

Back on the Chain Gang: Why the Eighth Amendment and the History of Slavery Proscribe the Resurgence of Chain Gangs

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Historically, American chain gangs were instruments with which to terrorize, control, and humiliate African Americans. In 1995, the chain gang reappeared as a method of punishment in Alabama prisons, thus resurrecting a powerful and shameful symbol of this country's legacy of racial injustice and institutionalized racial oppression. This Comment argues that chain gangs violate the Eighth Amendment's prohibition of "cruel and unusual punishments." The Eighth Amendment proscribes punishments that do not comport with "evolving standards of decency that mark the progress of a maturing society." The author suggests that a punishment's historical connotation and effect on individual dignity should be essential components of an Eighth Amendment analysis. Arguing that the chain gang's historical connection to slavery is inescapable, and that the punishment represents an affront to human dignity, she concludes that chain gangs offend the Eighth Amendment's mandate and should be condemned as a form of cruel and unusual punishment.

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INTRODUCTION

"Tsarist Russia had its Siberia; the Balkans has its underground inquisition; Venezuela its torture chamber; France its Devil's Island—and America its Chain Gang."¹

On display in the Mobile Public Library in Alabama is an interesting relic from the days of slavery. Discovered in the thicket near the East Head of Pigeon Creek, Greenville, Butler County, Alabama, this savage contraption from the past is a "Bell Rack."² This apparatus, a reminder of racial terrorism, consists of an iron collar that was closed by a bolt, attached to an upright bar or post.³ A belt went around the slave's waist and through an iron loop.⁴ When in use, a bell hung from a hook at the top, above the slave's head.⁵ This hook kept the slave confined to the highways and open places, for it would catch in the limbs of the trees and cause the bell to ring if the slave tried to run away through the woods.⁶ The slave could move around, but had no chance to make a getaway.⁷ The Bell Rack represents America's darkest chapter—one that should have closed over 100 years ago.

However, the legacy of the Bell Rack continues. Outside the walls of Alabama's Limestone Correctional Facility stands a tall U-shaped metal bar, called "the hitching post," to which an inmate is chained when he refuses to work on the chain gang.⁸ The inmate can move around, but has no chance to make a getaway.⁹ The man remains on the hitching post, with hands cuffed above his head, from 8:30 a.m. until 6:30 p.m.¹⁰ This is Alabama, 1996.

Four hundred convicts, who will form that day's chain gangs, are being led in groups of forty from their mass barracks to the yard.¹¹ Nearly seventy percent of the men are African American.¹² They wear white uniforms with the words "CHAIN GANG" stamped across their

1. WALTER WILSON, *FORCED LABOR IN THE UNITED STATES* 68 (1933) (quoting the editor of the *Southern Worker*).

2. See 1 *THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY* (George P. Rawick ed., Supp. 1 1977).

3. See *id.*

4. See *id.*

5. See *id.*

6. See *id.*

7. See *id.*

8. See Peter Morrison, *The New Chain Gang*, NAT'L L.J., Aug. 21, 1995, at A1.

9. See *id.*

10. See *id.*; William Booth, *Show Time: It's the Sound of the Men Working on the Chain Gang. Oooh. Aaaah.*, WASH. POST, Dec. 17, 1995, at F1, F4.

11. See Booth, *supra* note 10.

12. See Anne Hull, *Chained to a New Kind of Justice*, ST. PETERSBURG TIMES, June 25, 1995, at 1A; see also Telephone Interview with Mr. Gilkeson, Officer, Alabama Department of Corrections (Oct. 16, 1996) (reporting that, as of September 30, 1996, of the 20,139 male inmates in Alabama, 13,255 of them, about 66%, are black).

backs in large, black letters.¹³ From the yard, they move toward the road that encircles the prison, where guards await, shotguns balanced on their hips. The prisoners approach the guards and then kneel before them.¹⁴ The bright metal chains come out of their wooden boxes, clinking and rattling, and then the men are bound, ankle to ankle, shackled for their day's work.¹⁵

The rattling of chains stirs old memories. An image of slavery is inescapable. This Comment argues that chain gangs invoke an historical association with slavery and therefore should be deemed cruel and unusual punishment under the Eighth Amendment, which requires that a method of state punishment be consistent with societal notions of dignity, to wit: it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁶ The chain gang springs from an historical context that attaches a cruel meaning to this form of punishment. Chain gangs are inextricably bound to a legacy of racial injustice in this country and therefore should be proscribed by the Eighth Amendment.

Part I of this Comment summarizes the history of slavery and of chain gangs in this country. Part II discusses Alabama's modern chain gangs. Part III traces the history of the Eighth Amendment and its jurisprudence, setting up a framework for evaluating what constitutes cruel and unusual punishment. Noting that the Cruel and Unusual Punishments Clause proscribes punishments that do not comport with evolving standards of decency, Part IV suggests that historical association and individual dignity are necessary considerations in the constitutionality of punishments. Thus, the inextricable connection between chain gangs, slavery, and other forms of black¹⁷ oppression should render the chain gang a form of cruel and unusual punishment under the Eighth Amendment.

I

TRACING THE HISTORY OF SLAVERY AND THE HISTORY OF THE CHAIN GANG

The chain gang has largely been an instrument with which to terrorize, torture, and exploit Africans and African-Americans. Its beginnings can be traced to the roots of slavery in this country, as it was adopted in the colonies as a way to control and transport slaves. Former

13. See William Booth, *The Return of the Chain Gangs: Work Crews of Alabama Prisoners Form a Link to the South's Past*, WASH. POST, May 4, 1995, at A1.

14. See *id.*

15. See *id.*

16. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

17. The terms "African-American" and "black" are used interchangeably to identify people of discernible African descent.

slave holders embraced the chain gang at the end of the Civil War as a means of placing the recently "freed" blacks back into bondage.¹⁸

. A. *The Slave Trade*

Slavery was a large business. Investors around the world put up considerable sums of money for the opportunity to trade in human flesh.¹⁹ Backers wagered that a ship could get to Africa, trade for or capture slaves, transport them across the Atlantic, and sell them at a high price in the Western Hemisphere.²⁰ Ships left from various European nations with their trade goods—firearms, gunpowder, rum, beads, trinkets, tools—and visited trading posts on the west coast of Africa.²¹ Once there, they traded the rum and other goods for slaves.²² The slaves "were chained, leg to leg, arm to arm,"²³ to prevent escape, rebellion, and suicide.²⁴

Such treatment pales when compared with the treatment of slaves aboard the slave ship. The trips across the "middle passage," the six-to ten-week journey to the Western Hemisphere, chronicle some of history's most egregious human atrocities. There are many accounts of the severe suffering aboard slave ships. Particularly pertinent to this Comment is the pervasive mention of the chains that bound the slaves and the humiliation and inhumanity that accompanied such binding. The deplorable images of the slave ships are inseparably intertwined with chains:

On many of these ships, the sense of misery and suffocation was so terrible in the 'tween-decks—where the height was only 18 inches, so that the unfortunate slaves could not turn round, were wedged immovably, . . . and *chained to the deck by the neck and legs*—that the slaves not infrequently would go mad before dying or suffocating.²⁵

A doctor aboard a slave ship in the mid-eighteenth century described his harrowing impressions:

The wretched Negroes are immediately fastened together, two and two, by handcuffs on their wrists and by irons rivetted on their legs. . . . They are frequently stowed so close as to admit of

18. See WILSON, *supra* note 1, at 68.

19. See ROBERT LISTON, *SLAVERY IN AMERICA* 32 (1970).

20. See *id.*

21. See *id.*

22. See *id.*

23. *Id.* at 33.

24. See *id.* at 34.

25. *Id.* at 35-36 (emphasis added).

no other position than lying on their sides. Nor will the height between decks allow them to stand.²⁶

Perhaps a slave's own words best capture the mental and physical horrors. Gustavus Vassa was eleven when he was captured into slavery:

I was soon put down under the decks and there I received such asalutation in my nostrils as I had never experienced in my life; so that with the loathsomeness of the stench and crying together, I became so sick and low that I was not able to eat, nor had I the least desire to taste anything. I now wished for the last friend, death, to relieve me . . . The closeness of the place, and the heat of the climate, added to the number in the ship, which was so crowded that each had scarcely room to turn himself, almost suffocated us. This produced copious perspiration, so that the air soon became unfit for respiration, from a variety of loathsome smells, and brought on a sickness among the slaves, of which many died, thus falling victims to the improvident avarice, as I may call it, of their purchasers.

