NOTES

REINSTITUTION OF THE CHAIN GANG: A HISTORICAL AND CONSTITUTIONAL ANALYSIS

Although the American penal system has not used chain gangs for the past 50 years,[1] the spectacle of laboring convicts in leg irons and heavy chains returned briefly to Alabama roadsides. Alabama Prison Commissioner Ron Jones reinstituted the chain gang on May 3, 1995 pursuant to a policy he and Alabama Governor Fob James, Jr. adopted.[2] A lawsuit brought by the Southern Poverty Law Center challenging chain gangs as cruel and unusual punishment brought about a ban of the chain gang on June 19, 1996.[3] A concern remains, however, that other states which reinstituted chain gangs will continue to use them.[4]

The decision to reinstitute the chain gang raises constitutional issues, as well as overarching policy concerns about the growing tendency of states to enact more violent methods of punishment.[5] The current chain gang system is an anachronistic form of punishment. The chain gang's historical roots as a system designed to oppress and exploit the labor of African-Americans, immigrants, and poor people remains a source of social controversy. This Note examines the chain gang system as an economic, social, and political institution.

Part I of this Note demonstrates the various arguments made by proponents and opponents of the chain gang labor system. Part II examines the historical background of the chain gang system and explores the possibility that the resurgence of the chain gang as a form of punishment stems from similar goals of economic and social subjugation of minority groups.[6] Part III examines several

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[1] *See 20/20: 'The Chain Gang' - Cruel and Unusual Punishment?* (ABC television broadcast, June 9, 1995).

[2] *See Alabama to Make Prisoners Break Rocks*, N.Y. TIMES, July 29, 1995, pg. 5, colum. 1. Reinstitution of the chain gang did not require any legislation, it required only an executive order issued by Governor Fob James. *See* Curtis Wilkie, *Back on the Chain Gang Amid Fanfare and Complaints, Alabama Puts Shackled Prisoners to Work*, BOSTON GLOBE, May 4, 1995, at 24. The only restriction in the initial executive order was that it precluded the use of women on chain gangs. *See id.*

[3] *See Chain Gangs Are Halted in Alabama*, N.Y. TIMES, June 21, 1996, at A14. The chain gang will be banned permanently under an agreement reached by lawyers for the inmates, state prison officials, and Gov. Fob James, Jr. *See id.* This move was prompted by security problems: a guard fatally shot an inmate who attacked a fellow chain gang member after being unchained to get back on the bus. *See id.*

[4] After Alabama became the first state to reinstitute chain gangs, Florida, Arizona, Wisconsin, and Iowa also instituted chain gangs into their penal system. *See Alabama Ends Use Of Chain Gangs. Controversy, Security Issues Lead To New Policy*, CHI. TRIB., June 21, 1996 at § 1, at 10.

[5] *See id.*

[6] The term minority group refers to socially, economically, and politically dis-

constitutional issues raised by the reinstitution of the chain gang, including due process, cruel and unusual punishment, and equal protection issues.

I. THE UNDERLYING PURPOSE OF THE REINSTITUTION OF THE CHAIN GANG

A. *Underlying Purpose of Modern Chain Gang*

Proponents of the new chain gang policy minimize the policy's punitive dimension by emphasizing its alleged benefits, such as reduction in stress inside the prison facility, easier prison management, and reduction in the number of guards needed to monitor prisoners.[7] In addition, the proponents of chain gangs compare chain gangs to prison work program initiatives, since both yield economic, institutional, and individual benefits without a significant threat to the civilian workforce.[8] By stating their goals in these terms, proponents of the chain gang attempt to legitimize the reinstitution of the chain gang as a rational economic and social decision. A closer examination, however, reveals that chain gangs do not accomplish the underlying goals of prison work programs. In particular, chain gangs fail to comport with the three commonly offered justifications for pursuing a prisoner employment policy: economic soundness, prisoner rehabilitation, and humanitarian principles.[9]

In support of chain gangs, proponents often cite the proposition that prisoner employment provides economic advantages.[10] Prisoner employment advocates have long argued that improvement and expansion of prisoner employment can improve the aggregate economic welfare of the states by lowering correctional expenditures which are usually paid through state budgets.[11] Furthermore, increased employment of inmates may have the spill-over effect of enhancing the "stability and improv[ing] the atmosphere of the institutional environment."[12] Alabama State Prison Commissioner, Ron Jones, echoed this view stating that prison employment was necessary because the state had "poured a lot of money into prisons. [Yet,] [t]wenty years down the road, our prison population is four times larger and fifteen times more expensive to keep up."[13]

Such reasoning distorts the views of prisoner employment advocates, who em-

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empowered groups within the criminal justice system. It includes, but is not limited to, groups that have been oppressed based on race, such as African-Americans or Latinos, the poor, and the mentally ill.

[7] *See 20/20: 'The Chain Gang' - Cruel and Unusual Punishment?*, *supra* note 1 (interview with Ralph Hooks, Limestone Prison Facility Warden).

[8] *See* Timothy J. Flanagan & Kathleen Maguire, *A Full Employment Policy For Prisoners in the United States: Some Arguments, Estimates And Implications*, 21 J. CRIM. JUST. 117, 129 (1993).

[9] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Craig v. Boren, 429 U.S. 190 (1976); and Reed v. Reed, 404 U.S. 71 (1971).

[10] *See, e.g.*, Wilkie, *supra* note 2 (quoting Ron Jones, Alabama State Prison Commissioner).

[11] *See* Flanagan & Maguire, *supra* note 8, at 118.

[12] *Id.*

[13] Wilkie, *supra* note 2, at 24.

phasize the rehabilitative and economic value of the prison work programs.[14] Unlike chain gang proponents, advocates of prisoner employment stress the importance of simulating the private sector working environment.[15] As rudimentary economic analysis shows, the chain gang labor system lacks an adequate incentive program to have economic soundness.[16]

Similarly, the chain gang labor system also contradicts the second justification for prisoner work programs: prisoner rehabilitation. Advocates of prisoner employment have shown that prison work programs can instill self-discipline and a sense of responsibility and teach time and resource management, which can then be used by inmates upon their release from prison.[17] Advocates of prison employment also argue that such potential is achieved only through prison work programs that simulate the real world working environment.[18] The 1978 study on which the Law Enforcement Assistance Administration based its effort to revitalize prison industry programs reinforces this view.[19] The study concluded that prison work programs can achieve both financial self-sufficiency and rehabilitation of offenders through the creation of a realistic work environment, incentives, and restrictions similar to those of private-sector counter parts.[20]

Some advocates of prisoner employment are concerned about the inhumanity of forced idleness.[21] Advocates of chain gangs, on the other hand, do not seem to care about forced idleness, but simply want to punish prisoners with hard labor. For example, Florida, a state with chain gangs, also tried to pass the Florida Prison Safety Act of 1996[22] banning weight-lifting equipment from correctional facilities.[23] Even Florida state corrections officials spoke out against the measure in the belief that barring weight-lifting equipment is potentially dangerous because it "eliminates a hobby for idle prisoners in institutions that are chronically understaffed."[24] The actions of states like Florida provide an indication that

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[14] *See, e.g.*, Flanagan & Maguire, *supra* note 8, at 118 (stating their justification for prisoner employment in utilitarian terms: "[I]t is wholly inefficient, inhumane, unproductive, and perhaps counterproductive to allow a large number of employable individuals to languish in inactivity . . . ").

