIRING IN THE AMERICAN SOUTH 64 (Harvard University Press 2004).

43. CHAITANYA DAV, CRIMES AGAINST HUMANITY: A SHOCKING HISTORY OF U.S. CRIMES SINCE 1776, at 17 (AuthorHouse 2007).

44. GEORGE B.N. AYITTEY, AFRICA BETRAYED 6 (St. Martin's Press Inc. 1992).

45. MIA BAY, THE WHITE IMAGE IN THE BLACK MIND: AFRICAN-AMERICAN IDEAS ABOUT WHITE PEOPLE 14 (Oxford University Press 2000).

46. *See generally* ADAM JONES, GENOCIDE: A COMPREHENSIVE INTRODUCTION 40 (Taylor and Francis 2010).

47. DAV, *supra* note 43, at 17.

48. EDDIE DONOGHUE, BLACK BREEDING MACHINES 117 (AuthorHouse 2008).

49. *Id.*

50. *Id.*

to drown.[51]

Although Captain Collingwood was denied compensation, and lost during the ensuing civil trial of *Bregson v. Gilbert*, no murder prosecution was ever brought against him criminally.[52] Collingwood failed to recoup the thirty pounds per slave he had demanded, and the attorney prosecuting on behalf of the Zong's owners, John Lee, defended Collingwood's actions as he declared that no murder had been involved as Collingwood had a right to jettison and destroy slaves, who were mere chattels and property "without 'a surmise of impropriety."[53]

Despite the past, African-Americans were encouraged to toughen up and "get over it." It was surmised that if America is deemed the land of opportunity, and blacks have failed to prosper and achieve the measure of success that other immigrant groups have, it is due to their own internal failings. The hard-working and industrious will always prosper; so the unsuccessful, must therefore be lazy.[54] Those deemed lazy are often branded vagrants and loiterers — part of the criminal element. African-Americans fit the bill as being among those who allegedly deserved harsh punishments.[55]

III. HISTORICAL PROFITABLE USE: PEONAGE, THE CHAIN GANGS, AND THE CONVICT LEASE SYSTEM

A. The New Slavery

Although slavery ended in 1865, new mechanisms for race control sprang up to replace it.[56] Black codes were passed to restrict the rights of blacks to own property, to bind others into contracts, to own weapons, to serve on juries, and

51. *Id.* at 118.

52. *Id.*

53. ALI AL'AMIN MAZRUI, THE AFRICAN PREDICAMENT AND THE AMERICAN EXPERIENCE: A TALE OF TWO EDENS 7 (Praeger Publishers 2004).

54. This premise is based on numerous fallacies. Again, I do not suggest that human beings are not responsible for their own destinies; some of the greatest success stories emerged from conditions of mind-boggling adversity. However, in our fascination with legends, we tend to equivocate the capabilities of the overachiever with the rest of the population. There is no precise science that can pinpoint why certain individuals outdistance the rest. For example, we do know that mental illness can not only contribute to certain failures, but it can lead to aberrant behavior; conduct which is not accepted by society, often times is punished. A bodily handicap and physical disability can not only limit potential, but it often leads to social ostracization. As much as we would like to see a huge group rivaling the talents of Stephen Hawking, Helen Keller, Franklin Delano Roosevelt, and Ludwig van Beethoven rise out of obscurity and show the world that anything is possible; the reality of disabled people in our society is often a far cry from our hopes.

55. JILL LOCKE, *Work, Shame and the Chain Gang,* in VOCATIONS OF POLITICAL THEORY 287 (Jason A. Frank & John Tambornino eds., University of Minnesota Press 2000).

56. DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 196 (Doubleday 2008).

to run for office.[57] Slavery did not come to its well-awaited and purportedly intended end.[58] In the post-Civil War South, new methods of recapturing black labor sprung anew — peonage systems[59] and chain gangs began to dominate the scene[60], and the laws of the South codified them as soon as the legislators could draft them.

Blacks were either forced into labor contracts[61] or compelled to enter the convict labor system.[62] Of the approximately millions of slaves freed by the Thirteenth Amendment, a large majority were forced to take jobs as sharecroppers or tenant farmers, trapped within the crop lien system.[63] The New South was not to be defeated for it came back with a vengeance and inequality was re-established swiftly and harshly.[64] The state mainly leased the convicts to private interests, forcing them into criminal contracts under which a period of service for an employer was used to satisfy the payment of a criminal fine.[65] Alternatively, for those who were headed for prison, the state forced them into a life of hard manual labor, wearing shackles and chains — the chain gang.[66]

Tenant farming seemed to be the new insidious form of slavery, and binding contracts were used to keep the workforce steady and constant.[67] The labor contract system created a new involuntary form of submission that bound worker to master just as rigidly as slavery ever did.[68] In some ways, these workers, bound by ironclad contracts, were in a worse position than they had been, under the yoke of chattel slavery.

The transition from de jure slavery to de facto slavery was not challenged; the Congressional Reconstruction program focused on voting rights, equal access to courts and education, and desegregation, rather than remedying labor abuses.[69]

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57. THOMAS REED TURNER, 101 THINGS YOU DIDN'T KNOW ABOUT THE CIVIL WAR: PLACE, BATTLES, GENERALS: ESSENTIAL FACTS ABOUT THE WAR THAT DIVIDED AMERICA 231 (F+W Publications 2007).

58. BLACKMON, *supra* note 56, at 196.

59. BLACKMON, *supra* note 56, at 6.

60. BLACKMON, *supra* note 56, at 82, 352, 372.

61. BLACKMON, *supra* note 56, at 156.

62. BLACKMON, *supra* note 56, at 90.

63. BUREAU OF THE CENSUS, DEP'T OF COMMERCE AND LABOR, BULLETIN NO. 8, NEGROES IN THE UNITED STATES 80-82 (1904) [hereinafter NEGROES IN THE UNITED STATES].

64. MICHAEL J. THOMPSON, THE POLITICS OF INEQUALITY: A POLITICAL HISTORY OF THE IDEA OF ECONOMIC INEQUALITY IN AMERICA 107-108 (Columbia University Press 2007).

65. *Id.* at 156.

66. *Id.*

67. *See* NEGROES IN THE UNITED STATES, *supra* note 63, at 80-82.

68. MICHAEL A. HALLETT, PRIVATE PRISONS IN AMERICA: A CRITICAL RACE PERSPECTIVE 49 (University of Illinois Press 2006).

69. JOHN SPENCER BASSETT, A SHORT HISTORY OF THE UNITED STATES 1492-1920, 622 (The Macmillan Company 1921).

The reformers hoped that by fighting disenfranchisement, freed blacks could participate in the political process, and thus they could cast a voice in defending themselves.[70] This strategy proved ineffective as the era of renewed bondage settled upon the black community.

B. Take Your Pick: Chain Gang or Convict Lease?

In the late 1860s, state legislatures began to legalize the practice of service in chain gangs as a possible sentence the judiciary could impose on convicts.[71] Heavy chains and shackles were used to bind all of the members of the chain gang together by their legs and feet.[72] Chain gang members could only change clothes once per week. They were forced to urinate and defecate together and were given only a bucket to do this. As a torture method, a chain gang member could be placed in a box that was designed to prevent either standing or sitting; the tortured victims would have to remain in these boxes for days, and during weather in which the boxes exceeded 100 degrees Fahrenheit in temperature.[73]

During this time, many blacks became convicts for the first time.[74] Trumped up charges were invented to cause blacks to fall prey to a biased justice system.[75] No court seemingly would accept the word of a black man over a white man.[76] Laws were enacted making it a crime for a black man to be unemployed, wandering the streets — this crime was called vagrancy.[77] Other laws made it illegal to break an employment contract. If these violations did not land the targeted blacks in jail or prison, it earned them fines they could not pay. Those fines resulted in convict leasing to pay off the resulting debt; a spiral of enslavement.