This wretched situation was again aggravated by the galling of the chains, now become insupportable; and the filth of the necessary tubs, into which the children often fell, and were almost suffocated. The shrieks of the women, and the groans of the dying, rendered the whole scene of horror almost inconceivable.²⁷

Many slaves fought the hideous captivity by attempting suicide and fratricide.²⁸ They begged chainmates to choke or suffocate them; "[t]hey tore at their chains until they were maimed for life."²⁹

B. From African to Slave: 1619-1830

After arriving in the New World, the slaves were delivered to various locations in the Western Hemisphere. Those delivered to the British colonies were sold on auction blocks where they were displayed in chains.³⁰ The atrocious images of the auction blocks are intimately intertwined with the images of chains. Since these images are inseparable, an inquiry into the events of a slave auction illuminates what images are retrieved when viewing a chain gang.

The auction blocks, "niggah tradahs' yahds,"³¹ were used to systematically humiliate and dehumanize the slaves. The slaves were

26. *Id.* at 36 (emphasis added).

27. *Id.* at 37-38 (emphasis added).

28. *See id.* at 38.

29. *Id.*

30. *See id.* at 84-85.

31. FREDERIC BANCROFT, *SLAVE TRADING IN THE OLD SOUTH* 282 (1959).

stripped half or sometimes entirely naked.³² Their skin was coated with grease to make it glisten and appear healthy.³³ The auctioneer would describe each slave offered for sale as akin to an animal: "strong, healthy, choice stock, a willing worker."³⁴ The auctioneer might laud the women slaves as good breeders, referring to their ability to bear more slaves.³⁵ Since no buyer would spend money without guarantee of the quality, the auction also included an inspection.³⁶ Recalls one ex-slave: "They 'zamine you just like they do a horse; they look at your teeth, and pull your eyelids back and look at your eyes, and feel you just like you was a horse."³⁷ Conducted "amid jests and catcalls from the spectators," the inspection was inevitably the highlight of the auction.³⁸

Slave auctions are wedded to images of chains, as slaves were transported to and from such auctions chained together. As one account chronicles:

[T]he women were tied together with a rope about their necks, like a halter, while the men wore iron collars, fastened to a chain about one hundred feet long, and were also handcuffed. The men in double file went ahead and the women followed in the same order. The drivers rode wherever they could best watch and direct the coffle. At the end of the day all, without being relieved of their collars, handcuffs, chains or ropes, lay down on the bare floor, the men on one side of the room and the women on the other.³⁹

Elsewhere, "the men were linked by chains fastened to iron collars around their necks. In addition, they were handcuffed in pairs, with about a foot of chain between. In this [chained] fashion, the slaves trudged the hot, dusty roads of the South."⁴⁰

After the purchase at the auction, the slaves usually traveled to their new "homes" bearing chains.⁴¹ J.K. Spaulding, Secretary of the Navy

32. See LISTON, *supra* note 19, at 84.

33. See *id.*

34. *Id.*

35. See *id.* Perhaps the most significant step in degrading the status of people of African ancestry took the form of pronouncing that children of African women must serve according to the condition of the mother. See Paul Finkelman, *The Crime of Color*, 67 TUL. L. REV. 2063, 2071 (1993). The statute applied to blacks the civil law of *partus sequitur ventrem*: "Of all tame and domestic animals, the brood belongs to the owner of the dam or mother." *Id.* at 2082. This law was a clear departure from the English common-law rule, which stated that the child's status derived from the status of the father. See *id.*

36. See LISTON, *supra* note 19, at 84.

37. *Id.*

38. *Id.*

39. BANCROFT, *supra* note 31, at 282 (footnote omitted).

40. LISTON, *supra* note 19, at 85.

41. See *id.*

under President Van Buren, recounted his encounter with a group of chained slaves:

The sun was shining out very hot, and in turning an angle of the road we encountered . . . three men, bareheaded, half naked, and chained together with an ox-chain. Last of all came a white man on horseback, carrying pistols in his belt.⁴²

The systematic dehumanization of the American slaves involved far more than breaking them physically with toil and terrorizing them with the whip and auction block. In innumerable, perhaps unknowable, ways, the slave was humiliated and degraded. He was denied virtually every human dignity.⁴³ If a slave was starved, mutilated by a whip, sold away from his or her spouse, parents, or children, he had no recourse to appeal to for help.⁴⁴ Slaves could not own property, enter into contracts, vote, or testify under oath in a court.⁴⁵ Slave marriages had no legal standing, and slaves had no legal claim upon their children.⁴⁶ In essence, the slave in America was a thing, and "[a]bout the only significant difference between the planter's treatment of his slaves and his cattle was the fact that he did not slaughter his slaves for food."⁴⁷ Significantly, chains were a tangible symbol of this dehumanization and were prevalent throughout the ante-bellum South.

C. Emancipation—Free at Last?

For many African-Americans living in the United States at the end of the Civil War, the transition from bondage to freedom was more theoretical than real, and life for African-Americans "was punctuated with reminders that 'freedom' was essentially a change in form rather than in substance."⁴⁸ Although slavery ended in 1865, the various mechanisms for race control, including statutes and court decisions, as well as the underlying rationales for the law of slavery, continued to influence Southern law: "[t]he slave codes of the ante-bellum period were the basis of the black codes of 1865-66 and later were resurrected as the segregation statutes of the period after 1877. The legal heritage of slav-

42. *Id.*

43. Like real estate, "[slaves] could be bought, sold, bartered, rented, presented as gifts, willed, and divided among their heirs. Banks loaned money for their purchase on credit, and owners used them as security for loans." *Id.* at 81. Like cattle, slaves were housed, fed, and cared for, purposely bred to produce more slaves (the extras periodically sold off), and driven in groups, with dogs employed to keep them in line. *See id.*

44. *See id.* at 82.

45. *See id.*

46. *See id.*

47. *Id.* at 81-82.

48. MILFRED C. FIERCE, *SLAVERY REVISITED* 3 (1994).

ery did not end with its demise. . . ."⁴⁹ Most pertinent to this Comment is that in the antebellum South, chain gangs were pervasive and were used as a method to control freed blacks.

Even though slavery was officially over after the Civil War, mechanisms to control blacks remained. Blacks were either forced into labor contracts or compelled to enter the convict labor system.⁵⁰ It became impossible to escape the spiral of imprisonment. If the laborer refused to work on the farm, he was forced to work as a "convict."

Of the approximately four million slaves freed by the Thirteenth Amendment, the majority remained "dependent," taking jobs as sharecroppers or tenant farmers, finding themselves victims of the crop lien system.⁵¹ As one commentator notes, "the economic exploitation that Blacks suffered as slaves was merely modernized to accommodate the era of the New South."⁵² The labor contract was to take the place of slavery, and tenant farming seemed to perpetuate slavery under a different name. The labor contract system "so strictly and legally bound the farm workers to the plantation owners that it seemed like another form of slavery."⁵³ The black laborers "were at the mercy of [the] owners and local law-enforcement officers"⁵⁴ and were being held "in a worse state than [sic] when they were slaves."⁵⁵ In 1888, Booker T. Washington observed that "colored people on these plantations are held in a kind of slavery that is in one sense as bad as the slavery of antebellum days."⁵⁶

Despite this problem of de facto slavery, the Congressional Reconstruction program did not focus on forced labor, but rather on voting rights, equal access to courts and education, and desegregation.⁵⁷ The reformers hoped that if freed blacks could participate in the political process, they could protect themselves.⁵⁸ Although the most flagrant forced-labor provisions were repealed, legal mechanisms surrounding

49. Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 90 (1985) (footnote omitted).

50. See PETE DANIEL, *THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969*, at 25 (1972).

51. See FIERCE, *supra* note 48, at 3. After three hundred years of forced labor, the African-American population received their legal freedom largely ill-equipped to cope with the complex social, economic, and political structure of a new country. See *id.*

52. *Id.*

53. RHODA LOIS BLUMBERG, *CIVIL RIGHTS: THE 1960S FREEDOM STRUGGLE* 19 (rev. ed. 1991).

54. DANIEL, *supra* note 50, at 5.

55. *Id.* (quoting W.O. Butler, a Pensacola, Florida, lawyer).

56. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era* (pt. 2: The Peonage Cases), 82 COLUM. L. REV. 646, 653 (1982).

57. See *id.* at 650.

58. See *id.* (citing DONALD G. NIEMAN, *TO SET THE LAW IN MOTION* 60 (1979)).

black labor remained.⁵⁹ In essence, the legal reaction to the former slaves' freedom thrust them into a new bondage.

This system of forced labor also continued during and after Reconstruction through convict labor. There were few choices for "convicts." The state either leased the convicts to private interests, forced them into criminal surety contracts under which a period of servitude for a private employer was exchanged for the payment of a criminal fine, often based on petty or exaggerated charges, or placed them on state or county chain gangs.⁶⁰ A prison official, writing in 1904, noted the conditions of convicts and related that "The Negro Convict Is A Slave,"⁶¹ and the state, a collective slavemaster.

During this time, a large number of blacks became convicts for the first time.⁶² This type of bondage was supported by an unequal justice system "in which a black person could never successfully challenge a white person's word."⁶³ In addition, former slaves' petty theft, vagrancy, unemployment and contract violations earned them fines they could not pay, resulting in a convict labor system comprised of up to ninety percent African-Americans,⁶⁴ thereby making involuntary membership in such a system a realistic possibility for African-Americans.⁶⁵ Convict labor was so widespread and essential to the Southern economy that local sheriffs commonly arrested able-bodied African-Americans and falsely charged them with crimes, forcing them into labor as "convicts."⁶⁶ One contemporary commentator reported that "[o]ne

59. See *id.* at 651. In 1869, South Carolina enacted a statute that made simple breaches of labor contracts criminal; Mississippi and Georgia repealed laws punishing contract breaches, but used open-ended fraud and false-pretenses laws to punish laborers and sharecroppers who had received an advance and then breached contracts without repayment. See *id.* Similar statutes were enacted in Alabama, North Carolina, and Florida. See *id.*

60. See *id.* at 651. A laborer who signed a contract and then abandoned his job could be arrested for a criminal offense. As punishment, he could either work out his contract or go to the chain gang. See DANIEL, *supra* note 50, at 25. In such cases, the fines were often less than one dollar, but as William W. Armbricht, U.S. Attorney in Mobile, Alabama, pointed out in the early twentieth century, "the prosecution is not instigated with any idea of up-holding the majesty of the law, but with the idea of putting these negroes to work." *Id.* at 27.

61. FIERCE, *supra* note 48, at 251.

62. See Schmidt, *supra* note 56, at 651.

63. BLUMBERG, *supra* note 53, at 19.

64. See FIERCE, *supra* note 48, at 88, 147. "At the present time, especially in the county chain gangs, the Negroes still furnish a quota greatly out of proportion to the part which they form of the population." JESSE F. STEINER & ROY M. BROWN, *THE NORTH CAROLINA CHAIN GANG* 14-15 (1927)(relying on data from 1875-1878).

65. See Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1163-69 (1984).

66. See FIERCE, *supra* note 48, at 85-87. Vagrancy laws were so open-ended that any person without a job or means of support was fair game for arrest and conviction. See Schmidt, *supra* note 56, at 649. A 1903 Alabama law described a vagrant as "any person wandering or strolling about in idleness, who is able to work, and has no property to support him." WILLIAM J. COOPER, JR. &

reason for the large number of arrests . . . lies in the fact that the state and the counties make a profit out of their prison system," and therefore, the "natural tendency is to convict as many men as possible."⁶⁷

Even for African-Americans never caught in the toils of Southern justice, the threat of being forced into the convict labor system kept them in involuntary servitude under their labor contracts. "Contract breaches, switching jobs, failure to pay debts and simple idleness were surrounded with the threat of false accusations and criminal sanctions—a potent weapon in the hands of white employers who sought to bend blacks to their bidding."⁶⁸ As one black activist noted, "[t]he horror of ball and chain is ever before [blacks], and their future is bright with no hope."⁶⁹

After the war, the system of convict leasing began to grow and prosper, and by the mid-1870s, almost every Southern state had developed some type of convict leasing.⁷⁰ The general description of the fate that befell the mostly black convicts leased to private interests is worth noting:

Colored men are convicted in magistrates' courts of trivial offenses, such as alleged violation of contract or something of the kind, and are given purposely heavy sentences with alternate fines. Plantation owners and others in search of labour, who have already given their orders to the officers of the law, are promptly notified that some available labourers are theirs to command and immediately appear to pay the fine and release the convict from [jail] only to make him a slave. If the negro dares to leave the premises of his employer, the same magistrate who convicted him originally is ready to pounce down upon him and send him back to [jail]. Invariably poor and ignorant, he is unable to employ counsel or to assert his rights (it is treason to presume he has any) and he finds all the machinery of the law, so far as he can understand, against him. There is no doubt . . . that there are scores, hundreds perhaps, of coloured men in the South today who are vainly trying to repay fines and sentences imposed upon them five, six or even ten years ago.⁷¹

THOMAS E. TERRILL, *THE AMERICAN SOUTH* 546 (1991). In 1904, the Atlanta *Constitution* wryly notified the local police: "Cotton is ripening. See that the 'vags' get busy." *Id.*

67. Schmidt, *supra* note 56, at 651 (quoting R. BAKER, *FOLLOWING THE COLOR LINE* 50 (1964)).

68. *Id.* at 653.

69. FIERCE, *supra* note 48, at 233 (quoting Mary Church Terrell, *Peonage in the United States: The Convict Lease System and the Chain Gangs*, in *THE NINETEENTH CENTURY* 62, 308 (1907)).

70. *See id.* at 9.

71. *Id.* at 232 (quoting Mary Church Terrell, *Peonage in the United States: The Convict Lease System and the Chain Gangs*, in *THE NINETEENTH CENTURY* 62, 308 (1907)).

Many former slaves, jailed for petty offenses or kidnapped, were seized by the convict leasing so soon after the adoption of the Thirteenth Amendment that they never knew freedom.⁷² For these slaves, "convict leasing was not a revisit to slavery because they had never left it: freedom's interlude completely passed them by."⁷³ Assistant Attorney General Charles W. Russell, the Justice Department's special investigator, concluded that the convict leasing system was "largely a system of involuntary servitude—that is to say, persons are held to labor as convicts under those laws who have committed no crime."⁷⁴

Those "convicts" who served their time on the chain gangs also suffered severe hardships and disrespect. Such conditions are in an account of the Bibb County chain gang in Georgia:

The sufferers wear the typical striped clothing of the penitentiary convict. Iron manacles are riveted upon their legs. These can be removed only by the use of the cold chisel. The irons on each leg are connected by chains. . . . Their progress to and from their work is public, and from dawn to dark, with brief intermission, they toil on the public roads and before the public eye. About them, as they sleep, journey, and labor, watch the convict guards, armed with rifle and shotgun. This is to at once make escape impossible, and to make sure the swift thudding of the picks and the rapid flight of the shovels shall never cease. If the guards would hesitate to promptly kill one sentenced for petty violations of city law should he attempt to escape, the evidence does not disclose the fact. And the fact more baleful and more ignominious than all—with each gang stands the whipping boss, with the badge of his authority.⁷⁵

Life on the chain gang reached such an abominable level that in 1919, Alabama Governor Thomas E. Kilby declared his state's chain gangs and convict-lease system "a relic of barbarism . . . a form of human slavery."⁷⁶

In 1933, chain gangs became more common as Southern states outlawed convict leasing and replaced it with chain gangs.⁷⁷ New legislation required that convicts be confined to labor on "public works."⁷⁸ One evil thereby replaced another, and convict leasing systems were legally replaced with chain gangs.

72. See *id.* at 51.

73. *Id.*

74. Schmidt, *supra* note 56, at 651 (quoting C. RUSSELL, REPORT ON PEONAGE 17 (1908)).

75. *Id.* at 652 (quoting *Jamison v. Wimbish*, 130 F. 351, 355-56 (W.D. Ga. 1904)).

76. *Id.* at 651 (alteration in original).