[15] *See id.* at 121-22.

[16] For full discussion, see *infra* part I(B).

[17] *See* Flanagan & Maguire, *supra* note 8, at 119.

[18] *See id.* at 118-19.

[19] *See* ECON. INC., ANALYSIS OF PRISON INDUSTRIES AND RECOMMENDATIONS FOR CHANGE (1978).

[20] *See* Flanagan & Maguire, *supra* note 8, at 121.

[21] *See, e.g.*, LOUIS N. ROBINSON, SHOULD PRISONERS WORK? 2 (1931) (quoting E. R. Cass, General Secretary of the American Prison Association: "No greater cruelty can possibly be inflicted on prisoners than enforced idleness . . . Their health declines and in a large proportion of cases the mind, burdened by the monotony of the slowly passing hours in which neither hand nor brain is active, becomes affected.").

[22] Rule 13.2, Fla. H.R. 95, Reg. Sess. (1996) (died in the House Committee on Corrections, May 3, 1996).

[23] *See Weights Get Florida Trip to Solitary*, BOSTON GLOBE, Apr. 4, 1996, at 17.

[24] *Id.*

states are not introducing chain gangs out of humanitarian concerns for forced idleness.

B. *Economic Inefficiency of Chain Gangs*

The argument that chain gangs are economically beneficial to the prison system remains a powerful argument for their reinstitution. Even without the recent public concern over the government budget deficit, the principle that penal institutions should attempt to be self-supportive is a rational view. The opponents of chain gangs have counter-argued that the operation of the chain gang would be inefficient, but they have not provided a clear, articulate explanation.

By translating chain gang labor system into an economic language of marginal benefits and marginal costs, this section explains the inefficiency of the chain gang system.[25] An elementary economic analysis shows that in chain gang systems, the benefit to an individual agent does not equal the benefit to society, and the resulting outcome will be inefficient. Furthermore, although no thorough empirical study on the economics of the chain gang is available, there are strong reasons to doubt even the profitability of the chain gangs.[26]

Framing the chain gang labor system as an ordinary market situation in which inmates sell the output of their labor (such as road improvement) to the state illustrates the source of economic inefficiency. At first, it may seem incorrect to model prison labor in a market context since inmates forced into chain gang labor do not appear to have the option of varying their labor and, hence, their output.[27] While the time each inmate must spend in the work detail is fixed, however, a prison worker can vary the intensity with which he works. Thus, effective labor more accurately represents the labor supplied by an individual.[28]

In this framework, the state represents the demand side of the market. The state has a clear objective. It incurs costs in housing and maintaining inmates at penitentiaries, and the state would like to recover some, if not all, of this cost from the inmates by receiving goods that are produced by inmate labor. The state must incur additional cost, however, in order to assign inmates to chain gang labor. For simplicity, assume that road improvements are divisible into units, and define variable p as the cost per unit of road improvement. In this way, the state purchases chain gang labor at p dollars per unit.

On the supply side, each individual inmate acts as a firm that produces road improvement by using effort as a variable input. Increased effort by inmates

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[25] The intention of this section is not to argue that the correctional institution should not attempt to be economically sound but that the operation of chain gangs, in particular, fails to achieve economic efficiency.

[26] *See, e.g.*, JESSE F. STEINER & ROY M. BROWN, THE NORTH CAROLINA CHAIN GANG 102-24 (1969).

[27] For example, inmates at Alabama's Limestone Facility chain gang must put in 10 hours of work per day regardless of their desire to work. *See 20/20: 'The Chain Gang' - Cruel and Unusual Punishment?*, *supra* note 1.

[28] Effective labor represents a functional relationship such as effective labor = effort X hours worked.

generate more and better road improvement, so production is an increasing function of effort. Since effort also brings pain and discomfort to an inmate, each unit of effort exerted represents a cost to the inmate. Therefore, an inmate will exert effort only if the benefit derived from the effort is greater than or equal to the cost of his effort. In economic terms, an inmate optimizes his profit by producing up to the point where his marginal benefit *(MB)* equals his marginal cost *(MC)*. Note that even when he receives no benefit for his effort, an inmate produces a positive output. This reflects the fact that an inmate must at least put a minimum effort into the job. That is, he cannot simply stand idle.

Suppose now that the state must purchase goods from the inmates as if from any other contractor. Then, this system functions like an ordinary private-sector market, and the inmate produces output at the point where $MC = MB$.[29] In Figure 1, this occurs at quantity q' and at cost \$p' per unit to the state. By the first fundamental theorem of welfare,[30] q' represents the socially optimum level of inmate output.

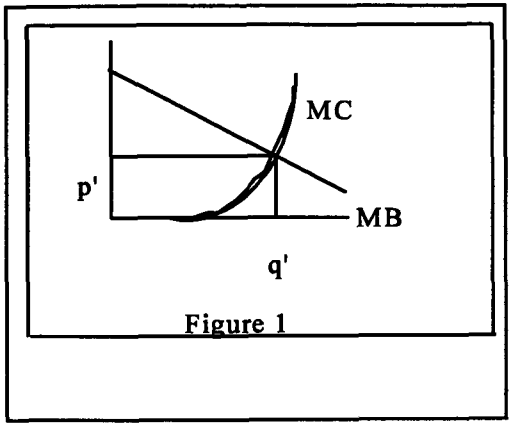

Figure 1

The free market system, however, is a poor model of the chain gang labor system. The crucial difference is that in the chain gang labor system the value of inmate labor, \$p -x q', is not transferred to the inmates. Thus, the marginal benefit to an individual inmate from producing the good is not the same as the marginal benefit to the state. When deciding the amount of goods to produce, and thus, how much effort to exert, an inmate does not care about how his labor benefits the state but only how it benefits him. Since, in the chain gang labor system, an inmate does not receive more benefit by producing more goods, the marginal benefit curve of an inmate *(MBi)*, is flat along the quantity axis. Moreover, in a brutal work environment, the lack of a proper incentive scheme, such as remuneration or reduction in sentence proportional to the output, means that

[29] According to standard economic theory, marginal cost curve is also the supply curve and the marginal benefit curve is the demand curve.

[30] The first fundamental theorem of welfare states that a competitive equilibrium must be Pareto Optimal.

an individual's marginal benefit is practically non-existent. Figure 2 illustrates this market.

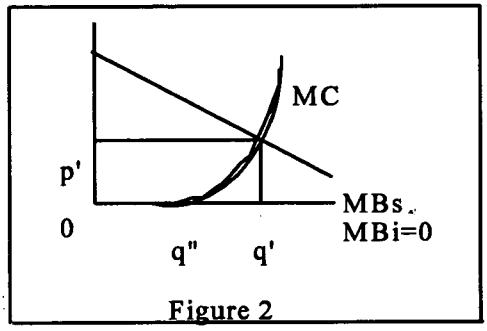

Figure 2

As in the competitive market, the solution to the inmate's optimization problems in this market also occurs at the level where *MC* = *MB*. Here, however, the *MBi* is not the same as the state's marginal benefit curve, *MBs*. Therefore, each inmate solves *MC* = *MBi*, and the equilibrium output occurs at *q"*. Note that the goods produced by the inmate are less than the socially optimum level *q'*. This type of inefficiency is similar to the inefficiency that arises when private firms provide public goods.