The convict labor system was comprised of as many African-Americans as possible.[78] It could not be avoided. The need for convict labor was so essential to the post bellum Southern economy that local police commonly arrested blacks to charge them with anything they could imagine.[79] This illustrated the danger of punishment as profitable use: the law proceeded to arrest as many blacks as it

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70. W.E.B Dubois, Black Reconstruction in America 1860-1880, at 539-540 (The Free Press 1998) (1935).

71. EMILY S. SANFORD, THE PROPRIETY AND CONSTITUTIONALITY OF CHAIN GANGS, 13 GA. ST. U. L. Rev. 1155, 1159 (1997).

72. *Id.*

73. *Id.* at 1160.

74. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 646, 651 (1982).

75. *Id.*

76. *Id.*

77. *Id.* at 649.

78. *Id.* at 651.

79. BLACKMON, *supra* note 56, at 65.

could, all in the almighty name of profit and prosperity of the economy.[80] After the Civil War, the system of convict leasing began to grow and fester; and by the late nineteenth century, almost every Southern state had caught on to the practice.[81]

Blacks arrested for trivial offenses were purposely given heavy sentences with alternate fines.[82] Local plantation owners had relayed their labor needs to the local sheriffs' offices and courthouses, and stood ready to arrive at the courthouse to pay the fine, if the black submitted to convict slavery.[83] Should this indebted worker try to free himself from his condition, bounty hunters would be mobilized to hunt him down; the sheriff would return to bring him back before the judge who was ready to send him to prison.[84] Convict slaves attempting to escape were shot on sight.

Many of these blacks were undoubtedly poor and uneducated. Mistreatment and death were commonplace. They remained trapped in a fate they could not comprehend trying to pay off trivial debts that had been imposed on them years before. Perhaps the transition from one form of slavery to the next was so swift that many of these men had never even had a moment to taste true freedom. If there were ever a Thirteenth Amendment, they had likely never known.

At least some form of reprieve came in 1911. In *Bailey v. State of Alabama*[85], Justice Hughes, in striking down a state peonage law, re-affirmed the continued validity of the Punishment Clause as he delivered the majority opinion:

> The Thirteenth Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The state may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the

80. MATTHEW J. MANCINI, ONE DIES, GET ANOTHER: CONVICT LEASING IN THE AMERICAN SOUTH, 1866-1928 48 (University of South Carolina Press 1996).

81. BLACKMON, *supra* note 56, at 65.

82. *See* MANCINI, *supra* note 80, at 188, 197.

83. *See id.*

84. BLACKMON, *supra* note 56, at 66.

85. *Bailey v. State of Alabama*, 219 U.S. 219 (1911).

service or pay the debt.[86]

The Supreme Court was concerned that many states had begun to attempt to violate the rights of minorities by driving them into forced labor to pay debts.[87] The Court recognized that convicts could be enslaved, but the Punishment Clause could not be read to create compelled service in noncriminal situations like default on an obligation.[88] This decision struck a blow to the peonage system that had been fast growing, in the effort to deliver the full meaning and import of the Thirteenth Amendment. However, that only stopped the peonage system; convict slavery as a practice remained untouched, though convict leasing would begin to decline.

C. The Chain Gang Emerges as the Dominant Punishment

Towards the early twentieth century, chain gangs became more prevalent as Southern states inevitably outlawed convict leasing[89] and replaced it with chain gangs. The new laws mandated that convicts be confined to labor on "public works." The chain gangs of the 1930s were still just as humiliating and stripped the affected inmates of the basic necessities of human dignity.[90] The convicts were usually shackled together at all times, whether eating, sleeping or having to use the toilet facilities. The chains were fastened to their ankles, and could only be removed with a cold chisel at the time of the inmate's ultimate release.[91]

A chain gang inmate's life was one filled with filth and stench. Confined in unreasonable conditions, they were forced to sleep with insects, bugs, and lice, in cages at times.[92] Seldom offered opportunities to take decent baths, they were often forced to scratch at themselves for relief, until their sores filled with blood and pus.[93] Those who examined the practice slowly came to realize that the humiliation and degradation affected not only the convict slaves, but anyone

86. *Id.* at 243-244.
87. *Id.*
88. *Id.*
89. One theory could be that perhaps, at this point, the state no longer wanted to share its labor potential with the private industries. Another would be that the courts took a dim view, in light of the previous decision regarding peonage, which was similar in principle.
90. DAVID NICHOLAS ELDRIDGE, AMERICAN CULTURE IN THE 1930S, at 76 (Edinburgh University Press, 2008) (discussing the film I am a Fugitive from a Chain Gang, based on Robert Burns' true personal account of his experience in the Georgia prison system).
91. Tessa M. Gorman, *Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs*, 85 Calif. L. Rev. 441, 451 (1997).
92. *Id.* at 452.
93. *Id.*

forced to look upon them as they worked.[94]

Although chain gangs would continue to build public works for the Southern states for decades to come, the number of abuses multiplied until they caught a significant amount of attention. That attention led to reform of penological practices and, finally, extinction of the chain gangs for a time.[95] It was surmised that the level of abuse had reached the point where it did not serve the purpose of punishment and instead was cruel and unnecessary suffering. However, this was not the last of chain gangs in the United States.

IV. HOW DOES THE EIGHTH AMENDMENT PROHIBIT CONVICT SLAVERY?

A. Examining Prisoner Rights

To analyze constitutional rights as applied to convict slavery, it is necessary to first examine the rights of a prisoner. "Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner."[96] However, constitutional rights not inconsistent with prisoner status are still retained.[97] Thus, for example, the right to privacy, the right against unreasonable searches and seizures, and the right to bear arms are but a few examples of rights that would be inconsistent with incarceration. The Supreme Court has traditionally allowed for substantial deference to the decisions of prison administrators, expecting they will usually employ the appropriate means to accomplish and enforce the prison sentences of inmates.[98]

Claims of deprivation of constitutional rights of prisoners are usually examined under a rational basis test[99] with the burden on the prisoner to prove that decisions of the prison administrators do not serve any rational basis at all.[100] The test for reviewing a prison regulation against a constitutional challenge is (1) whether the regulation has a rational connection to legitimate governmental interest; (2) whether alternative means exist and are open to inmates to exercise the asserted right; (3) the impact an accommodation of right would have on inmates, guards and prison resources; and (4) whether there are ready alternatives to the regulation.[101] Thus, where some rights that a prisoner must surrender are

94. *Id.*.
95. *Id.*
96. Overton v. Bazzetta, 539 U.S. 126, 131 (2003); *see also* Cruz v. Beto, 405 U.S. 319, 321 (1972); Price v. Johnston, 334 U.S. 266, 285 (1948).
97. Pell v. Procunier, 417 U.S. 817, 822 (1974).
98. Overton, 539 U.S. at 131.
99. *See, e.g.*, Block v. Rutherford, 468 U.S. 576, 587 (1984).
100. Overton, 539 U.S. at 132.
101. *Id.*

obvious, other rights that must be foregone are those which impact on the ability of prison administrations to effectively ensure that their correctional facilities are able to safely carry out their designated goals and objectives. Nonetheless, prisoners have a basic right to be treated humanely. Therefore, at the very least, inhumane forms of confinement must yield where they exceed the boundaries of cruel and unusual punishment.