77. See FIERCE, *supra* note 48, at 12-13.

78. See *id.* at 13.

The chain gangs of the 1930s were marked by the same humiliation and dehumanization as those of the ante-bellum era. The convicts were usually harnessed together with chains at all times, even while eating or sleeping.⁷⁹ The chains were riveted around their legs and could only be removed with a chisel at the time of the prisoners' release from the gang.⁸⁰ John L. Spivak, in his book *Georgia Nigger*, paints a vivid picture of life on a South Carolina prisoner chain gang:

In Buzzard's Roost [a Georgia chain gang] there were vermin and stench, cursings and beatings and stocks but out of Slaternville seventeen Negroes went into the wilderness of the South Carolina hills in a floating cage, a cage drawn by four mules, a swaying, creaking, rumbling prison of thick wood with no bars or windows for air on nights that choked you, and bunks of steel with rungs for master chains to lock you in at night. Bedbugs slept with you in that cage and lice nestled in the hair of your body and you scratched until your skin bled and the sores on your body filled with pus. Meat for the floating kitchen wrapped in burlap bags, stinking meat swarming with maggots and flies, and corn pone soaked by fall rains, slashing rains that beat upon the wooden cage through the barred door upon the straw mattresses until they were soggy.⁸¹

A 1927 look at the chain gang chronicled the shame involved, noting that chain gangs were "frequently criticized on the ground that the use of chains . . . in public places is unduly humiliating to the prisoners as well as degrading to those who are forced to witness such a spectacle when passing along the highways."⁸²

Chain gangs continued building public works for the Southern states until widespread abuses led to reform and, finally, extinction.⁸³ They were seen more as public humiliation than punishment.⁸⁴ However, in 1995, the chain gang returned to Alabama.

II

CHAIN GANGS TODAY

A. May 1995 - May 1996

On any particular Alabama summer day, it is nearly 100 degrees outside when inmates, most of them black, get off the bus beside Inter-

79. See WILSON, *supra* note 1, at 70.

80. See *id.*

81. *Id.*

82. STEINER & BROWN, *supra* note 64, at 8.

83. See FRANCIS BUTLER SIMKINS, A HISTORY OF THE SOUTH 512 (3d ed. 1963).

84. See John Pillow, *Chain Reaction . . . Even Shackled for Work, Inmates Like Outdoors*, COURIER-JOURNAL, Aug. 23, 1995, at B1.

state 65.⁸⁵ These men will form the day's chain gang. Guards with mirrored sunglasses overlook the long stretches of hot road, while nearby tracking dogs howl in their cages.⁸⁶ The inmates drop to their knees so their ankles can be linked with the chains.⁸⁷ Three guards, armed with 12-gauge shotguns, carefully watch the inmates.⁸⁸

This notorious method of punishment returned to Alabama on May 3, 1995.⁸⁹ Alabama became the first state in the nation to reinstitute chain gangs.⁹⁰ The chains went on for political reasons, returning after newly elected Alabama Governor Fob James, Jr. suggested them on a radio talk show in the final weeks of his 1994 campaign.⁹¹ He kept his election promise. Polling showed that an overwhelming majority of Alabamans approved of the idea.⁹²

Approximately 700 inmates make up the Alabama chain gang.⁹³ The inmates are usually sent to work on the chain gang as punishment for violating parole or for breaking prison rules.⁹⁴ However, state judges also have the discretion to impose time on a chain gang as part of the original sentence.⁹⁵ Recidivists work on the chain gang for between six months and one year, while disciplinary offenders stay on the chain gang for up to forty-five days.⁹⁶ Either way, members of the chain gangs are "forced to labor for ten hours a day."⁹⁷

When the chain gangs at Limestone Correctional Facility first began, members cut weeds and picked up trash along highways; today, however, most of the chain gang members spend their days doing the stereotypical chore at the rock pile, pounding big rocks into little pebbles with sledgehammers.⁹⁸ Since it would be cheaper to buy crushed rocks,⁹⁹ the only goal of the rock-crushing program must be to increase the level of punishment and humiliation for prisoners. After the prisoners kneel and are shackled, they walk a few hundred feet from the

85. See Rhonda Cook, *Back to Hard Labor*, ATLANTA J. & CONST., Aug. 20, 1995, at D4.

86. See Hull, *supra* note 12.

87. See Cook, *supra* note 85.

88. See *id.*

89. See John David Morley, *Back on the Chain Gang*, TIMES MAG. (London), Aug. 5, 1995, at 22, 24.

90. See *id.*

91. Plaintiffs' Second Amended Complaint at 4, *Austin v. James* (M.D. Ala. 1996) (No. 95-T-637-N) [hereinafter Plaintiffs' Complaint].

92. See Eric Harrison, *The Chain Gang Is Resurrected in Alabama*, L.A. TIMES, May 3, 1995, at A5 (reporting that 70% of the state's residents support the chain gangs); Morley, *supra* note 89 (reporting that 75% of those polled said they were in favor of putting people in chains);

93. Plaintiffs' Complaint, *supra* note 91, at 4.

94. See *id.*

95. See *id.*

96. See *id.*

97. *Id.* at 5.

98. See Booth, *supra* note 10.

99. See *id.*

prison walls into a new enclosure, "sort of a cattle pen of barbed wire."¹⁰⁰ Although the men are enclosed securely, the guards also have orders to shoot escaping prisoners.¹⁰¹

During their tenure, the chain gang members are at substantial risk of receiving snake and insect bites.¹⁰² Reverend Joseph Lowery, a black man, and president of the Southern Christian Leadership Conference, out visiting one of the Alabama chain gangs, asked about the various hazards: the threat of heat stroke, snakes, and chiggers. With little sympathy, deputy commissioner Charles "Red" Sanders responded that "[r]ed bugs is in the air here. If they chopping cotton, they'd get red bugs. You just think back when you was a little boy, Reverend."¹⁰³ Reverend Lowery laughed politely and answered that he never chopped cotton.¹⁰⁴

When the first chain gangs were reintroduced, the brainchild behind the gangs' resurrection, then Commissioner of Corrections Ronald Jones,¹⁰⁵ presided over the event. Hundreds of reporters and photographers from around the world came to Alabama to witness this spectacle. Alabama convicts have long performed cleanup work on the roads.¹⁰⁶ So why all the attention?

The chains create an intentional spectacle—a deliberate and obvious association with a different era. Alabama is not a place stuck in time. Just down the road in nearby Huntsville, passers by who just gawked at the chain gang will be able to see a NASA installation and dozens of aerospace and defense companies.¹⁰⁷ However, with tobacco chewing officers, tough talking Southern lawmen, "this redneck scene . . . is straight outta Hollywood," commented one inmate.¹⁰⁸

100. *Id.*

101. "If they try to escape, our officers are going to shoot them," promised Ronald Jones, the Commissioner of Corrections. Adam Cohen, *Back on the Chain Gang*, TIME, May 15, 1995, at 26.

102. See Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 12-13, Austin v. James (M.D. Ala. 1996) (No. 95-T-637-N) [hereinafter Plaintiffs' Opposition].

103. Hull, *supra* note 12.

104. See *id.*

105. Jones resigned from his post on April 26, 1996. See Deborah L. Rhode, *Is There Sexual Parity For Prisoners?*, NAT'L L.J., July 8, 1996, at A19. Jones' fate as Alabama's Prison Commissioner was sealed when he proposed in the spring of 1996 that women prisoners be put on chain gangs, joining their male counterparts. See *id.* In response to a lawsuit challenging Alabama's resurrection of chain gangs as unlawful sex discrimination, Jones agreed, concluding that "[t]here's no real defense for not [including] females." *Id.* (second alteration in original). In response, Governor James demanded Jones' resignation and reassured worried citizens that "[t]here will be no women on any chain gang in the state of Alabama today, tomorrow, or any time under my watch." *Id.* The governor then named Joe Hopper as acting Prison Commissioner. See Les Payne, *Old Times Here Are Not Forgotten*, NEWSDAY, May 5, 1996, at A42. Hopper quickly pledged to continue placing male inmates on chain gangs. See *id.*

106. See Michael Dorman, *On the Chain Gang*, NEWSDAY, June 18, 1995, at A7.

107. See Booth, *supra* note 13, at A14.

108. Hull, *supra* note 12.

The description that follows illuminates the odd climate that is being created in Alabama. It seems that the Alabama chain gangs are part of an environment created to appease society's hostility to prisoners, dissatisfaction with criminal justice, and intolerance of further crime. The following paragraphs and pages are not meant to draw overbroad generalizations about the people of Alabama, but rather to highlight the peculiar context of the chain gangs. They chronicle the Alabama that the Alabama Department of Corrections has deliberately presented to the American public. Since hundreds of newspaper reporters were invited to Alabama, per Jones' invitation, to view the display, Jones must have known the images would be carried throughout the world.¹⁰⁹ The message being sent is clear: Alabama is tough on crime because Alabama is tough on criminals.