Thus, the chain gang labor system results in economic inefficiency because of the lack of proper incentives to work. Raising the MBi curve to coincide with the MBs curve at q can restore efficiency. In practice there are two ways to achieve this. The first is to provide positive incentives that are proportional to the inmate's exerted effort. Examples of such an incentive mechanism include remuneration (even moderate) or sentence reductions proportional to the inmate's productivity. This unfortunately appears to be a policy that the state is not willing to pursue. The second method is to provide negative incentives for withholding effort. In the context of the chain gang labor system, however, the state could only achieve this by brutalizing inmates into working harder.[31] Hopefully, this is one policy that no state would pursue.

Until the state can solve this incentive problem complaints about inmates' malingering or feigning injuries will be common.[32] After all, chain gang laborers are merely behaving rationally. In this context, it is the state that fails to act in an economically rational manner.

II. The Historical Roots of the Chain Gang

Reinstitution of the chain gang labor system is particularly troubling because it is an antiquated form of punishment rooted in America's racist past. Chain gang labors were first instituted in the convict lease system of the postbellum

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[31] For full discussion of cruelty associated with the old chain gang system, see *supra*, part II(A).

[32] *See* Sam Grossfeld, *Upon This Rock: Working on the Chain Gang in Alabama*, Boston Globe, Aug. 27, 1995, at 66.

South, in which convicted criminals were leased to private interests in exchange for a fee.[33] Although not uniquely a Southern institution, the South had the highest concentration of chain gangs. They served as part of the larger legal network, called Peonage, used to keep African-Americans in virtual slavery and ensure the Southern racial hierarchy.[34] The use of chain gangs was later adopted by county governments which found it especially suitable to county road repairs.[35] Chain gang labor survived well into 1930s even as the Supreme Court gradually dismantled the Peonage system. Thus, the historical context in which the state instituted and propagated chain gang labor raises concerns about both the implications and the underlying purposes of its reinstitution.

A. *The Cruelty That Links Past And Present*

Because the chain gang labor system lacked a positive incentive scheme,[36] chain gang labor operated on intimidation and violence to extract work from convicts. Hardy Mobley, a young black convict from Carroll County, Georgia, related an example of the routine cruelty inflicted on chain gang laborers when he testified about prisoner life at the Georgia Midland Railroad work camp.[37] On August 19, 1886, C. C. Bingham, the whipping boss at the work camp, ordered Mobley to remove his pants.[38] Bingham then placed Mobley across a barrel and had four guards hold Mobley while Bingham whipped him.[39] Bingham continued to whip Mobley until blood flowed down his legs, pausing from time to time only to soak the whip and drag it in the sand.[40]

By any measure, cruelty and disregard for human life marked the postbellum convict lease system.[41] The annual death rates for prisoners were close to twenty percent, and in some places nearly fifty percent.[42] Convicts who served their time on state and county chain gangs suffered no less than convicts leased to private interests.[43] Almost all of the convicts trapped in this system were African-Americans.[44] To avoid the cruelty of the penal system, many African-Americans voluntarily signed up with private employers at wages far below the

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[33] *See* Matthew J. Mancini, *Race, Economics and the Abandonment of Convict Leasing*, 63 J. NEGRO HIST. 339, 340 (1978).

[34] *See id.* at 339.

[35] *See id.* at 343.

[36] For full discussion on economics of chain gang, see *supra* part I(B).

[37] *See* Mancini, *supra* note 33, at 342 (citing ATLANTA CONSTITUTION, Sept. 9, 1887).

[38] *See id.*

[39] *See id.*

[40] *See id.*

[41] *See id.* (citing PROCEEDINGS OF THE CONVICT LEASE SYSTEM LITIGATION 1242-43 (1908) (describing incident in which a sixteen year old white convict was whipped to death) (transcript available in Georgia Department of Archives and History)).

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

[43] *See id.* at 652.

[44] *See id.* at 651.

average salary to avoid fines or repay debts.[45]

The convict lease system was more brutal than slavery because the replacement cost of convicts was much lower than that of slaves. The large supply of convicts meant that the employer could replace a dead or unproductive convict with another convict at virtually no cost.[46] Thus, the convict lease system lacked slavery's paternalism that had provided slaves some degree of protection.[47] In the convict lease system, every laborer was expendable.[48]

Current attitudes on acceptable punishment for criminals seem to have evolved towards more humane and dignified punishments than those of the convict lease system. Yet, the brutality found in the newly reinstituted Alabama chain gang greatly resembles the postbellum convict lease system.[49] At Limestone Correctional Facility in Alabama, inmates worked all day on rock piles, breaking boulders with only a sledgehammer.[50] Inmates say that smashing a sledgehammer against a boulder is "like hitting a fastball on the fists."[51] Most inmates do not have gloves and wear only goggles to protect their eyes from the flying shards of broken limestone boulders.[52]

Chain gang proponents may argue that, even in the modern context, men wearing leg irons and chained eight feet apart to four other men is far less cruel than Mobley's experience. The methods of punishment on current chain gangs, such as those alleged by inmates at the Limestone Correctional Facility,[53] however, raise serious concerns about the modern chain gang's potential to become a brutalizing mechanism.[54]

B. *Peonage And The New Chain Gang: The Disproportionate Impact On African-Americans*

1. Subjugation of African-Americans through race neutral statutes

Peonage existed in many Southern states until the early twentieth century when the Supreme Court began prohibiting it.[55] Peonage laws were an integral part of state laws and customs. These laws included statutes dealing with contract fraud, criminal surety, vagrancy and other "open-ended" statutes that permitted the criminal prosecution of laborers who sought to abandon their jobs.[56]

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[45] *See id.* at 653.

[46] *See* Mancini, *supra* note 33, at 345.

[47] *See id.*

[48] *See id.*

[49] *See* Grossfeld, *supra* note 32, at 66.

[50] *See id.*

[51] *Id.*

[52] *See id.*

[53] *See* Plaintiff's Complaint, Austin v. James (No. 95-T-637-N) (hereinafter Complaint).

[54] For full discussion, *see supra* part III(A)(3).

[55] *See* United States v. Reynolds, 235 U.S. 133 (1914), Bailey v. Alabama, 219 U.S. 219 (1911); Clyatt v. United States, 197 U.S. 207 (1905).

[56] *See* Schmidt, *supra* note 42, at 651.

Convicts often worked on state or county chain gangs or were forced into criminal surety contracts.[57] Under the criminal surety laws, indigent convicts avoided the chain gang by contracting their labor to employers who would pay their fines.[58] However, these contracts functioned more like servitude designed to trap African-Americans.[59]

A large number of criminal convictions were based on "petty" and "trumped up charges" to meet the demand for cheap convict workers.[60] This system became what the Supreme Court called a "wheel of servitude."[61] For example, Alabama's prison population increased from 374 in 1869 to 1,183 in 1892.[62] Georgia's convict population increased tenfold during the forty year period from 1864 to 1904.[63] Other states such as Florida, North Carolina, and Mississippi experienced similar increases in their prison populations.[64] "One reason for the large number of arrests—in Georgia particularly—lies in the fact that the state and the counties make a profit out of their prison system[s]," reported Ray Stannard Baker in 1908.[65] Baker found that "[s]ome of the large fortunes in Atlanta have come chiefly from the labor of chain gangs of convicts leased from the state."[66]

After investigating the peonage system, the United States Assistant Attorney General Charles W. Russell concluded "that the chief support of peonage is the peculiar system of State laws prevailing in the South, intended evidently to compel services on the part of the workingman."[67] Russell also noted that these laws can be adapted so that they completely nullify the Thirteenth Amendment and establish involuntary servitude.[68] Russell further concluded that the convict lease

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[57] *See id.*

[58] *See* RAY S. BAKER, FOLLOWING THE COLOR LINE 95-97 (1964). *See also* Schmidt, *supra* note 42, at 691-92.