B. Eighth Amendment Considerations

"Confinement in a prison ... is a form of punishment subject to scrutiny under the Eighth Amendment standards."[102] Determinations about whether certain punishments violate standards under the Eighth Amendment are entirely based on the acceptability as determined by the courts, but "judgment[s] should be informed by objective factors to the maximum possible extent."[103] There is no fixed test by which courts determine whether conditions of confinement are cruel and unusual, as the Eighth Amendment's meaning is defined by evolving standards of decency within a society that develops with time.[104]

Where punishments are grossly disproportionate to the severity of the crime, they will be deemed cruel and unusual.[105] The words cruel and unusual are interpreted in a "flexible and dynamic manner," and this interpretation prohibits punishments, which although not physically brutal, "involve the unnecessary and wanton infliction of pain."[106] However, the mere restriction on freedom and harshness of a sentence alone is insufficient to constitute either the unnecessary and wanton infliction of pain or punishments which are grossly disproportionate to the severity of the crime.[107] An unnecessary and wanton infliction of pain can include one "totally without penological justification."[108] One such example of an excessive punishment occurs when a prison fails to attend to the medical needs of the prisoner; without assistance from the prison officials, the prisoner is unable to seek treatment otherwise.[109]

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102. Hutto v. Finney, 437 U.S. 678, 685 (1978) (discussing prison conditions that affect the prison population generally).

103. Rummel v. Estelle, 445 U.S. 263, 274-275 (1980).

104. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

105. Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

106. Gregg v. Georgia, 428 U.S. 153, 171, 173 (1976).

107. Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (finding that certain conditions of confinement may be proscribed by the Eighth Amendment, but not conditions which are not cruel and unusual by contemporary standards).

108. Estelle v. Gamble, 429 U.S. 97, 103 (1976) (finding that the Cruel and Unusual Punishments Clause could be applied to some deprivations that were not specifically part of the sentence).

109. *Id.*

C. Resurgence of the Chain Gangs

Starting around 1995, the chain gang has reappeared as a practice in numerous states.[110] The states that have re-instituted the practice are Alabama, Arizona, Florida, Iowa, Kentucky, Oklahoma, Mississippi, Nevada, Tennessee, and Wisconsin.[111] For example, in Florida, State Senator Charlie Crist made great efforts to reintroduce the chain gang, hence earning him the nickname "Chain Gang Charlie."[112] Five of the states have rules that require participation in the chain gangs; the remaining states make it voluntary.[113] It may have been coincidental that in the same years, legislators from one of the states attempted to introduce bills that would have allowed for paddling and caning for the commission of certain misdemeanors.[114]

In Alabama in particular, the use of chaining inmates to a hitching post from 8:30 a.m. to 6:30 p.m. has been criticized as an abusive practice.[115] The men wear uniforms that have the words "Chain Gang" stamped across them and they are chained and shackled ankle-to-ankle while working in prison yards under the supervision of the guards.[116] The uneasy feel and climate is one that is reminiscent of all of the psychologically harmful badges and indicia of slavery.[117]

In the case of *Austin v. Haley*[118], the Southern Poverty Law Center (SPLC), a civil rights group, settled a case involving the shackling and chaining of prisoners to a hitch post and the deprivation of proper toilet facilities with the state of Alabama. Stipulations were made to abolish the use of the chain gang[119] and to

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110. MICHAEL P. ROTH, PRISONS AND PRISON SYSTEMS: A GLOBAL ENCYCLOPEDIA 57 (Greenwood Press 2006).

111. Judith A. M. Scully, *Chain Gangs*, in 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 263 (Paul Finkelman, ed., 2006).

112. Mark Leibovich, *The First Senator From the Tea Party?*, N.Y. TIMES, Jan. 6, 2010, at MM29.

113. Scully, *supra* note 111, at 263.

114. Richard D. Chesteen, *The Tennessee Prison: A Study of Evolving Public Policy in State Corrections*, in TENNESSEE GOVERNMENT AND POLITICS: DEMOCRACY IN THE VOLUNTEER STATE 277 n.49 (John R. Vile & Mark E. Byrnes, eds., Vanderbilt University Press 1998).

115. Gorman, *supra* note 91, at 442.

116. Gorman, *supra* note 91, at 442.

117. Gorman, *supra* note 91, at 442.

118. 212 F.Supp.2d 1339 (M.D.Ala. 2002) ("Counsel for defendant Michael Haley having indicated during a conference on July 24, 2002, that, in light of *Hope v. Pelzer*, the Alabama Department of Corrections does not intend to resume use of the hitching post or restraining bar, it is ORDERED that any additional relief in this litigation is unnecessary and thus is denied.") (citation omitted).

119. Stipulation, *Austin*, No. 95-T-637-N (M.D.Ala. Jun. 19, 1996), *available at* http://www.splcenter.org/sites/default/files/austinvjames_cgstipulation.pdf ("In light of the agreement of the Defendant Commissioner not to resume the practice of chaining inmates together, the parties agree that the plaintiffs' challenge to the practice should be dismissed with prejudice.").

provide alternative toilet facilities.[120] The district court, took quite seriously the issue of the claims of psychological damage under the Eighth Amendment, as it pointed to the following statements, taken from affidavits of the inmates:

> "People photographed and waved and honked at me and the other inmates. This was humiliating. Looking down at my feet and seeing the chains around them, I felt like a slave. Wearing the chains publicly was still more humiliating."
>
> "The chain gang tore me apart mentally. I was chained up in public view. My family, friends and potential employers could all see me in chains — a fact which hurt and embarrassed me deeply."
>
> "The chain gangs have caused me extreme mental anguish. Wearing chains made me feel like an animal. Being paraded along the Alabama highways, moreover, made me feel like I was for sale — for public consumption."
>
> "My chain gang sentence has caused me extreme mental anguish. Being forced to wear chains was humiliating. The experience also reminded me of the slavery that my ancestors had to endure. Although I have been out of chains for months, I cannot stop their image from running through my mind. I dream about the chains frequently. I often wake up two or three times in the night screaming and in a cold sweat. Every time I see my ankles, I picture the chains around them."[121]

The SPLC was also able to secure a finding from a federal court that the Alabama practice of chaining inmates to a hitching post for hours on end, without water or bathroom breaks, also constituted cruel and unusual punishment.[122]

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120. Stipulation, *Austin*, No. 95-T-637-N (M.D.Ala. Sep. 24, 1996), *available at* http://www.splcenter.org/sites/default/files/austinvjames_tfstipulation.pdf ("Because no toilet facilities are provided to medium custody work squads that labor on the prison grounds, reasonable efforts shall be made to allow privacy to medium custody inmates who must relieve themselves. A shovel or other implement suitable for digging a hole shall be brought to all work sites on the prison grounds. In the event that a medium custody inmate must defecate without the use of a toilet facility on the prison grounds, he must do so into a hole in the ground and the waste shall be adequately covered.").

121. Mem. Op., *Austin*, No. 95-T-637-N, at 19-20 (M.D.Ala. Sep. 24, 1996), *available at* http://www.splcenter.org/sites/default/files/austinvjames_hpjudgment1.pdf.

122. *Id.* at 2 ("[T]he DOC's use of the hitching post is held to be unconstitutional, albeit only as

D. Some hope in Hope v. Pelzer?

In *Hope v. Pelzer*[123], an Alabama inmate brought a suit alleging violation of the Eighth and Fourteenth Amendments when prison guards handcuffed him to a hitching post for seven hours without adequate water or bathroom breaks.[124] He was shirtless the entire time, and the sun burned his skin.[125] At one point, a guard taunted him, giving water to dogs first, and when offering water to him, spilling it on the ground in front of him.[126] Because of the way he was handcuffed, he was rendered stationary, forced to keep his arms raised the entire time, causing pain to his muscles.[127] He filed suit in the Northern District Court of Alabama. Finding they had qualified immunity, the district court granted summary judgment to the guards.[128] The Eleventh Circuit Court of Appeals affirmed.[129]

Justice Stevens delivered the majority opinion, joined by Justices O'Connor, Kennedy, Souter, Ginsberg and Breyer. Justice Thomas authored the dissenting opinion, joined by Chief Justice Rehnquist and Justice Scalia. Justice Stevens observed:

> As the facts are alleged by Hope, the Eighth Amendment violation is obvious. Any safety concerns had long since abated by the time petitioner was handcuffed to the hitching post because Hope had already been subdued, handcuffed, placed in leg irons, and transported back to the prison. He was separated from his work squad and not given the opportunity to return to work. Despite the clear lack of an emergency situation, the respondents knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a seven-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.[130]

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to the manner in which the hitching post is generally used.").