Each person at the Alabama Department of Corrections plays his part to perfection, from the shotgun toting guards to the colorful Prison Commissioner. Commissioner Jones looks the part of the lawman—smoking menthols and wearing a bad tie that does not cover his stomach.¹¹⁰ Jones spoonfeeds the press the stereotypical role of a lawman they have come to see, hollering that “[w]e’re going to make prison as miserable as we can and that’s not a threat, that’s a promise.”¹¹¹ His image has been broadcast everywhere. The world has seen the heavy chain and sixty-five-pound ball that grace the walls of his office in the state capital of Montgomery.¹¹² It has heard him glibly state that “[i]t became real humane on my part to put these inmates out there in leg irons because they have virtually no chance of escaping. Therefore they’re not going to get shot.”¹¹³ Jones continues, “I don’t want them shot. It’s not that I’m a softy. It’s expensive. You shoot someone and you send him to the hospital and it costs \$100,000 to patch him up.”¹¹⁴

Jones rails against in-prison education, drug counseling and therapy, calling them “freebies,” and arguing that they have transformed inmates into a “class of parasites on the welfare wagon.”¹¹⁵ Jones loves the press, welcoming the attention. Jones wants it that way: “The more press the better.”¹¹⁶ Television crews are invited to spend a week at an Alabama prison, with total access to all the facilities.¹¹⁷

109. See, e.g., Morley, *supra* note 89, at 22.

110. See Booth, *supra* note 10.

111. Katherine M. Skiba, *Bustin' Rock: Alabama Resurrects Chain Gangs Under Scrutiny of Guards, Critics*, MILWAUKEE J. SENTINEL, Nov. 12, 1995, at 1.

112. See Booth, *supra* note 10.

113. John Leland, *Back on the Chain Gang*, NEWSWEEK, May 15, 1995, at 58; see Cohen, *supra* note 101, at 26.

114. Booth, *supra* note 13, at A14.

115. Skiba, *supra* note 111, at 1.

116. Booth, *supra* note 10, at F1.

117. See *id.* at F4.

In his role as Commissioner, Jones publicized that his next project would be the installation of electrified fences that would deliver a deadly dosage of 5000 volts—twice the electric current of Alabama's electric chair—to anyone who touched them.¹¹⁸ Commented Jones, "It's what you call extremely lethal."¹¹⁹ However, Jones is not the redneck Southern lawman he so desperately tries to portray. Ron Jones actually received a doctorate in demographic analysis from the University of Missouri.¹²⁰ Before working for Alabama's prison system, Jones analyzed population trends in the former Soviet Union and investigated Medicaid fraud.¹²¹ Indeed, his Southern lawman routine is quite intentional. Again, Alabama seeks to portray a particular image to its constituents.

Although Commissioner Jones justified the chain gangs as more cost effective, commenting "[m]y reality is budget cuts and a taxpayer revolt,"¹²² it remains uncertain whether the chain gangs are saving Alabama any money.¹²³ Jones also claimed that the chain gang is successful because it deters crime.¹²⁴ However, it is widely disputed whether the chain gang program will decrease recidivism, discourage parole violations, or reduce disciplinary violations.¹²⁵

There is something going on in Alabama, something to do with the public's feelings regarding the nature of punishment. The resurrection of chain gangs comes at a time when the nation is weary of the rehabilitation programs of the 1970s and eager for retribution.¹²⁶ The public yearns to see prisoners work, desires *real* punishment instead of cable television and weights. "There is something about the notion of hard labor, punishment for punishment's sake, that appeals to an electorate scared of crime, fed up with what it sees as coddling."¹²⁷ And the politicians are responding. They are quite willing to show the public what it desires to see.

B. Current Status of Chain Gangs

On June 19, 1996, without being ordered to do so by the Court, the State of Alabama, in a settlement with the Southern Poverty Law Center, agreed to end the practice of chaining inmates together in the state

118. See Cook, *supra* note 85.

119. *Id.*

120. See Booth, *supra* note 10.

121. See *id.*

122. Booth, *supra* note 13, at A14.

123. See Plaintiffs' Opposition, *supra* note 102, at 5.

124. See Cook, *supra* note 85.

125. See Plaintiffs' Opposition, *supra* note 102, at 5.

126. See Morrison, *supra* note 8.

127. Booth, *supra* note 10.

prison system.¹²⁸ The State did not concede that there was an Eighth Amendment violation, and in fact the settlement explicitly stated that "no evidence has been adduced of any violation of the Eighth Amendment with regard to the practice of chaining inmates together."¹²⁹

The absence of group chaining does not eliminate the "cruel and unusual" historical association of chain gangs with slavery and convict leasing. Viewers still observe a disproportionate number of African-American men wearing chains and performing labor.¹³⁰ The image evokes the same connotation of slavery. A chain gang still exists—different form, same substance.

For instance, although Arizona's chain gangs are comprised of inmates shackled at the ankle, but not to each other, they are nonetheless called "chain gangs."¹³¹ Also, the projected image is the same despite the actual method of chaining, as evidenced by Senator Sandra Kennedy's comment while viewing an Arizona chain gang: "This reminds me of the old days of slavery."¹³²

Even before the court agreement was reached in June, the prison commission had ceased chaining inmates together, in large part due to safety concerns.¹³³ Alabama did not stop the practice because of its inherent inhumanity, nor because of political pressure. To the contrary, Alabama prison officials try to appease a general public that overwhelmingly supports chaining inmates.¹³⁴ Indeed, Alfred Sawyer, Governor James' spokesperson, insists that individual chains are not much of a departure from Governor James' original promise to put prisoners in leg irons.¹³⁵ Alabama did not "agree" to end chaining

128. See Stipulation at 1, *Austin v. James* (M.D. Ala. 1996) (No. 95-T-637-N) [hereinafter Stipulation]. This settlement was the result of a suit filed in 1996 by the Southern Poverty Law Center (SPLC) against Fob James and Ron Jones, seeking injunctive relief to end chain gangs and hitching posts. The SPLC argued that "[t]hese practices deprive prisoners of their associational rights and innate human dignity and are barbaric, cruel and unusual." Plaintiffs' Opposition, *supra* note 102, at 1. The SPLC's arguments focused on 1) the inmates' increased exposure to substantial risk of physical injury and death due to traffic accidents, inmate violence, injuries at the rock pile, and snake and insect bites; 2) the unsanitary and uncivilized conditions of the toilet facilities; and 3) the grave psychological pain suffered by chain gang members. See Plaintiff's Opposition, *supra* note 102, at 7-13.

129. Stipulation, *supra* note 128, at 1, *Austin* (No. 95-T-637-N).

130. See *supra* note 12 and accompanying text.

131. See Norm Parish, *Chain Gangs a Link to Slavery?*, ARIZ. REPUBLIC, May 29, 1995, at A1.

132. *Id.* Senator Kennedy is an African-American Democrat representing southern Phoenix, Arizona. See *id.*

133. As of May 21, 1996, Alabama ceased chaining inmates together after a guard fatally shot an inmate who attacked a fellow chain gang member. *Alabama Alters Chain Gang Rules*, PHOENIX GAZETTE, June 21, 1996, at A4.

134. See *supra* note 92 and accompanying text.

135. See *Alabama Court Case Settled over Chain Gang Dispute* (National Public Radio broadcast, June 21, 1996) [hereinafter *Alabama Court Case*].

inmates together for fear of losing the litigation.¹³⁶ Alabama ended the practice because of administrative concerns.