[59] *See* Schmidt, *supra* note 42, at 692. Commenting on the great number of white employers eager to obtain black laborers through criminal-surety contract, Baker concluded that the "natural tendency" of the Southern justice system under criminal-surety contract "is to convict as many Negroes as possible and to punish the offences charged as severely as possible." BAKER, *supra* note 58, at 98.

[60] *See* Schmidt, *supra* note 42, at 651.

[61] In describing the plight of the convicts, Justice Day wrote "the convict is thus kept chained to an ever turning wheel of servitude." United States v. Reynolds, 235 U.S. 133, 146-47 (1914). *See also* Schmidt, *supra* note 42, at 699.

[62] *See* Mancini, *supra* note 33, at 343 (citing *Governor's Message*, Ala. House J., 1869, at 20; 1892-93, at 28).

[63] *See id.* at 343 (citing Report of the Principal Keeper of the Penitentiary (1868-1908)).

[64] *See id.*

[65] BAKER, *supra* note 58, at 50 (Ray S. Baker was a Progressive Era muckraker whose principal concern was involuntary servitude in the South). *See also* Schmidt, *supra* note 42, at 651.

[66] BAKER, *supra* note 58, at 50.

[67] Schmidt, *supra* note 42, at 648-49 (quoting CHARLES W. RUSSELL, REPORT ON PEONAGE 7 (1908)).

[68] *See id.* at 649.

systems in Florida and Georgia were primarily forced servitude in which those forced to labor had not committed any crime.[69] Alabama Governor Thomas E. Kilby also declared in 1919 that his state's convict lease system was "a relic of barbarism . . . a form of human slavery."[70]

The peonage system characterized racial and economic arrangements in the South during the Progressive era.[71] Through peonage laws, Southern states effectively enacted legislation to reduce freed blacks to the level of slave labor without having statutes defined in racial terms.[72] For example, a typical peonage law like the Florida vagrancy statute of 1905, which subjected vagrants to a $250 fine or six months on a chain gang, did not refer to race.[73] It defined vagrants as a multitude of persons beginning with "[r]ogues and vagabonds, idle or dissolute persons, common night walkers, [p]ersons who neglect their calling," and ending with "all able-bodied male persons over eighteen years of age who are without means of support."[74] In reality, however, Southern states used these broad statutes to convict any person without a job or means of support and found their targets mostly in African-American laborers who typically did not have contractual employment.[75]

Furthermore, the drastic demographic changes that accompanied the peonage system made clear that the peonage system had a disproportionate impact on African-Americans.[76] As the justice system sought to supply the convict lease system, the prison population became "younger and almost entirely black."[77] African-Americans constituted more than ninety percent of the convict population in the South.[78] Lastly, the peonage system's language and customs-underscored the intended role of African-Americans.[79] Alabama and Texas classified convicts according to their anticipated labor values as "full," "medium," or "dead" hands, just as they had categorized slaves.[80]

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[69] *See id.* at 651.

[70] *Id.*

[71] See *id.* at 646.

[72] *See id.* at 673. Although the victims of peonage were primarily African-Americans, towards the end of Peonage Era immigrants also became a target of peonage system. *See id.* For example, after finding seven hundred Italians on an Arkansas plantation Russell concluded "[u]ntil we began our work in October, 1906, the chief supply of peons came from the slums—i.e., foreign quarters of New York and from Ellis Island." *Id.* (quoting CHARLES W. RUSSELL, REPORT ON PEONAGE 13, 15, 17, 19, 22-24, 31 (1908)).

[73] *See id.* at 649 (citing Fla. Stat. §§ 3570-71 (1905)).

[74] *Id.*

[75] *See id.*

[76] *See* Mancini, *supra* note 33, at 343.

[77] *Id.*

[78] *See id.* The author does not cite a specific statistical study. *See also* Schmidt, *supra* note 42, at 651 (noting that "[a]lmost all the convicts caught in this lethal [peonage] system were blacks").

[79] *See* Mancini, *supra* note 33, at 345.

[80] *Id.*

2. Judicial relief for African-Americans through race neutral decisions

Just as race neutral peonage statutes subjugated African-Americans, the Supreme Court invalidated these statutes without racial consideration. The Supreme Court decisions in the Peonage cases, *Clyatt v. United States*,[81] *Bailey v. Alabama*,[82] and *United States v. Reynolds*[83] contributed greatly to justice for African-Americans during the early twentieth century.[84] By judicially invalidating forced labor,[85] the Supreme Court defined the scope of the Thirteenth Amendment's protection against involuntary servitude.[86]

The first major peonage case, *Clyatt v. United States*,[87] affirmed the validity of the then dormant Peonage Abolition Act, which declared unlawful "the holding of any person to service or labor under the system known as peonage" and nullified "all acts, laws, resolutions, orders, regulations or usages" which maintained peonage.[88] In *Bailey v. Alabama*,[89] the Supreme Court invalidated Alabama legislation which provided that breach of contract "shall be prima facie evidence of the intent to injure or defraud [one's] employer."[90] Although Bailey's lawyers argued that the statute, in effect, coerced a particular class of laborers into performing contracts based upon the racial antagonism of society,[91] the Court refused to take into account the sectional racial issues that characterized these types of statutes.[92] Finally, in *United States v. Reynolds*,[93] the Court held that the Alabama statute punishing breach of contract in the criminal surety

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[81] 197 U.S. 207 (1905).

[82] 219 U.S. 219 (1911).

[83] 235 U.S. 133 (1914).

[84] *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 630 (Kermit L. Hall ed., 1992).

[85] *See id.*

[86] "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.

[87] 197 U.S. 207 (1905).

[88] Act of Mar. 2, 1867, ch. 187, 14 Stat. 546 (1867) (currently codified at 42 U.S.C. § 1994 (1994)).

[89] 219 U.S. 219 (1911).

[90] *Id.* at 227 (citing Ala. Acts 345-46 (1903)). Peonage reformers such as Booker T. Washington had criticized the statute because its statutory presumption and bar on testimony meant that "any white man who cares to charge that a Colored man has promised to work for him and has not done so, or who has gotten money from him and not paid it back can have the Colored man sent to the chain gang." Schmidt, *supra* note 42, at 677 (quoting P. DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH 67 (1972)).

[91] *See* Schmidt, *supra* note 42, at 680. The lawyers argued that the statute applied only to "service[s] rendered by commonest laborer or the poorest tenant of the farmlands" who were "as a class, negroes." *Id.* (quoting Brief by Edward S. Watts and Daniel W. Troy for Plaintiff in Error at 7, Bailey v. Alabama, 219 U.S. 219 (1911)).

[92] *See* Bailey, 219 U.S. at 231 (using sectional character to mean issues particular to the postbellum South).