123. 536 U.S. 730 (2002).

124. *Id.* at 734.

125. *Id.*

126. *Id.* at 735.

127. *Id.* at n.2.

128. Hope v. Pelzer, No. CV 96-BU-2968-S, 2000 WL 35501948 (N.D.Ala. Mar. 24, 2000).

129. Hope v. Pelzer, 240 F.3d 975 (11th Cir. 2001).

130. Hope, 536 U.S. at 738.

Citing *Trop v. Dulles*,[131] the Court held that the use of the hitching post in this fashion violated basic human dignity. The Court reversed the decision, finding that qualified immunity did not shield the correctional officers.[132]

Justice Thomas in dissent, pointed to numerous federal Alabama district court decisions that had upheld the use of handcuffing to posts.[133] Justice Thomas was unwilling to conclude that the guards had violated clearly established rights, and opined that to the contrary, prior decisions had not made it clear that the use of restraints in this fashion was necessarily unconstitutional.[134] Pointing to the "deliberate indifference" standard announced in *Farmer v. Brennan*[135], he would not have held the guards in question liable where it could not be factually shown that they disregarded an excessive risk to an inmate's health or safety, and thus would affirm the lower court's decision.[136]

Despite the decision of the Court in *Hope*, the question of punishment as profitable use has not ended; nor has the practice of forced servitude and the use of conditions mimicking slavery. The decision, though a major one in Eighth Amendment law, has still to some extent, been limited to its particular set of facts. Moreover, the Punishment Clause has still yet to be repealed by a subsequent amendment to the Constitution. This article turns to two other more recent cases which touch on the subject matter.

V. THE CURIOUS CASE OF MARICOPA COUNTY AND THE PROFITABILITY OF FEDERAL PRISON INDUSTRIES, INC.

A. Maricopa County Extends a Warm Welcome

Joseph M. Arpaio, Sheriff of Maricopa County, Arizona, claims to hold the title of "America's Toughest Sheriff."[137] He was elected in 1992 to the position and has been re-elected four times in 1996, 2000, 2004, and 2008.[138] He serves inmates poor quality food[139], and claims that he spends more on his dogs for

131. Trop, 356 U.S. at 100.

132. Hope, 536 U.S. at 747-748.

133. *Id.* at 757 (Thomas, J., dissenting).

134. *Id.* at 760-763.

135. 511 U.S. 825 (1994).

136. Hope, 536 U.S. at 763-764.

137. *See, e.g.*, Michael Janofsky, *Another Plot Against Tough Sheriff, With a Twist*, N.Y. TIMES, May 16, 2002, at A1.

138. Susan Casper, *10 Questions for Sheriff Joe Arpaio*, ABC15.com, Jun. 15, 2010, http://www.abc15.com/dpp/news/local_news/10_questions/10-questions-for-sheriff-joe-arpaio.

139. Varying sources have indicated that the food is usually surplus, spoiled, and outdated. For example, green bologna sandwiches. See Tom Zoellner, *Partners in Pink Underwear: Janet Napolitano's Embarrassing History with Sheriff Joe Arpaio*, SLATE, Nov. 24, 2008, http://www.slate.com/id/2205223/.

food than the inmates.[140] He set up "Tent City" as an extension of the Maricopa County jail.[141] The prisoners are regularly forced to sleep with cockroaches.[142] Phoenix is noted for its extreme temperatures, and when inmates complained of the heat which often rises above 110 degrees Fahrenheit in their barbed-wire tent encampments, he allegedly told them to "shut your mouths" and replied that soldiers in Iraq were living in tents in 120 degree Fahrenheit weather, and they had not committed any crimes.[143]

He also forced the inmates to wear pink briefs, boxers and underwear.[144] Apparently seeking to profit from the publicity generated by this, he sells customized pink boxers to the public with the Sheriff's logo on them, and the words "Go Joe."[145] He also has used pink handcuffs to help peddle his wares.[146] To date, he has not provided a full accounting of the monies under his control, despite allegations of possible misuse of various funds.[147]

For example, in September of 2010, the Maricopa County Office of Management and Budget found that Arpaio has misspent as much as $80 million in taxpayer dollars over half a decade.[148] The analysis showed that he misdirected monies from the restricted detention fund which could only legally be used to pay for jail items, such as food and detention officers' salaries.[149] The analysis also detected abusive spending items, including a resort trip to Alaska and trips to Disneyland.[150] A local Phoenix newspaper, *The Arizona Republic*, also uncovered inappropriate use of public funds by Arpaio's office, including high-ranking his workers and regularly charging expensive meals and luxury hotel stays on county credit cards.[151] *The Arizona Republic* also discovered that Arpaio used

140. Erwin James, *Life in America's Toughest Jail*, THE GUARDIAN, Sep. 1, 2010, *available at* http://www.guardian.co.uk/society/2010/sep/01/englishman-in-us-prison.

141. *Id.*

142. *Id.*

143. Matt York, *Phoenix in Sizzling in Record Heat*, ASSOCIATED PRESS, Jul. 26, 2003, *available at* http://www.usatoday.com/weather/news/2003-07-26-phoenix-heat_x.htm.

144. *Id.* (commenting that the prisoners stripped down to their pink boxers in light of the weather which had reached 138 degrees Fahrenheit the week before and that sweat drenched their pink towels and pink socks).

145. *See* Sheriff Joe Arpaio's Pinkunderwear.com: America's Toughest Underwear, http://www.pinkunderwear.com/ (last visited Sep. 1, 2010).

146. *Id.*

147. Yvonne Wingett, *Maricopa County Sheriff's Office Spent Loosely*, THE ARIZ. REPUBLIC, Aug. 8, 2010, *available at* http://www.azcentral.com/news/election/azelections/articles/2010/08/08/20100808maricopa-county-sheriff-office-spending.html.

148 Yvonne Wingett, *Joe Arpaio's office Misused up to $80 Million, Maricopa County Says*, THE ARIZ. REPUBLIC, Sep. 22, 2010, *available at* http://www.azcentral.com/news/articles/2010/09/22/20100922joe-arpaio-misused-funds-maricopa-county-says22-ON.html.

149. *Id.*

150. *Id.*

151. *Id.*

a restricted jail enhancement fund to pay for a staff party at a local amusement park and a bus costing nearly half a million dollars, in violation of the county's procurement rules.[152]

Many groups have complained about Arpaio's abusive practices and noted that a portion of the inmates were actually only awaiting trial and had not actually been convicted. Arpaio's practices have been criticized by organizations such as Amnesty International[153], the American Civil Liberties Union[154], the Arizona Ecumenical Council, the American Jewish Committee, and the Arizona chapter of the Anti-Defamation League.[155] Aside from subjecting men to ridicule wearing pink undergarments, in above 110 degree weather, sleeping in tents and "cockroach infested hellholes"[156], he has also come under scrutiny for his re-instatement of chain gangs:

> He boasts of his success with chain gangs on the Maricopa County Sheriff's Office website: Of equal success and notoriety are his chain gangs, which contribute thousands of dollars of free labor to the community. The male chain gang, and the world's first-ever female and juvenile chain gangs, clean streets, paint over graffiti, and bury the indigent in the county cemetery.[157]

He has the prisoners wearing the black and white striped uniforms of old, which are reminiscent of a bygone era.[158] The inmates work seven days a week, with no salt, ketchup, or recreation.[159] They have to pay a $10 fee to see a nurse. They are forced to bury indigent dead bodies and even the priests performing the service criticize the practice.[160] While the practice is termed as "voluntary," in fact, the prisoners rush to sign up for this in order to get back to the tents and avoid being

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152. *Id.*

153. Tom Ortega, *Human Plights*, PHOENIX NEW TIMES, Sep. 18, 1997, http://www.phoenixnewtimes.com/1997-09-18/news/human-plights/.