As Governor Fob James commented in a public statement, "[w]e determined individual chains allow for more efficient management of inmates, especially with regard to safety."¹³⁷ According to one official, the "change was due to safety concerns as well as to the relatively inefficient use of time spent chaining and unchaining inmates for transportation and work purposes."¹³⁸ In essence, the chaining together of inmates was not as logistically facile as the state had hoped. There were problems, major problems: chain gang inmate Abraham McCord was shot and killed by a correctional officer after he attacked a fellow chain gang inmate with an ax; many inmates were injured with tools because they were unable to escape the fighting.¹³⁹ Moreover, two inmates escaped from the gangs.¹⁴⁰

Chain gangs still exist and continue to prosper in Alabama. The Alabama Department of Corrections still has high-risk prisoners working on the roads, and they still are bound in chains.¹⁴¹ Each prisoner on the chain gang has his legs shackled together, but is not chained to other inmates.¹⁴² In August 1996, Alice Ann Byrne, Assistant General Counsel of the Alabama Department of Corrections, wrote a letter to *Newsweek* correcting the magazine on its article about the discontinuation of Alabama's chain gangs in which she said, "Your article stated that Alabama has discontinued the use of chain gangs. Not only is this incorrect, but just the opposite is true. As individual chains have proved to be more efficient, Alabama is increasing the number of inmates on its chain gang by at least 10 percent."¹⁴³

The use of chain gangs endorses a mode of punishment that is both a cruel barb and an unusual indignity to the class of persons most likely to suffer the penalty. Chain gangs are a loaded symbol. They evoke the horror of countless racial indignities, from slave ships to forced labor. Since chain gangs have been used as instruments in such barbaric systems, they now cannot be used as part of a "legitimate" system, seeking to administer justice. Such a punishment, one which fits into a repertoire of repression, cannot satisfy the mandate of decency demanded by the Eighth Amendment.

136. The state has never conceded that the practice is cruel and unusual. *See id.*

137. *Alabama Drops its Chain Gangs, Opts for Individual Chains*, AGENCE FRANCE-PRESSE, June 21, 1996, available in Westlaw, AGFRP database.

138. *Letters: Chain Gangs*, U.S. NEWS & WORLD REP., Aug. 19, 1996, at 6 [hereinafter *Letters*] (letter written by Alice Ann Byrne, Asst. Gen. Counsel, Alabama Department of Corrections).

139. *See* Plaintiff's Opposition, *supra* note 102, at 10-11.

140. *See The Nation: Unchained*, USA TODAY, Jan. 18, 1996, at 3A.

141. *See Alabama Court Case*, *supra* note 135.

142. *See id.*

143. *Letters*, *supra* note 138.

III

TRACING THE HISTORY OF THE EIGHTH AMENDMENT AND
ITS JURISPRUDENCE

To provide a context for how punishments are deemed to be cruel and unusual and to demonstrate why chain gangs should be proscribed by the Eighth Amendment, this Part examines the Cruel and Unusual Punishments Clause and its development in the United States.

A. *Early English Concepts of Punishment*

The philosophical underpinnings of the Eighth Amendment trace back to the earliest developments of Western culture. The prohibition against excessive punishments first appeared in the pages of the Old Testament.¹⁴⁴ According to the Judeo-Christian tradition, God gave Moses the *lex talionis*, or law of retaliation.¹⁴⁵ The *lex talionis* embodied the concept of "[e]ye for eye, tooth for tooth,"¹⁴⁶ mandating that punishment correspond with the crime committed.¹⁴⁷ Although its retributive sentiments are considered harsh by modern standards, the *lex talionis*, a revolutionary concept of fixed punishment, established a maximum limit on punishment and thus introduced the concept of proportionality.¹⁴⁸ The term "Talion" literally means equality, for "Talion" is derived from the Latin for "equivalent to" or "equal."¹⁴⁹

The notion of proportionality in punishment was also expressed in early Greek philosophy. Aristotle wrote, "What the judge aims at doing is to make the parts equal by the penalty he imposes."¹⁵⁰ Early penal codes embraced these biblical and Hellenic concerns by attempting to appropriately calibrate the punishment with the offense committed. Eventually these concepts were incorporated into Anglo-Saxon, Germanic, and Norse Law.¹⁵¹

144. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 844 (1969); see also Exodus 21:23-25 ("And if any mischief follow, then thou shalt give life for life, Eye for eye, tooth for tooth, hand for hand, foot for foot, Burning for burning, wound for wound, stripe for stripe."); Leviticus 24:19-20 ("And if a man cause a blemish in his neighbor; as he hath done, so shall it be done to him: Breach for breach, eye for eye, tooth for tooth; as he hath caused a blemish in a man, so shall it be done to him again.")

145. See BLACK'S LAW DICTIONARY 913 (6th ed. 1990).

146. Exodus 21:25

147. See Granucci, *supra* note 144.

148. See *id.*

149. See *id.* (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1450 (unabr. ed. 1967)).

150. See *id.* at 844 n.23 (quoting ARISTOTLE, ETHICS 148-49 (Penguin Classics ed. 1955)).

151. See *id.* at 844. The concern for fixed punishment is highlighted in the carefully and precisely drafted laws: "For a wound in the head if both bones are pierced, 30 shillings shall be given to the injured man If a wound an inch long is made under the hair, one shilling shall be paid" *Id.* at 845 (citing J. Dawson, *The Development of Law and Legal Institutions* 44 (1965) (unpublished, Harvard Law School)).

This system of fixed punishment temporarily disappeared with the Norman conquest of 1066.¹⁵² With the exception of grave crimes for which the punishment was death or outlawry, the law of *lex talionis* was replaced with a system of discretionary fines.¹⁵³ These fines, called amercements, allowed punishments to be adjusted to reflect the particular circumstances of individual cases.¹⁵⁴ However, this discretionary power was susceptible to abuse, and the discretion presented an opportunity for the return of excessive punishments.¹⁵⁵ This system nearly resulted in the complete demise of fixed punishment.¹⁵⁶ In fact, the Normans so flagrantly exploited their discretion over amercements that three chapters of the Magna Carta were subsequently devoted to the regulation of amercements.¹⁵⁷

Chapter 14 of the Magna Carta prohibits excessive punishment: "[a] free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence"¹⁵⁸ Early judicial records reflect that many fines were in fact set aside in accordance with this prohibition of excessive punishments.¹⁵⁹ This principle was extended to ensure proportionality of physical punishment as well, and by the year 1400 this notion was codified in English law: "We do forbid that a person shall be condemned to death for a trifling offense. . . . [E]xtreme punishment shall be inflicted according to the nature and extent of the offense."¹⁶⁰ A notion of proportionality returned.

B. England's Prohibition of Cruel and Unusual Punishment

The phrase "cruel and unusual punishments" first appeared in the English Declaration of Rights of 1689 at the accession of William and Mary.¹⁶¹ By the time England adopted its Bill of Rights, the country had

152. *See id.*

153. *See id.*

154. *See id.*

155. *See id.*

156. *See id.*

157. *See id.*

158. *Id.* at 846.

159. *See id.*

160. *Id.* (citing BOYD C. BARRINGTON, *THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND* 181, 199 (1900)).

161. *See* *Gregg v. Georgia*, 428 U.S. 153, 169 (1976); Granucci, *supra* note 144, at 852-55. However, the underpinnings of the phrase were first promulgated by Sir Robert Beale and Nathaniel Ward. Beale, an Oxford-educated member of Parliament, published a manuscript in 1583 in which he attacked the crown's right to punish persons for ecclesiastical offenses. *See id.* at 848-49. Beale served as counsel for Puritan ministers who were being deprived of their benefices. *See id.* at 848. In addition, Beale denounced the use of torture. *See id.* at 849. Beale was eventually banished from the Royal Court in 1592 for his objections to cruel methods of punishment. *See id.* at 849-50. In his admonition of Beale, the Archbishop of Canterbury stated, "[Beale] condemneth (without exception of any cause) the racking of grievous offenders as being cruel, barbarous, contrary to law, and unto

already developed a common law prohibition against excessive punishment.¹⁶² This generally recognized prohibition, summarized in the Declaration of Rights, stated that "excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."¹⁶³ However, since the doctrine of *lex talionis* literally authorized "heinous punishments for heinous crimes," it is not clear that the English decree of proportionality prohibited cruel *methods* of punishments in all circumstances.¹⁶⁴ Instead, the English decree appears to be a reiteration of the English policy against disproportionate penalties.¹⁶⁵ Commentators continue to disagree over what the Declaration of Rights actually was intended to codify.¹⁶⁶ In sum, the meaning of the Declaration of Rights' cruel and unusual punishment clause is not entirely clear and this ambiguity contributes to the difficulty of determining the Framers' intent in drafting the Eighth Amendment to the United States Constitution.

the liberty of English subjects." *Id.* at 849 (citing 1 J. STRYPE, *THE LIFE AND ACTS OF JOHN WHITGIFT* 402 (1822)). Ward, an American Puritan attorney, was the first to memorialize the phrase "cruel and unusual" in writing. *See id.* at 850. Ward, after being deprived of his benefice, set sail for Massachusetts. *See id.* In 1641, the General Court of the freeman of the colony of Massachusetts, in an attempt to stabilize the colony and frame a body of laws, enacted Ward's draft codes into law. *See id.* at 850-51. Clause 46 of Ward's *Body of Liberties* stated: "For bodily punishments we allow amongst us none that are inhumane, barbarous or cruel." *Id.* at 851 (citing R. PERRY, *SOURCES OF OUR LIBERTIES* 4 (1959)).