[93] 235 U.S. 133 (1914).

system violated "rights intended to be secured by the Thirteenth Amendment."[94]

3. Possibility of racial subjugation through the current chain gang system

The peonage system exemplifies how a complex web of laws that maintain a social system can have a substantial impact on a particular racial group without having statutes explicitly framed in racial terms. Similarly, it is difficult to determine whether racial motives underlie the reinstitution of chain gangs.[95] Concerns exist that chain gang proponents' arguments about deterrence or economic need are merely pretextual.[96] In addition, opponents of the chain gang fear that history may repeat itself and those convicted of relatively minor crimes will suddenly be forced to work on a chain gang.

Furthermore, even if overt racial motives are not part of the reasons for reinstituting the chain gang, chain gangs still disproportionately impact African-Americans. For example, although Alabama may carefully try to match its chain gang population to the 40% white 60% black prison population ratio,[97] the same ratio indicates that the burden of chain gang labor will fall disproportionately on African-Americans when the population is considered as a whole.[98] If the chain gang is widely implemented across the United States, the effect will be even greater now that 1 in 3 black men aged 20-29 are currently in the criminal justice system.[99]

Whether current law enforcement practices are really different from those of the past is questionable. One of the most pervasive problems of peonage was that the web of Southern criminal laws and customs was designed to work in the interest of white people. Blacks who offended whites risked entrapment in a law enforcement system in which justice depended upon white police, white lawyers, white judges, and mostly white juries. Even in the current justice system, whether African-Americans receive the same protection under the law as whites, is still far from settled.

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[94] *Id.* at 150.

[95] *See, e.g.*, Complaint, *supra* note 53, ¶ 34, (claiming that guards assigned to the chain gang frequently "hurl racial epithets at [chain gang inmates]").

[96] For example, during 1983-93 period, the inmate population in Alabama rose by only 58%, which is the fourth lowest increase among 49 states (the Alaska figure is not given). IRA P. ROBBINS, PRISONERS AND THE LAW VOL. 2, App. D-289 (1995). This statistic contradicts Alabama prison officials' alleged concern for exploding prison population and cost. *Cf.*, *supra* part II(A).

[97] *See 20/20: 'The Chain Gang' - Cruel and Unusual Punishment?*, *supra* note 1.

[98] Even if the racial decomposition of the chain gang population matches the demography of the prison population, it will not match the demography of the United States since the ratio of African-Americans in prison are greater than whites. *See* Anthony Flint, *Inside Views on Black Incarceration Issue*, BOSTON GLOBE, Oct. 20, 1995 at 29, 36 (citing Sentencing Project report).

[99] *See id.* The author also notes that racism and discrimination, whether overtly present in law enforcement or covertly in employment, is still a major factor in black incarceration. *See id.*

III. CONSTITUTIONAL ANALYSIS

A. *The Resurgence of Eighth Amendment Issues*

1. History of Eighth Amendment doctrine

The Eighth Amendment provides that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[100] The founding fathers readily incorporated the prohibition against cruel and unusual punishment, which traces back to the Laws of King Alfred in 900 A.D, into the Bill of Rights with little political opposition.[101] The Supreme Court has interpreted the Fourteenth Amendment to extend "the privileges or immunities of citizens of the United States" to include protection against "cruel and unusual punishment."[102] Similar provisions also exist in virtually all state constitutions.[103]

There is a commonly held belief that the Eighth Amendment deals only with the prohibition of torturous and inhumane punishment.[104] The Eighth Amendment, however, is much more expansive.[105] The Eighth Amendment extended the concept of protection to inmates incarcerated in jails and penitentiaries.[106]

Courts originally limited the scope of the Eighth Amendment to physical punishments or conditions that were "barbarous" or "shocking to the conscience."[107] Courts, however, now interpret the Eighth Amendment "in a flexible and dynamic manner" by the "evolving standards of decency that mark the progress of a maturing society."[108] The evolving nature of standards of punishment can be seen by examining incorporeal punishment. While corporeal punishment involves the infliction of some type of physical harm,[109] incorporeal punishment inflicts almost no physical harm[110] but may still be considered cruel and unusual.[111]

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[100] U.S. CONST. amend. VIII.

[101] *See* Larry C. Berkson, *Cruel and Unusual Punishment: The Parameters of the Eighth Amendment*, 13 J. OF PUB. POL'Y STUD. 131, 131 (1975).

[102] Furman v. Georgia, 408 U.S. 238, 241 (1972) (citing the Fourteenth Amendment applied in conjunction with the Eighth Amendment).

[103] *See* Shelon Krantz, THE LAW OF CORRECTIONS AND PRISONER'S RIGHTS CASES AND MATERIALS 333 (1981).

[104] *See* Berkson, *supra* note 101, at 135.

[105] *See id.*

[106] *See id.*

[107] *See* ROBBINS, *supra* note 96, at 16-20. Punishments such as quartering, crucifixion, strangling, and burying alive were "shocking to the conscience" and therefore thought to be prohibited by inhibition against cruel and unusual punishment. *See* Berkson, *supra* note 101, at 132.

[108] ROBBINS, *supra* note 96, at 16-20.

[109] *See* Berkson, *supra* note 101, at 131-32. Historically a large number of corporeal punishments have been considered by the courts. *See id.*

[110] *See id.* at 132.

[111] *See id.* at 134.

A prime example of incorporeal punishment is excessive sentencing. As late at 1892, the Supreme Court refused to hold that the Eighth Amendment applies to "all punishments which by their excessive length or severity are really disproportionate to the offense charged."[112] The Court reversed itself in *Weems v. United States* because it found the sentence to be "cruel in its excess of imprisonment and that which accompanies and follows imprisonment."[113]

Following *Weems*, an increasing number of decisions have declared certain punishments excessive.[114] In *People v. Lorenzen*,[115] the court sentenced a youth convicted of unlawfully-selling marijuana to twenty to twenty-one years under a statute requiring a mandatory minimum of twenty years imprisonment.[116] In *Lorenzen*, the Michigan Supreme Court noted that the statute applied equally to either a first-time offender, such or a high school student, as to a "wholesaling racketeer."[117] The court further noted that the penalties for other harmful substances were lighter. Therefore, the court held that the statute failed to meet the test of proportionality, and hence constituted cruel and unusual punishment.

Whether the current chain gang policy is cruel and unusual punishment requires examination of the chain gang method in both general and specific terms. The validity of the chain gang policy depends on contemporary punishment standards and the individual inmate's "just punishment." In a dissent from a denial of certiorari in *McLamore v. South Carolina*,[118] Justice Douglas emphasized the importance of addressing issues of cruel and unusual punishment raised by inmates on chain gangs.[119] Justice Douglas noted the evolving nature of Eighth Amendment doctrine, stating that "the delineation of just what conditions constitute cruel and unusual punishment is not well defined."[120] Justice Douglas further noted that *Weems* established that "the concept is not rigid, but progressive; that it acquires meaning as the public becomes enlightened."[121]

2. Current test for cruel and unusual punishment

Some recent cases involving alleged Eighth Amendment violations in prisons are workplace safety cases.[122] Prisoners often claim Eighth Amendment viola-

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[112] O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (cited in Berkson, *supra* note 101, at 134).

[113] Weems v. United States, 217 U.S. 349, 377 (1910). *See also* Berkson, *supra* note 101, at 134.

[114] *See, e.g.*, People v. Lorenzen, 194 N.W.2d 827 (Mich. 1972).

[115] *Id.*

[116] *See id.* at 828.

[117] *See id.* at 831; *see also* Berkson, *supra* note 101, at 134.