154. Michael Kiefer, *Abortion Pits ACLU v. Arpaio*, THE ARIZ. REPUBLIC, Aug. 8. 2008, *available at* http://www.azcentral.com/news/articles/2008/08/08/20080808abortion0808.html (regarding Arpaio's denial of inmates' requests to be transported to abortion clinics).

155. Neftali Vilchis, *Sheriff Joe Arpaio: Has He Gone Too Far?*, ASSOCIATED CONTENT, Mar. 31, 2009, http://www.associatedcontent.com/article/1598937/sheriff_joe_arpaio.html.

156. *Id.*

157. Maricopa County Sheriff's Office: Sheriff Joe Arpaio, http://www.mcso.org/index.php?a=GetModule&mn=sheriff_bio (last visited Sep. 2, 2010).

158. Alan Elsner, *Sheriff Runs Female Chain Gang*, Reuters, Oct. 29, 2003, *available at* http://www.cnn.com/2003/US/Southwest/10/29/chain.gang.reut/.

159. *Id.*

160. *Id.*

imprisoned in "lock-down" where they are trapped in an eight by twelve square feet cell for twenty three hours a day.[161]

Arpaio lends himself as an ideal model for "the punishment as profitable" use justification of punishment. Perhaps, he fills this role too well. Considering, all of the criticism of his policies, Maricopa County, having elected him five times, appears to express approval of his policies. It has been suggested his success could have translated into a run for Governor as he already has $2.3 million in his campaign coffers; he has subsequently declined, indicating he intends to try to get re-elected in 2012 for another term as Sheriff.[162]

B. The Wondrous World of Federal Prison Industries, Inc.

The purpose of Federal Prison Industries, Inc. (FPI) is to employ inmates, in a manner that provides "market-quality products and services."[163] FPI, also called UNICOR, claims to provide inmates with job skills training.[164] In addition, FPI is committed to contributing to the safety and security of the federal prison system by occupying the time of inmates and giving them something to do, rather than them being idle.[165] It purports to operate in a self-sustaining manner and avoids trying to impact private business and labor.[166]

FPI has also diverted a portion of the wages paid to inmates to crime victims for restitution.[167] "Backed by a robust SAP[168] manufacturing system and rigorous testing, UNICOR meets or exceeds industry standards. ISO 9001:2008 certified factories and Lean Six Sigma processes improve efficiency, reduce waste and enhance customer satisfaction."[169] In support of punishment as profitable use, FPI claims, "Your purchases generate lasting societal benefits: a reduction in government spending; the viability and health of our communities; improved public safety; and a "second chance" for thousands of inmates to, one day,

161. *Id.*

162. Amanda Lee Myers, *New immigration Bill Old Hat for 'Sheriff Joe'*, ASSOCIATED PRESS, May 6, 2010, available at http://www.msnbc.msn.com/id/36998749/.

163. UNICOR Online, About UNICOR, http://www.unicor.gov/about/overview/ (last visited Sep. 3, 2010) [hereinafter About UNICOR].

164. *Id.*.

165. *See generally id.*

166. About UNICOR, *supra* note 163.

167. UNICOR Online, About FPI Programs, http://www.unicor.gov/about/about_fpi_programs/?navlocation=InmateProgram (last visited Sep. 3, 2010).

168. Systems Application and Products in Data Processing. SAP Global, http://www.sap.com/index.epx (last visited Mar. 2, 2011).

169. UNICOR Online, Top Ten Reasons to Buy from UNICOR, http://www.unicor.gov/about/about_fpi_programs/?navlocation=InmateProgram (last visited Sep. 3, 2010).

become productive citizens. Simply put, it's the right thing to do!"[170]

Created in 1934, by President Franklin D. Roosevelt, FPI has its share of criticisms.[171] The complaints are not about ill treatment or terrible conditions, but that FPI cuts into the profits of private business.[172] At one point, FPI was considered a mandatory resource of labor for government contract work.[173] However, irrespective of the flack, FPI remains profitable and competitive with private industry; workers are paid between $0.23 to $1.15 per hour, and in 2003, sales were booming at $666.8 million for that year.[174]

In fact, there is a demand to get into the programs. Inmates are on a waiting list and commit less infractions and violations to avoid being bumped from the list.[175] Yet still only 17% of the federal prison population was employed in 2005.[176] This is despite the fact that inmates are required to work.[177] Prisoners may work in food service, grounds keeping, or maintenance, or work directly with UNICOR at one of its 106 factories, which produce goods in the areas of metals, textiles, furniture, electronics, and graphic arts.[178] The prisoners receive holidays, accrue paid vacation time, and longevity bonuses.[179] This might prompt the reader to ask, "What is wrong with this picture?"

The only serious criticisms that have surfaced, along the lines of cruel and unusual treatment are twofold: (1) that the prisoners have at times been subjected to hazardous working conditions, such as working with potentially hazardous computer parts from computers to be recycled[180]; and (2) prisoners were asked to volunteer to participate in clinical drug testing trials.[181] However, the two issues

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170. Id.

171. K. Daniel Glover, *Prison Labor Program under Fire by Lawmakers, Private Industry,* NATIONAL J., Apr. 12, 2004, available at http://www.govexec.com/dailyfed/0404/041204njl.htm.

172. *Id.*

173. *Id.*

174. *Id.*

175. *See* Jonathan Cowen, *One Nation's Gulag is another Nation's Factory within a Fence: Prison Labor in the Peoples Republic of China and the United States of America,* 12 UCLA Pac. Basin L.J. 190, 231-232 (1993).

176. Colleen Dougherty, *The Cruel and Unusual Irony of Prisoner Work Related Injuries in the United States,* 10 U. PA. J. BUS. & EMP. L. 483, 490-491 (2008).

177. U.S. DEPT. OF JUSTICE, FEDERAL BUREAU OF PRISONS, STATE OF THE BUREAU 10 (2005), available at http://www.bop.gov/news/publications.jsp ("Sentenced inmates must work if they are medically able.").

178. Dougherty, *supra* note 176, at 490.

179. Cowen, *supra* note 175, at 200-201.

180. Phoenix Pak, HASTE MAKES E-WASTE: A COMPARATIVE ANALYSIS OF HOW THE UNITED STATES SHOULD APPROACH THE GROWING E-WASTE THREAT, 16 Cardozo J. Int'l & Comp. L. 241, 253 (2008) ("In both circumstances, workers are afforded inadequate, if not completely lacking, protection from the hazardous materials found in e-waste and have no power to voice any objection to the unsafe working conditions...As such, there is often little regard for worker exposure to haz-

have been limited in scope, and overall, FPI seems to be a model for punishment as profitable use, but stands in a position superior to Arpaio and Maricopa County — FPI has seemed to avoid repeated unconstitutional violations which impact the Eighth Amendment. Nonetheless, is punishment as profitable use consistent with our historical values?