162. *See* BOYD C. BARRINGTON, *THE MAGNA CHARTA AND OTHER GREAT CHARTERS OF ENGLAND* 846-47 (1900).

163. Granucci, *supra* note 144, at 853 (citing R. PERRY, *SOURCES OF OUR LIBERTIES* 4 (1959)).

164. *See id.* at 848.

165. *See id.* at 860.

166. Many commentators point to the "Bloody Assize," the treason trials of 1685, to support their contention that the clause was intended to address cruel punishments, such as beheading and disemboweling. *See, e.g.,* *Weems v. United States*, 217 U.S. 349, 392-93 (1910) (White, J., dissenting); Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1910). However, recent historians contend that the clause was adopted to prohibit arbitrary sentencing power. These commentators cite the trial of Titus Oates in 1685, the only recorded use of the clause contemporaneous with its drafting, to support their contention. *See, e.g.,* *Harmelin v. Michigan*, 501 U.S. 957, 968-74 (1991) (plurality opinion); Granucci, *supra* note 144, at 857-59. They assert that the "Bloody Assize" is the improper origin because, among other reasons, the methods of punishment utilized during the "Bloody Assize" remained in effect after the passage of the Declaration of Rights, therefore indicating that such punishments were not proscribed by the new Declaration. *See* Granucci, *supra* note 144, at 855-56.

Oates was convicted of perjury and sentenced to a fine, life imprisonment, whippings, defrocking, and pillorying four times a year. *See Harmelin*, 502 U.S. at 969-70; Granucci, *supra* note 144, at 858. "Pillorying" consisted of placing the offender in a wooden frame with holes in which the head and hands were locked. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 892 (1991). Oates survived and four years later, after Parliament's adoption of the Declaration of Rights, he petitioned the House of Lords to set aside his sentence. *See Harmelin*, 501 U.S. at 970. The petition was rejected, with a minority of the Lords in dissent. *See id.* The commentators using Oates as support focus on this dissent to explain the meaning of the clause. *See id.* at 971.

*C. The Development of Constitutional Prohibitions in
Colonial and Revolutionary America*

The cruel and unusual punishments clause included in England's Declaration of Rights was subsequently adopted in various colonial declarations of rights.¹⁶⁷ George Mason, one of Virginia's delegates to the Constitutional Convention, proposed a constitution for Virginia which included, for the first time in the British Colonies, a prohibition against cruel and unusual punishment.¹⁶⁸ Virginia's cruel and unusual punishments clause was a verbatim copy of that contained in the English Declaration of Rights.¹⁶⁹ Following Virginia's lead, eight other colonies adopted the clause in their constitutions.¹⁷⁰ The federal government inserted it into the Northwest Ordinance of 1787, and in 1791 it became the Eighth Amendment to the United States Constitution.¹⁷¹ The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁷² The American amendment was adopted almost word-for-word from the English version. In fact, the only change James Madison made in writing the American version was to replace the English "ought not" with the imperative "shall not."¹⁷³

Although the similar wording of the two documents indicates that the English Declaration of Rights influenced the Framers, debate surrounds what the Founding Fathers intended in adopting the clause. There is very little record of the Framers' discussion of the Clause, and scholarship on the Framers' intent is inconclusive.¹⁷⁴ Some commentators assert that the American drafters who adopted the English phraseology were primarily concerned with proscribing "tortures" and other "barbarous punishments."¹⁷⁵ They contend that it was unusual cruelty in the *method* of punishment that was condemned.¹⁷⁶ Others argue that the clause is rooted in English tradition and its sensitivity to *excessive*

167. See *Ingraham v. Wright*, 430 U.S. 651, 664 (1977); Granucci, *supra* note 144, at 852-53.

168. See Granucci, *supra* note 144, at 840.

169. See *id.* at 853.

170. See *id.* at 840.

171. See Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636-37 (1966).

172. U.S. CONST. amend. VIII.

173. See LARRY CHARLES BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* (1975).

174. See *Weems v. United States*, 217 U.S. 349, 368-69 (1910); John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 482 (1990).

175. See Granucci, *supra* note 144, at 841-42.

176. See *Weems*, 217 U.S. at 389-409 (dissenting opinion) (discussing early attitudes toward the provision).

punishments.¹⁷⁷ Still others argue that the Framers of the American Constitution mistakenly misinterpreted the English clause, copying the Clause without any understanding as to its original meaning.¹⁷⁸ It remains unclear whether the Framers intended the Eighth Amendment to prohibit barbarous methods of punishment, disproportionate punishments, or both.

Thus, an examination of the history of prohibitions against cruel methods and excessiveness of punishments offered little guidance to the Supreme Court's Eighth Amendment analysis.¹⁷⁹ The lack of historical evidence made it difficult for the Supreme Court to determine what the clause was intended to prohibit, which in turn made it difficult for the Court to announce exacting, consistent standards to govern its application.¹⁸⁰

Following the adoption of the Cruel and Unusual Punishments Clause in 1791, both state and federal jurists seemed to accept the view that the Clause prohibited the more cruel methods of punishment such as pillorying, disemboweling, decapitation, and drawing and quartering.¹⁸¹ However, since the United States never resorted to the barbarous punishments used in Stuart England, by the nineteenth century, some considered the Eighth Amendment to be obsolete.¹⁸² Accordingly, the Clause was rarely invoked in court.¹⁸³ During this time, attempts to extend the Clause to cover disproportionate punishments were rejected.¹⁸⁴

D. The Formative Cases

1. The Supreme Court's Nineteenth Century Use of the Eighth Amendment

The Supreme Court first applied the Eighth Amendment by comparing the challenged methods of execution to concededly cruel methods of punishment, such as torture.¹⁸⁵ The Court defined the scope

177. See Granucci, *supra* note 144, at 842; Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 784-85, 806-31 (1975).

178. See Granucci, *supra* note 144, at 860. According to Granucci, George Mason and the framers of the United States Constitution misinterpreted the meaning of the cruel and unusual punishments clause of the English Bill of Rights of 1689, substituting in its place the principles subscribed to by Sir Robert Beale and Reverend Nathaniel Ward. See *id.*

179. See Wefing, *supra* note 174, at 481-82.

180. See Schwartz & Wishingrad, *supra* note 177, at 789.

181. See Granucci, *supra* note 144, at 842.

182. See Note, *supra* note 171, at 637.

183. See Granucci, *supra* note 144, at 842.

184. See *id.*

185. See *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878); see also *Gregg v. Georgia*, 428 U.S. 153, 170 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding that a second attempt at electrocution did not violate the Eighth Amendment, because it was "an unforeseeable accident" and there was "no purpose to inflict unnecessary pain").

of the Cruel and Unusual Punishments Clause for the first time in *Wilkerson v. Utah*.¹⁸⁶ *Wilkerson* involved a defendant convicted of murder in the first degree and condemned to death.¹⁸⁷ The sentencing judge, acting under authority of a territorial statute, dictated that the defendant should die by shooting.¹⁸⁸ Although acknowledging that defining the scope of the Eighth Amendment with "exactness" was difficult,¹⁸⁹ the Court found that punishment should not entail "terror, pain, or disgrace."¹⁹⁰ The Court was resolute that the Eighth Amendment condemned torture, stating that "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden."¹⁹¹

The Court concluded that shooting was an acceptable method of punishment and did not constitute unnecessary cruelty.¹⁹² To guide its inquiry, the Court indulged in a two-page historical analysis, chronicling the historical acceptability of certain practices and examining traditional means of death.¹⁹³ The Court found shooting to be a legitimate method because it was a common military practice.¹⁹⁴ It denounced unacceptable practices—such as public burning, disembowelment, drawing and quartering—and attempted to differentiate these from acceptable practices by focusing on torture and unnecessary cruelty.¹⁹⁵ Ultimately, it found that the custom of shooting did not offend contemporary standards of decency, and therefore execution by shooting was not cruel.¹⁹⁶

More than a decade later, in *In re Kemmler*, a condemned convict asserted that death by electrocution was cruel and unusual and that New York's arbitrary adoption of such punishment violated his right to due process.¹⁹⁷ In the *Kemmler* opinion, relying upon the rationale of *Wilkerson*, the Court acknowledged that the mere fact that a punishment was "unusual" or novel was not sufficient reason for its condemnation under the Eighth Amendment.¹⁹⁸ Rather, to violate due process, the punishment must be considered *excessively* cruel.¹⁹⁹

186. 99 U.S. 130 (1878).