[118] 409 U.S. 934 (1972).

[119] *See id.* at 935.

[120] *Id.*

[121] *Id.* (citing Weems v. United States, 217 U.S. 349, 378 (1910)).

[122] *See, e.g.*, Lee v. Sikes, 870 F. Supp. 1096 (S.D. Ga. 1994). *See also* Warren v. State of Missouri, 995 F.2d 130 (8th Cir. 1993) (alleging Eighth Amendment violation when inmate broke a wrist because of defective saw in prison workshop).

tions based on the dangerousness of their assigned task, usually after suffering a work-related injury.[123] In *Lee v. Sikes,* an inmate brought suit after suffering a boar hog attack while working in the prison's hog farm operation.[124] The United States District Court for the Southern District of Georgia held that the inmate did not establish an Eighth Amendment violation because he failed to prove "deliberate indifference" by the operation's supervisor or the prison warden.[125] The court noted that in deciding what is deliberate indifference in violation of the Eighth Amendment, "mere negligence or inadvertence is insufficient."[126] Instead, deliberate indifference occurs "when [prison officials] knowingly compel convicts to perform physical labor which is beyond their strength, or which constitutes a danger to their lives or health, or which is unduly painful."[127] Additionally, to prove deliberate indifference the prisoner must show that prison officials were at least aware of the safety rules.[128]

Generally, courts consider prison work assignments conditions of confinement subject to Eighth Amendment scrutiny.[129] The prohibition against cruel and unusual punishment contained in the Eighth Amendment is applicable to states through the Due Process Clause of the Fourteenth Amendment.[130] The Eighth Amendment is not limited to specific acts directed at selected individuals but is equally applicable to the general conditions of confinement in a prison.[131] When inmates are subjected to conditions that violate the parameters of the Eighth Amendment, courts have a "duty to protect the prisoner from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by the court."[132]

3. Allegations of cruel and unusual punishment by chain gang inmates at Limestone Correctional Facility

A comparison of the current chain gang system and the chain gangs of the postbellum South is not so tenuous. In May 1996, inmates at the Limestone Correctional Facility brought a complaint against Alabama state officials.[133] The inmates alleged Eighth Amendment violations that included such practices as handcuffing inmates to "hitching posts,"[134] forcing them to defecate without ad-

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[123] *See* Sikes, 870 F. Supp. at 1098-1100.

[124] *See id.* at 1098.

[125] *See id.* at 1099-1101.

[126] *Id.* at 1100 (citing Choate v. Lockhart, 7 F.3d 1370, 1374 (8th Cir. 1993)).

[127] *Id.* (quoting Ray v. Mabry, 556 F.2d 881, 882 (8th Cir. 1977)).

[128] *See id.* The court noted that in this case there was a classification and testing process before the inmate, Lee, was assigned to barn work detail. *See id.* at 1098.

[129] *See* Choate v. Lockhart, 7 F.3d 1370, 1373 (8th Cir. 1993).

[130] *See* Gates v. Collier, 501 F.2d 1291, 1300-01 (5th Cir. 1974).

[131] *See id.* at 1301.

[132] Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968).

[133] *See* Complaint, *supra* note 53.

[134] *Id.* ¶ 1. The complainant alleges that the hitching post is a barbaric and inhumane method of torture that offends contemporary standards of decency and that its use as pun-

equate toilet facilities,[135] and placing inmates in imminent danger when fights erupted between prisoners chained together and equipped with blades, axes, and sledgehammers.[136]

The Eighth Amendment claims alleged by the Limestone inmates indicate both serious physical and psychological abuses. The primary test of cruel and unusual punishment is whether, under all the circumstances, the punishment in question is "of such character or consequences as to shock the general conscience or to be intolerable in fundamental fairness."[137] Underlying the Eighth Amendment prohibition is the basic concept of the "dignity of man."[138] Additionally, in *Weems v. United States*, the Supreme Court used two other tests.[139] The Court considered a punishment to be cruel and unusual if it is "disproportionate to the offense,"[140] or when it is unnecessarily cruel in view of the "purpose of punishment."[141]

Many of the physical indignities that the Limestone inmates allegedly suffered are distinguishable from, and more severe than, those presented in *Lee v. Sikes*.[142] Prisoner work assignments and work conditions have a different character and purpose under the new chain gang policy than the assignments and conditions in *Lee v. Sikes*,[143] and raise Eighth Amendment issues of degradation and humiliation.[144] Inmates alleged that the defendants intended to use inmates working along the roadside to create a "spectacle."[145] Plaintiffs alleged that the intended effect of chain gangs is to divert drivers' attention over to the roadside to humiliate the inmates.[146] The complaint argued that the chain gang is "part of a systematic effort to degrade and humiliate [the] inmates," as exemplified by guards who hurl racial epithets at prisoners, force inmates to defecate on the side of the highway in front of the public, and "maliciously and sadistically" use the hitching post to intimidate prisoners who refuse to work.[147]

Applying Eighth Amendment protections to the allegations of inmates at the Limestone Correctional Facility will likely weigh in favor of the prohibition of

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ishment inflicts wanton and unnecessary physical and psychological pain on prisoners. *See id.*

[135] *See id.* ¶ 36.

[136] *See id.* ¶ 25.

[137] Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965).

[138] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[139] *See* Weems v. United States, 217 U.S. 349, 368, 381 (1910).

[140] *See id.* at 368 (quoting McDonald v. Com. 173 Mass. 322, 328 (1899)).

[141] *See id.* at 381 (stating that "crime is repressed by penalties of just, not tormenting, severity"). *See also* KRANTZ, *supra* note 103, at 334 (discussing the two tests of cruel and unusual punishments stated in Weems).

[142] 870 F. Supp. 1096, 1098 (S.D. Ga. 1994).

[143] *See id.*

[144] *See* Complaint, *supra* note 53, ¶ 1.

[145] *See id.* ¶¶ 22, 23, and 33.

[146] *See id.* ¶ 23(b)

[147] *Id.* ¶¶ 34, 35, and 38.

the chain gang as a form of cruel and unusual punishment.[148] Practices such as handcuffing prisoners to a hitching post and making prisoners defecate in public are likely to shock the conscience.[149] Courts will likely consider the physical and psychological humiliation associated with use of the chain gang, which the state inflicts primarily on prisoners who have violated parole or prison rules, as unnecessarily cruel and unusual to achieve a legitimate state purpose.[150]

B. *The Fourteenth Amendment: The Politics of Substantive and Procedural Due Process*

1. Substantive due process and the chain gang

Alabama's decision to reinstitute chain gangs raises both substantive and procedural due process issues.[151] Historically, the Supreme Court has recognized Fourteenth Amendment substantive due process claims challenging state legislative impositions of certain modes of punishment or the length of a prisoner's sentence.[152] For example, in *In re Kemmler*, the Supreme Court faced a challenge to the use of electrocution for capital punishment.[153] While the Court held that the Eighth Amendment prohibition against cruel and unusual punishment did not apply to the States, the Court examined the constitutionality of the punishment under the Fourteenth Amendment's Due Process Clause.[154]

Currently, *Kemmler* stands primarily for the proposition that a punishment is not necessarily unconstitutional simply because it is unusual, provided that the legislature has a humane purpose for enacting it.[155] In *Kemmler*, the Court recognized the unusual nature of the execution but attributed it to a humane purpose: a desire to minimize the pain of persons executed.[156] Thus, the Court looked to the excessive nature of the punishment as well as the legislative purpose for its enactment.[157]

In *O'Neil v. Vermont*,[158] the dissenting opinion laid the foundation for applying the Eighth Amendment to the states through the Fourteenth Amendment's Due

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[148] *See id.*

[149] *See id.* ¶ 36.