VI. DECONSTRUCTING CONVICT SLAVERY AS PROFITABLE USE

A. The Philosophy of John Locke

John Locke, the famous philosopher of contractarianism, believed government should only properly come about with the consent of the majority to be governed, seeking protection from the state of nature.[182] Therefore, a government should come about through its citizens entering into a social contract.[183] He is considered the principal drafter of the Fundamental Constitutions of Carolina[184] which, although never adopted, was later relied on heavily in developing the state constitutions of North Carolina and South Carolina after America obtained its independence from England.[185]

He considered that punishment is evil, inconvenient, and causes suffering, but it is done to achieve a greater good.[186] One purpose of a just government

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ardous materials and even less concern for these substances being released into the environment. Sometimes the so-called recycling methods employed to extract valuable parts are themselves a cause for environmental concern.").

181. Keramet Reiter, *Experimentation on Prisoners: Persistent Dilemnas in Rights and Regulations*, 97 CAL. L. REV. 501, 514 (2009) ("Prisoners who participated as subjects of drug trials usually received around $1 per day, or $30 per month, for participation. In other words, a prisoner could make considerably more than the lowest-paid prison laborer simply by participating in a drug trial. Likewise, using prisoners as the subjects of Phase I drug tests constituted tremendous savings for drug companies like Upjohn and Parke Davis.") (footnotes omitted).

182. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 337-338, § 171 (London: Printed for R. Butler, etc. 1821) (1690) ("Secondly, Political power is that power, which every man having in the state of nature, has given up into the hands of the society, and therein to the governors, whom the society hath set over itself, with this express or tacit trust, that it shall be employed for their good, and the preservation of their property: now this power, which every man has in the state of nature, and which he parts with to the society in all such cases where the society can secure him, is to use such means, for the preserving of his own property, as he thinks good, and nature allows him...").

183. *Id.* at 269, § 95 ("Men being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community, for their comfortable, safe and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it.").

184. Colonial Carolina geographically was made up of the land that was between Virginia and Florida.

185. THE FUNDAMENTAL CONSTITUTIONS OF CAROLINA (March 1, 1669), *available at* http://avalon.law.yale.edu/17th_century/nc05.asp#2.

is to punish the wrongdoers who violate the rights of others and to pursue the public good even where this may conflict with the rights of individuals.[187] Thus the benefit of a governed society over the state of nature is that citizens will be protected, and impartial judges will be appointed, to mete out justice by determining punishment.[188] The sentences they hand down must be proportional to the crime — this is consistent with our Eighth Amendment.[189]

John Locke distinguished political power from despotic and patriarchal powers, and rejected the idea that an illegitimate government should be able to exercise despotic power by violating the rights of its own citizens.[190] An illegitimate government inevitably makes slaves of its citizens which leads to a state of nature and a state of war with its citizens.[191] This results in rebellion and the people wishing to end the reign of its leadership to destroy tyranny.[192]

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186. Locke, *supra* note 182, at 193, § 8 ("Which being a trespass against the whole species, and the peace and safety of it, provided for by the law of nature, every man upon this score, by the right he hath to preserve mankind in general, may restrain, or where it is necessary, destroy things noxious to them, and so may bring such evil on any one, who hath transgressed that law, as may make him repent the doing of it, and thereby deter him, and by his example others, from doing the like mischief. And in this case, and upon this ground, every man hath a right to punish the offender, and be executioner of the law of nature.").

187. Locke, *supra* note 182 at 195, § 11 ("From these two distinct rights, the one of punishing the crime for restraint, and preventing the like offence, which right of punishing is in every body; the other of taking reparation, which belongs only to the injured party, comes it to pass that the magistrate, who by being magistrate hath the common right of punishing put into his hands, can often, where the public good demands not the execution of the law, remit the punishment of criminal offences by his own authority, but yet cannot remit the satisfaction due to any private man for the damage he has received.").

188. Locke, *supra* note 182, at 261, § 88 ("But though every man who has entered into civil society, and is become a member of any commonwealth, has thereby quitted his power to punish offences, against the law of nature, in prosecution of his own private judgment, yet with the judgment of offences, which he has given up to the legislative in all cases, where he can appeal to the magistrate, he has given a right to the commonwealth- to employ his force, for the execution of the judgments of the commonwealth, whenever he shall be called to it; which indeed are his own judgments, they being made by himself, or his representative.").

189. *Compare* Locke, *supra* note 182, at 196, § 12 ("By the same reason may a man in the state of nature punish the lesser breaches of that Law. Perhaps it will be demanded, with death? I answer, each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like. Every offense that can be committed in the state of nature, may in the state of nature be also punished equally, and as far forth as it may, in a commonwealth.") *with* U.S. CONST. amend. VIII.

190. Locke, *supra* note 182, at 335-339, §§ 169-172.

191. Locke, *supra* note 182, at 207, § 24 ("This is the perfect condition of slavery, which is nothing else, but the state of war continued, between a lawful conqueror and a captive: for, if once compact enter between them, and make an agreement for a limited power on the one side, and obedience on the other, the state of war and slavery ceases, as long as the compact endures: for, as has been said, no man can, by agreement, pass over to another that which he hath not in himself, a power

This brings us to Locke's view of slavery. Locke makes the conditions of legitimate slavery nearly impossible, as he posits:

> This freedom from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together: for a man, not having the power of his own life, cannot, by compact, or his own consent, enslave himself to anyone, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases.[193]

Some have remarked that Locke's historical involvement with trade and colonial government, and his mention of the possibility of legitimate slavery, showed his support for the African slave trade.[194] Those remarks are unlikely; Locke clearly defines the relationship between slave and master as being one of the state of war[195]; however, he approves, only slightly, of voluntary servitude, which he renames "drudgery" to distinguish it from true slavery in which the master holds the life and death of the slave in his hands.[196]

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over his own life.")

192. Locke, *supra* note 182, at 316, § 149 ("Though in a constituted commonwealth, standing upon its own basis, and acting according to its own nature, that is, acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.").

193. Locke, *supra* note 182, at 206, § 23 ("This freedom from absolute, arbitrary power, is so necessary to, and closely joined with a man's preservation, that he cannot part with it, but by what forfeits his preservation and life together: for a man, not having the power of his own life, cannot, by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases.").

194. Locke, *supra* note 182, at 206, § 23 ("Indeed, having by his fault forfeited his own life, by some act that deserves death; he, to whom he has forfeited it, may (when he has him in his power) delay to take it, and make use of him to his service, and he does him no injury by it: for, whenever he finds the hardship of his slavery outweigh the value of his life, it is in his power, by resisting the will of his master, to draw on himself the death he desires.").

195. Locke, *supra* note 182, at 207, § 24.

196. Locke, *supra* note 182, at 207, § 24 ("I confess we find among the Jews, as well as other nations, that men did sell themselves; but it is plain, this was only to drudgery, not to slavery: for, it is evident, the person sold was not under an absolute, arbitrary, despotical power: for the master could not have power to kill him, at any time, whom, at a certain time, he was obliged to let go free

B. Applying Robert Nozick's Philosophy

A discussion of the views of libertarian Robert Nozick might be helpful; he supported a deontological framework, much like Kant, viewing people as ends, rather than as means to an end.[197] Nozick explored scenarios involving free exchange among consenting adults while attacking notions of redistribution.[198] He is a natural rights theorist and, as such, views natural rights as existing independently of cultural values, traditions, social relationships, subjective perceptions, and shared ideals. If everyone were to begin from a hypothetically equal starting position, being rational beings with free will to make choices, they would structure their choices in a manner that is self-beneficial.[199] Howard Kahane describes Nozick's position in *Anarchy, State and Utopia* as being fourfold:

> Nozick adopts Lockean natural rights as the starting point;
>
> Nozick's "minimal state" is justified because protective associations can form from the state of nature, without violating Lockean natural rights;
>
> No states which are more extensive than the "minimal state" arising from the state of nature can be justified, because more extensive states violate Lockean natural rights; and
>
> Nozick's entitlement theory of distributive justice derived from his natural rights starting point.[200]

Each person in the state of nature has established boundaries around himself or herself.[201] Each person has freedom to act and to dispose of property, but a

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out of his service; and the master of such a servant was so far from having an arbitrary power over his life, that he could not, at pleasure, so much as maim him, but the loss of an eye, or tooth, set him free, Exod. xxi.").