[150] *See id.* ¶ 19. Some state judges impose chain gang punishment as part of a sentence for the conviction of a crime. *See id.* Repeat offenders currently stay on the chain gang for six months, a period that will ultimately be extended to one year. *See id.* Disciplinary offenders remain on the chain gang for between fifteen and forty-five days. *See id.* ¶ 20.

[151] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

[152] *See* Furman v. Georgia, 408 U.S. 238, 323 (1972).

[153] *See* In re Kemmler, 136 U.S. 436 (1890).

[154] *See id.* at 445-46.

[155] *See id.* at 447. *But c.f.*, discussion of underlying purpose of chain gangs, *supra* part II.

[156] *See id.* at 443-44.

[157] *See id.*

[158] O'Neil v. Vermont, 144 U.S. 323 (1892).

Process Clause.[159] The lower court found the defendant, O'Neil, guilty of 307 counts of selling liquor in violation of Vermont law and fined him $6,140.00, in addition to the costs of prosecution.[160] The court held that if the fines were not paid before a specified date, the state would confine O'Neil in the house of corrections for approximately fifty-four years of hard labor.[161] A majority of the Supreme Court upheld the decision.[162] The three dissenting justices, Field, Harlan, and Brewer, maintained that the Cruel and Unusual Punishment Clause of the Eighth Amendment was applicable to the states and that, in O'Neil's case, the state had violated the Eighth Amendment.[163] Justice Field wrote:

> That designation [cruel and unusual], it is true, is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of the limbs and the like, which are attended with acute pain and suffering. . .The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive. . ."[164]

Gradually, the Supreme Court expanded the scope of the Eighth Amendment by applying it to state laws and customs. In *Howard v. Fleming*,[165] the Supreme Court followed the approach advocated by the dissenters in *O'Neil*. In rejecting the claim that a ten year sentence for conspiracy to defraud was cruel and unusual, the Supreme Court considered the nature of the crime, the purpose of the law, and the length of the sentence imposed,[166] but did not question the applicability of the Eight Amendment to the state.[167]

Seven years later, the Court again used the *O'Neil* approach in *Weems v. United States*.[168] After convicting an United States Government officer of falsifying a "public and official document,"[169] the lower court sentenced him to fifteen years of hard labor with chains on his ankles, to the loss of his civil rights, and to perpetual surveillance.[170] In finding this punishment to be cruel and unusual, the Court emphasized that the Constitution was not an "ephemeral enactment, designed to meet passing occasions."[171] In *Weems*, the Supreme Court invali-

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[159] *See id.* at 330-40 (Field, J. dissenting).

[160] *See id.* at 330.

[161] *See id.*

[162] *See id.* at 337.

[163] *See id.* at 363-65, 370-71.

[164] *See id.*

[165] 191 U.S. 126 (1903).

[166] *See id.* at 136.

[167] *See id.* at 135 (stating that the Court "may not interfere with [state court's] judgment unless some right guaranteed by the Federal Constitution was denied, and the proper steps taken to preserve for our consideration the question of that denial").

[168] Weems v. United States, 217 U.S. 349 (1910).

[169] *Id.* at 357.

[170] *See id.* at 383.

[171] *Id.* at 373.

dated, for the first time, a penalty prescribed by a legislature for a particular offense.[172] The Court established that excessive punishments were as objectionable as inherently cruel punishments.[173]

Historically, the Due Process Clauses of the Fourteenth and Fifth Amendments served as a check on the power of the legislatures.[174] The Supreme Court settled that due process bans cruel and unusual punishment.[175] The Fifth and Fourteenth Amendments' protections help to preserve the balance between the public right to be safe and a prisoner's substantive due process rights. Whatever the supposed deterrent value of current chain gangs this deterrent value must be weighed against inmates' right to be free of cruel and unusual punishment to achieve this deterrence.

2. Disciplinary measures used in the chain gang: violation of inmates' rights to procedural due process

While the substantive due process issues involved in placing inmates on a chain gang are the initial concern, there are also concerns about subsequent procedural due process problems. Guards at Limestone allegedly impose punishments, such as handcuffing inmates to hitching posts without any prior disciplinary proceedings.[176] Inmates allegedly receive disciplinary hearings only after they have already served time on the hitching post.[177] The lack of procedural due process gives a great deal of discretion to prison guards and creates opportunities for guards to inflict punishment in an arbitrary and inhumane manner.[178]

In *Sandin v. Conner*,[179] the Supreme Court prevented an even milder hardship than the practice of shackling prisoners to a hitching post imposes.[180] In *Sandin*, a prisoner brought a civil rights action against prison officials and the state of Hawaii, challenging the use of disciplinary segregation to punish misconduct.[181] Speaking for the Court, Justice Rehnquist stated that:

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[172] *See id.* at 349.

[173] *See id.* at 367 (noting that the prohibition against cruel and unusual punishment relevant to *Weems* was found in the Philippine Bill of Rights. It was, however, borrowed from the Eighth Amendment to the United States Constitution and had the same meaning).

[174] *See* Furman v. Georgia, 408 U.S. 238, 241 (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463, 473-74 (1947)).

[175] *See id.*

[176] *See* Complaint, *supra* note 53, ¶ 40.

[177] *See id.*

[178] *See Chain Gangs Are Halted in Alabama*, N.Y. TIMES, June 21, 1996, at 8A (noting that the Alabama chain gang policy has had various episodes of violence associated with the chain gang method of punishment. Most recently, a guard fatally shot an inmate who attacked a fellow chain gang member after being unchained to get on the prison bus).

[179] 115 S. Ct. 2293 (1995).

[180] *See id.* at 2295.

[181] *See id.*

> [T]he Due Process . . . [liberty] interests [created by prison regulations] will be generally limited to freedom from restraint which, while not exceeding the [prisoner's] sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[182]

The Court explicitly stated that prison regulations, such as punishment within the prison for inmates' misconduct, must not be so severe that they invoke the protection of the Due Process Clause by exceeding the prisoner's original sentence in an unexpected manner.[183]

Procedural due process analysis usually begins with *Wolff v. McDonnell*.[184] In *Wolff*, inmates challenged prison officials' decisions to revoke good time credits without adequate procedures.[185] The Supreme Court held that the Due Process Clause does not create a liberty interest in a "shortened prison sentence" earned through good time credits.[186] The Court characterized the Constitutional liberty interest at stake as one of "real substance," and articulated the minimum procedures necessary to reach a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution."[187] *Wolff*'s primary contribution to prisoners' due process rights was not the definition of prisoners' liberty interests, but the establishment of a loose balancing test which balanced prison management concerns and prisoners' liberty interests to determine the amount of process due.[188]

The physical restraint to the hitching post may be severe enough to implicate a prisoner's liberty interest in receiving due process prior to punishment. Such a liberty interest outweighs the prison management's concerns about judicial economy or the immediate extraction of work from inmates. Prisoners may have medical or other legitimate reasons for ceasing to work. Rather than subject these prisoners to automatic punishment, accuracy and fairness requires a disciplinary hearing first.