197. *See* J.J. GRAAFLAND, ECONOMICS, ETHICS, AND THE MARKET: INTRODUCTION AND APPLICATIONS 185 (Routledge 2007) ("Nozick's theory is highly deontological in nature.").

198. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 163 (Basic Books, Inc. 1974).

199. *See Id.* at 161 (discussing the Wilt Chamberlain example, to show why socialism is problematic).

200. HOWARD KAHANE, CONTRACT ETHICS: EVOLUTIONARY BIOLOGY AND THE MORAL SENTIMENTS 109 (Rowman and Littlefield Publishers Inc. 1995).

201. *Id.* at 110.

transgression against another person, violating that person's natural rights, results in an appropriate response: the victim may defend himself or herself, recover damages, and seek proportional punishment so as to deter future transgressions.[202]

Nozick's minarchist views would permit nothing more than a night watchman state.[203] It is likely that such a state would involve a private paramilitary security force like the early Texas Rangers employed by Stephen F. Austin in 1823[204] prior to the Rangers becoming an actual governmental law enforcement agency.[205] The argument against using a central police force drawing funds from taxation comes from Nozick's position that the members of the protective association would pay the association to hire a force that is in effect a monopoly, and that taxation is an unjustified use of force that violates the rules of a minimal state.[206] However, the problem with this is the danger that even the "invisible hand" could not avert: a competing protective force could arise, which would outperform the monopolistic force at a lesser societal cost, and the cycle of competitive struggle could cause the state to degenerate into anarchy once more.[207]

Methods of punishment are not fully clarified in Nozick's work. What would be clear though is that losses from offenses should be compensated, and also that methods greater than just compensation must also be used. Such methods of deterrence are necessary to promote safety and security. Others who have studied Nozick's philosophy rely on it to support prison privatization.[208] Thus we come to a very important statement that Nozick makes:

> They think it relevant in assessing the justice of a situation to consider not only the distribution it embodies, but also how that distribution came about. If some persons are in prison for murder or war crimes, we do not say that to assess the justice of the distribution in the society we must look only at what this person

202. *Id.*

203. NOZICK, *supra* note 198, at 162 (discussing in a footnote how "the minimal night-watchman state, [is] a state limited to protecting persons against murder, assault, theft, fraud, and so forth.").

204. KEN ANDERSON, CRIME IN TEXAS: YOUR COMPLETE GUIDE TO THE CRIMINAL JUSTICE SYSTEM 15 (Revised ed., University of Texas Press 2005) (discussing how Austin hired 10 men to provide defense, paid them $15 a day, and the men had to supply their own horses and guns).

205. Unfortunately Nozick does not fully develop his theory as he leaves much of the judgment and decisionmaking to the reader.

206. David Osterfield, *Internal Inconsistencies in Arguments for Government: Nozick, Rand, and Hospers*, 4 J. LIBERTARIAN STUD. 331, 332 (1980).

207. *Id.* at 334.

208. NILS CHRISTIE, CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE 144 (3d. ed. Routledge 2000).

> has, and that person has, and that person has ... , at the current time. We think it relevant to ask whether someone did something so that he deserved to be punished, deserved to have a lower share. Most will agree to the relevance of further information with regard to punishments and penalties. Consider also desired things. One traditional socialist view is that workers are entitled to the product and full fruits of their labor; they have earned it; a distribution is unjust if it does not give the workers what they are entitled to. Such entitlements are based upon some past history.[209]

Thus in Nozick, we finally find someone who would likely not have Locke's qualms about punishment as profitable use. Nozick necessarily accepts the fact that even with free will and choices, the results of those choices may necessarily result in inequality and uneven distributions.[210] Compulsory redistribution is wrong[211] because it violates natural rights to self-ownership and it amounts to theft.[212] This would constitute taxation as slavery, which is wrong because it is forced.

However, Nozick took free choice to the extreme; he opined that freedom was not an inalienable right.[213] Unlike Locke, Nozick would have no objection to voluntary slave contracts.[214] The constitution is a social contract between all who band together for protection; it rigidly defines the rules of living within a protective association. If that constitution provides that a possible punishment for being adjudged guilty of a crime is enslavement, then how could it not be said that the person voluntarily bound himself or herself to slavery any less than he or she forfeited his or her rights to liberty and freedom when being sentenced to prison?

Trying to formulate punishment in a Nozickean light, we equate the amount of punishment ('P') to the amount of responsibility ('r') multiplied by how

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209. Nozick, *supra* note 198, at 154.

210. JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE, AND THE MINIMAL STATE 123 (Stanford University Press 1991) ("It is likely - some would say certain — that in a libertarian society massive inequalities would develop, but if equality of wealth came about by chance or by voluntary co-operation, this would be remarkable but unobjectionable.").

211. Nozick was not opposed to noncompulsory voluntary redistribution.

212. MARTIN GARDNER, THE WHYS OF A PHILOSOPHICAL SCRIVENER 130 (St. Martin's Press 1983).

213. ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 356 (Harvard University Press 1981) ("An inalienable right is one you are stuck with, in contrast to a right that can be alienated by exercising it (or another) in a certain way; one is not stuck with the inalienable right of freedom.").

214. *Id.*; *see also* NOZICK, *supra* note 198, at 331.

wrongful the behavior was ('H'), i.e. P = r x H.[215] This ensures that punishment meets the requirement of proportionality, and that the penalty never exceeds the correct amount of punishment.[216] Although revenge may mean something and fit the communicative behavior of sending a message similar to retribution, Nozick draws a demarcation line with revenge differing from retribution while acknowledging why it is easy to conflate the two.[217]

Nozick also considers that in exacting the punishment, other wrongs might be inflicted on the wrongdoer — specifically referencing that in maintaining prisons, horrible things may happen, but this is not the intention of the punishing force.[218] Incarceration is meant to lower the incidence of crime, not create more crime.[219] We would have the same concern about the punishment clause of the Thirteenth Amendment: a master has the capability of exposing his convict slave to more suffering than is necessary.[220] It is entirely possible that a convict slave may be victimized resulting in a new wrong or crime.[221]

If we had to express this, we would add the actual punishment ('a'), to the excess punishment ('e'),[222] and thus, gross punishment ('G') would be expressed as "G = a + e." If the amount of gross punishment does not exceed the deserved punishment, either "G < P" or "G = P," then it could be argued under desert theory, that the wrongdoer has gotten no more than his just desert.[223] If the amount of gross punishment exceeds the amount of punishment deserved, "G > P" then the result is cruel and unusual punishment, which would violate our Eighth Amendment.

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215. NOZICK, *supra* note 198, at 370-371.

216.NOZICK, *supra* note 198, at 370-371.

217.NOZICK, *supra* note 198, at 370.

218. NOZICK, *supra* note 198, at 371.

219. NOZICK, *supra* note 198, at 371.

220. See E. Stagg Whitin, *Law Evoked to Stop Practical Slavery of Convicts*, N.Y. TIMES, Jul. 13, 1913, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=F10D15FB3E5B13738DDDAA0994DF405B838DF1D3 (discussing convict factories, convicts working in mines at risk of gas explosions, and the risks of accidents that will inflict greater punishment than the sentence).

221. *Id.*

222. By excess punishment, I mean punishment derived directly or indirectly from punishment that the protecting force inflicts. As an example, if a death row inmate were about to be executed, but fell deathly ill just prior to execution, a retributivist would require nursing the inmate back to good health. If the death row inmate were to die due to illness, justice would be thwarted. A retributivist would only tolerate death inflicted by the protecting agency's hand, not some unexpected twist of fate.

223. Once I spoke with a homicide detective who seemed bitter that a particular death row inmate had not yet been executed. He complained how with appeal after appeal, and a score of post-conviction motions, the offender had managed to avoid his ultimate fate. The detective spoke with enthusiasm when he remarked, "However, I think the doctors are saying his kidneys are starting to fail. There's hope yet." As previously noted however, a true retributivist would not accept this development as being indicative of proper punishment.

The minimal state is a harsh and cold state to exist within.[224] Thus, Nozick would not have any problem with punishment as profitable use so long as the constitution binds and limits the protecting force, and the punishment exacted on anyone who violates community rules is proportional and does not exceed the limit of punishment permitted by moral desert. However, should the punishment be disproportional, or should it be cruel and unusual, injustice would result thus undermining the confidence of the community and possibly leading to anarchy.

C. Squaring Convict Slavery with Nozick and Locke

In light of even libertarian treatment of slavery and punishment, it does not seem possible that the practice of convict slavery can continue. Under Nozick's ideas, by utilizing slavery in the fashion that it has been historically used, we cause more harm than good. When the gross punishment exceeds the punishment required, injustice has resulted. The injustice is cruel and unusual punishment. Considering even the modern day resurgence of chain gangs, the degree of stigmatization, humiliation and psychological damage is clearly too great to offset the advantages of convict slavery.

Under Locke's ideas, we do not even get as far to make an analysis. While incarceration is accepted because the protecting force occasions this evil on those who would violate the rights of others, the relationship of slave to master is the state of war. Freedom from slavery is a natural right. As such, it is inalienable, and the argument that one forfeits the right to be free from slavery fails because it is a right we cannot freely alienate.

Of course, that is not to say that neither Locke nor Nozick would ever tolerate some type of servitude as punishment. Quite the contrary; if the conditions of servitude were more humane, carried more dignity with them, and were structured with the safety of inmates being made a priority, it is likely that both men would not oppose punishment as profitable use in this fashion.

There is one more danger that both men would fear. If the punishment became too profitable, there would be the possibility of corruption. Consider that the government could see the profit potential as being great, and then begin to enact

224. Consider the case of the family in South Fulton, Tennessee, who watched their home burn to the ground. Firefighters stood by and watched but did not intercede. Obion County did not provide fire services and did not tax residents for firefighters. South Fulton offered firefighting services, but only on the payment of a $75 annual fee in advance, i.e. a "pay to spray" policy. The family forgot to pay the fee and was told it was too late when they called 9-1-1. The only reason the firefighters were on scene was because a paying neighbor called them to ensure that the fire did not spread to other houses. The firefighters refused to break the law and stood by and did nothing for the family who had not paid; they merely monitored the situation to protect the paying customers.

laws that made more everyday activities illegal, i.e. *mala prohibita*. As the jails and prisons filled up with more convicts, revenues for the government would increase. As America has often times stripped minorities, particularly blacks, of their rights and sent more young men and women to prison rather than college, it is precisely this kind of tyranny and despotic power that both men would advocate for the destruction of, sending us back into the state of nature.

Consider the case of a favored law enforcement tool — the confidential informant. There are occasions where a confidential informant may not have taken a plea having been promised that either the informant would not be arrested, or if arrested that the case would be dropped, or that they would be treated with leniency at sentencing. There is a degree of coercion in the process. This could be considered to be an act of slavery within the meaning of the Thirteenth Amendment.[225] Assistant Professor Michael L. Rich uses the case of a college graduate named Rachel Morningstar Hoffman to illustrate an example of this.[226] Hoffman had been used by the Tallahassee, Florida, Police Department as a confidential informant at the threat of criminal prosecution, braving great peril, she was sadly murdered by targets of the investigation.[227] Rich used Hoffman's case to argue that her servitude was coerced and constituted a violation of the Thirteenth Amendment.[228]

There are also confidential informants unlike Hoffman who actually enter into plea deals and plead guilty prior to sentencing as well. Often, these plea deals involve a conviction and a negotiated sentence that will be honored if the confidential informant complies with the terms of the plea contract. The Thirteenth Amendment cannot protect these individuals, as Rich observed, "it forbids only the use of threats of criminal sanctions as leverage to compel informant cooperation absent a criminal conviction."[229] Even if the plea were attacked on the grounds that it was not entered into voluntarily, a very difficult

225 .Debra Satz, *Voluntary Slavery and the Limits of the Market*, 3 LAW & ETHICS HUM. RTS. 86, 87 (2009) ("Indeed, while slavery itself is usually rooted in an initial act of coercion, it is not even necessary for slavery to originate in violence and force. Slavery has been reported to be voluntary in a number of important historical instances.").

226. Michael L. Rich, *Coerced Informants and the Thirteenth Amendment Limitations on the Police-Informant Relationship*, 50 SANTA CLARA L. REV. 681, 681-685 (2010).

227. *Id.*

228. *Id.* at 745 ("Recognizing the primacy of these interests in the Thirteenth Amendment analysis, this article views the Amendment consistently with its forceful language as an absolute prohibition on a class of conditions that are per se sufficiently harmful to require the termination of the offending condition, an absolute remedy. Applied in the instant context, this approach instructs us that because the use of coerced informants violates the Thirteenth Amendment, half-measures are inadequate to remedy the constitutional violation and that use must cease.").

229. *Id.* at 744.

challenge to mount, the offender still faces the possibility of a harsher sentence. Both Locke and Nozick might well fear that an overly zealous police department might well seek to incarcerate more individuals, with the hopes of turning them into informants, but at unnecessary risks to the lives of these individuals. It is highly unlikely that either would find this type of punishment justifiable and the public trust would eventually be shattered.

VII. CONCLUSION

This country failed to eradicate the full evil of slavery when it initially passed the Thirteenth Amendment. The decision to include the language of the Punishment Clause has led to great travesty and injustice. Either the drafters of the Thirteenth Amendment failed to foresee that the system of slavery would transform from one method (chattel) to the next (de facto) or the drafters intended this result. That little was done to stop the abuse that followed tends to support the latter conclusion.

The Southern states led the charge in proceeding to make use of the Punishment Clause to their immediate benefit. Blacks were introduced to the criminal justice system in disproportionate numbers, causing them to fall prey to an even more dangerous form of servitude. When the peonage systems and convict leasing began to fade from the scene, the dominance of the chain gang filled the void. Some in those years had never seen true freedom. In some ways, the stereotype of the black as criminal, has become embedded in the social consciousness of the nation as a lingering after thought.

Although punishment as profitable use gains some support from the recent success story of the FPI and UNICOR, by and large, it fails on many other counts, and as a whole, lends itself to abuse, wanton punishment, corruption, and greed. The views of Locke make the most sense about it: a slave will always exist in a state of war with his master. The natural right of a man is to be free. Slavery as punishment for an offense is typically disproportionate for just about any crime — save the very worst, e.g. rape, murder, etc. Moreover, the right of freedom from compulsory servitude in this respect is an inalienable right.

I would call for a constitutional amendment, repealing the Punishment Clause. In the *Hope* case, Justice Thomas pointed to a gray area of ambiguity within the state of the law on cruel and unusual punishment, as justifying a reason to affirm a trial court ruling that prison guards had not violated the rights of prisoners handcuffed to a hitching post because those constitutional rights were not well established within the law. Only by establishing the laws with greater clarity, can we prevent future similar injustices from occurring. Convict slavery is a barbaric practice that is a relic of the dark past of America; a past steeped in the evil of racism. We should dispense with it without delay. Our contemporary standards demand no less.