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[182] *Id.* at 2300 (citations omitted). Prisoners retain protection from arbitrary state action other than just due process protection even within an expected condition of confinement. *See id.* Prisoners may invoke, where applicable, the First and Eighth Amendments, the Equal Protection clause of the Fourteenth Amendment, where appropriate, and may draw upon internal prison grievance procedures and state judicial review, where available. *See id.*

[183] *See id.* at 2300.

[184] 418 U.S. 539 (1974).

[185] *See id.* at 543 n.2. Good time credits were revocable only if the prisoner was guilty of serious misconduct. *See id.* at 563.

[186] *Id.* at 557.

[187] *Id.* at 556.

[188] *See id.* at 560-63.

C. *Fourteenth Amendment Equal Protection: Women on the Chain Gang — a Social Impossibility*

"No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[189] The Fourteenth Amendment Equal Protection Clause has been used both to challenge discrimination and to reveal the legal contradictions created by laws applied unequally.[190] The mere suggestion of putting women on chain gangs forced the termination of Alabama's prison commissioner, Ron Jones.[191] Although the image of women shackled together on a chain gang may be controversial, different punishment standards for men and women regarding chain gangs raises Equal Protection concerns.

The Supreme Court in *Reed v. Reed* held unconstitutional an Idaho statute which provided that when choosing between persons equally qualified to administer estates, the state must prefer males to females.[192] The Court stated that the statute was based solely on a gender-based discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment.[193] In applying the Equal Protection Clause, the Supreme Court has consistently recognized that the Fourteenth Amendment does not entirely deny states the power to treat different classes of persons in different ways.[194] The Equal Protection Clause does not forbid state created classifications based on gender; however, it does require courts to scrutinize gender classifications to ensure that they are not arbitrary.[195]

The reaction against placing women on chain gangs has caused tension in a jurisprudence that has historically gained rights for women and protected men from arbitrary gender-based classifications.[196] In *Craig v. Boren* the Supreme Court held that statutory classifications that distinguish between males and females are "subject to scrutiny under the Equal Protection Clause."[197] To with-

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[189] U.S. CONST. amend. XIV, § 1.

[190] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977); Craig v. Boren, 429 U.S. 190 (1976); and Reed v. Reed, 404 U.S. 71 (1971).

[191] *See Chain Gangs for Women Cause Furor*, N.Y. TIMES, Apr. 28, 1996, § 1, at 4. Alabama Prison Commissioner Ron Jones resigned after his plan to put women on chain gang was stopped by Alabama Governor Fob James. Jones considered placing women on chain gangs in response to male inmates' contention that the chain gang labors were discriminatory because only males were required to serve in them. *See id. See also* Curtis Wilkie, *Prison Chain Gangs' Progress Arrested Across the South*, ROCKY MTN. NEWS, May 26, 1996, at 36A (reporting that two statewide candidates in Louisiana and Mississippi were rejected by voters last fall after advocating the use of chain gangs).

[192] *See* Reed, 404 U.S. at 74.

[193] *See id.* at 77.

[194] See *id.* at 75

[195] *See id.* at 76.

[196] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976). In *Craig*, the Supreme Court considered statutes prohibiting the sale of 3.2 percent beer to males under twenty-one and females under eighteen invidious, gender-based discrimination. *See id.* at 204.

[197] *Id.* at 197 (quoting Reed v. Reed, 404 U.S. 71, 75 (1971)).

stand constitutional challenge, the Court held that gender classifications must serve important governmental objectives and be substantially related to achievement of those objectives.[198]

Until recently, Alabama did not have to provide a reason for placing only men on the chain gang. Yet, as inmates raise more constitutional issues, the contradictions inherent in the new chain gang policy become more obvious. Some proponents of the chain gang have emphasized the contradictions inherent in "protecting" female prisoners from hard labor when women have challenged laws and policies that prevent them from equal access to certain occupational positions.[199] For example, women have used the Equal Protection Clause to challenge gender based standards designed to prevent them from occupying certain jobs.[200] In *Dothard v. Rawlinson*, a female applicant, Rawlinson, filed a charge with the Equal Employment Opportunity Commission and ultimately brought a class action against the Alabama state penitentiary system.[201] Rawlinson challenged the height and weight requirements and a regulation establishing gender criteria for assignment of corrections officers to "contact positions"[202] as violative of Title VII and the Equal Protection Clause.[203] The Supreme Court held that the height and weight requirements are not occupation-related and that the evidence established a prima facie case of discrimination.[204] The Court upheld the regulations based on gender in maximum security prisons in which more than ten percent of the prison population consisted of sex offenders, but did not uphold the regulations for minimum security prisons.[205]

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[198] *See id.* at 197-98 (noting that administrative ease and convenience have been rejected as sufficiently important objectives to justify gender-based classifications). *See also,* Schlesinger v. Ballard, 419 U.S. 498, 506-07 (1975); Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972).

[199] *See, e.g.,* Jennifer Dziura, *Alabama Chain Gang Convicts Link Work With Displeasure,* VIRGINIAN PILOT, May 31, 1996, at E13.

> [A]nyone who thinks women should be exempt from doing work during their prison sentences had best go home and tighten her corsets. But perhaps those of less progressive opinions might be soothed by the fact that some prison guard will surely be obliged to, in true chivalric fashion, hold the door for the long line of shackled women.

Id.

[200] *See* Dothard v. Rawlinson, 433 U.S. 321, 324 (1977).

[201] *See id.* at 324.

[202] Contact positions are positions requiring close proximity to prisoners. *See id.* at 325.

[203] *See* Dothard, 433 U.S. at 324-26.

[204] *See id.* at 329-30 (citing statistics in the evidence that showed that 33.29% of women in the United States between the ages of 18 and 79 would be excluded from employment as correctional counselors because of the height requirement, and that 22.29% of the women would be excluded because of the minimum weight requirement, and that only 1.28% and 2.35% of men would be excluded by height and weight requirements, respectively).

[205] *See id.* at 336-67.

Although female prisoners probably will not demand a place on chain gangs, male inmates can challenge the different treatment on Equal Protection grounds. Unlike *Dothard*, a prison policy that distinguishes men from women does not seem to rest upon any important governmental objective,[206] but is solely based on social mores about what punishments are acceptable for women and men. If work on a chain gang seems too cruel and unusual for women, then it is equally cruel and unusual for men.

VII. CONCLUSION

The reinstitution of the chain gang in Alabama, and its growing appeal as a form of punishment among other Southern and Midwestern states, does not rest upon rational economic or deterrence considerations. Instead it rests upon anachronistic notions about what punishment convicted criminals deserve. Despite the lack of logical reasoning, however, politicians have brought back the chain gangs. Potential legal arguments against such action, such as the Cruel and Unusual Punishment, Due Process, and Equal Protection Clauses are still being negotiated and have not been formally addressed by a court.

The settlement, filed in federal court between the lawyers for the chain gang inmates and state prison officials, makes the Alabama Department of Corrections' decision to stop chaining inmates together a permanent one. Until a challenge to the use of chain gangs is brought to the Supreme Court and its constitutionality is decided by the Court, however, the presence of chain gangs around the country will present both a legal and social challenge for the United States.

Nancy A. Ozimek

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[206] In contrast, in *Dothard*, preventing endangerment of female correctional counselors because of the high number of sex offenders in the prison population was an important governmental objective. *See id.* at 336.