187. *See id.* at 130-31.

188. *See id.* at 131.

189. *See id.* at 135-36.

190. *Id.* at 135.

191. *Id.* at 136.

192. *See id.* at 135-36.

193. *See id.* at 134-35.

194. *See id.* at 134-37.

195. *See id.* at 135-36.

196. *See id.*

197. *See In re Kemmler*, 136 U.S. 436, 439, 441-42 (1890).

198. *See id.* at 447.

199. At the time of *Kemmler*, the Eighth Amendment had not been applied to the states. *See* Sabrina L. McLaughlin, *High-Tech Lynchings in an Age of Evolving Standards of Decency*, 3 SAN DIEGO JUST. J. 177, 183 (1995). However, New York's constitution prohibited cruel and unusual

After discussing manifestly cruel punishments such as "burning at the stake, crucifixion, [and] breaking on the wheel,"²⁰⁰ the Court found that "common knowledge" is sufficient to render certain punishments unusually cruel.²⁰¹ Although the Court introduced a standard stating that "[p]unishments are cruel when they involve torture or a lingering death,"²⁰² the opinion as a whole suggests that an unpleasant visceral response to punishments may provide a starting point for Eighth Amendment analysis.

2. "Cruel and Unusual" Clause Given New Life

In 1910, a revolutionary expansion of the Eighth Amendment occurred. In *Weems v. United States*,²⁰³ the Court for the first time rejected the notion that the Eighth Amendment is limited to punishments that are inhumane, barbarous, or torturous. Instead, *Weems* addressed the excessiveness of a punishment,²⁰⁴ noting that the Eighth Amendment was not designed merely to prohibit the cruel methods of punishment employed by the Stuarts in England.²⁰⁵ In essence, the *Weems* Court expanded the American application of the cruel and unusual punishment clause beyond restrictions on methods of physical punishment.

In *Weems*, a Philippine court convicted a civil servant for falsifying an entry in a public document.²⁰⁶ Weems was sentenced to an extremely harsh, but common, form of punishment called *cadena temporal*.²⁰⁷ The punishment directed that Weems "carry a chain at the ankle, hanging from the wrists . . . [and that he] be employed at hard and painful labor" for fifteen years.²⁰⁸ The statute also restricted his personal rights, resulting in his loss of marital and parental rights, inability to pass property inter vivos, and subjection to life-long surveillance.²⁰⁹

punishment and the opinion remains useful for its determination that the cruelty of a particular form of punishment can derive from intuition. See *id.* at 183-89.

200. *Kemmler*, 136 U.S. at 446.

201. See *id.* at 447.

202. *Id.*

203. 217 U.S. 349 (1910).

204. See *id.* at 366-67, 377-78.

205. See *id.* at 370-73. The Stuarts were infamous for their punishment of criminals. During their reign, the punishment for treason involved dragging the condemned individual to the gallows, hanging him by the neck, cutting him down while still alive, beheading him, and finally drawing and quartering. See Granucci, *supra* note 144, at 854 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 92).

206. See *Weems*, 217 U.S. at 357. Weems was convicted by a Philippine court of law under the Philippine Bill of Rights; however, the Court determined that it was borrowed from the Eighth Amendment to the United States Constitution and had the same meaning. See *id.* at 367.

207. See *id.* at 358.

208. *Id.* at 364.

209. See *id.*

The Court found that punishment could no longer be justified on the basis of tradition alone. It recognized that the Eighth Amendment is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."²¹⁰ The *Weems* Court acknowledged that "[t]ime works changes, brings into existence new conditions and purposes."²¹¹ These sentiments set the tone for future Eighth Amendment inquiries by suggesting that the Amendment should be interpreted in a flexible manner to comport with the developments of time: "[for] a principle to be vital[, it] must be capable of wider application than the mischief which gave it birth."²¹² In effect, whether a punishment is constitutional depends on dynamic societal standards of justice.

Forty years later, the dissenters in a death penalty case, *Louisiana ex. rel. Francis v. Resweber*, addressed whether the psychological effects of a punishment can prompt a violation of the Eighth Amendment.²¹³ Convicted murderer Willie Francis was sentenced to die by electrocution.²¹⁴ Francis' life was spared, however, when the electric chair malfunctioned in the course of his execution.²¹⁵ Although the switch was repeatedly thrown, the electric chair continued to fizzle. Francis groaned, jumped, and finally demanded that the current be turned off and he be allowed to breathe.²¹⁶

Francis presented the issue of whether it was constitutional to allow a second attempt at electrocution. Francis claimed that a second attempt would force him to repeat the severe psychological strain of preparing for electrocution, thereby subjecting him to a "lingering or cruel and unusual punishment."²¹⁷ A majority of the Court rejected Francis' argument, holding that the Constitution prohibits cruelty only in the method of punishment.²¹⁸ The State therefore was held to be morally blameless for any cruelty that resulted from the "unforeseeable accident."²¹⁹ The majority holding sent Francis back to the electric chair, where he died in a second electrocution.

210. *Id.* at 378.

211. *Id.* at 373.

212. *Id.*

213. *See Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 477 (1947) (Burton, J., dissenting).

214. *See id.* at 460.

215. *See id.*

216. *See id.* at 480 n.2.

217. *Id.* at 464.

218. *See id.*

219. *Id.*

Four Justices dissented in *Francis*, dismissing the majority's reliance on official intent, focusing instead on pain and mental anguish.²²⁰ According to the dissenters, the case should be remanded for a determination of the amount of electric current applied to Francis in the first execution attempt and the consequent pain suffered by him.²²¹ Despite conflicting reports of witnesses,²²² the State claimed that "no current whatsoever reached Francis' body."²²³ In determining whether a second electrocution would be cruel and unusual punishment, the dissenters emphasized the pain and mental anguish of Francis.²²⁴

In the next significant Supreme Court case, the *Weems* principle of the changing nature of Eighth Amendment prohibitions reached full articulation. In *Trop v. Dulles*,²²⁵ the Court held that a non-death penalty, non-physical punishment could violate the Eighth Amendment.²²⁶ Trop was a wartime deserter, and as a consequence of a provision of the Nationality Act of 1940, he lost his citizenship.²²⁷ Trop protested that the Eighth Amendment prevented divestment of citizenship, and the Court confronted the issue of whether denationalization was cruel and unusual within the meaning of the Eighth Amendment. Relying on the sentiments of *Weems*, a plurality of the Court announced a flexible governing principle: "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²²⁸

In analyzing the constitutionality of Trop's punishment, the Court found that, although denationalization does not involve any "physical mistreatment [or] primitive torture,"²²⁹ it still offends modern sensibilities, and therefore violates the Eighth Amendment.²³⁰ The Court considered the psychological effects of forced denationalization on an individual, including "fear and distress," in holding this form of punishment unconstitutional.²³¹ The Court contemplated civilized standards of decency and asserted that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."²³²

220. See *id.* at 477. Finding intent immaterial in its determination of whether a second attempt at execution is cruel and unusual, the dissenters argued that "[t]he intent of the executioner cannot lessen the torture or excuse the result." *Id.*

221. See *id.* at 472 (Burton, J., dissenting).

222. See *id.* at 480 n.2.

223. *Id.* at 472-73.

224. See *id.* at 475-77 (Burton, J., dissenting).

225. 356 U.S. 86 (1958).

226. See *id.* at 99-103 (plurality opinion).

227. See *id.* at 87-88.

228. *Id.* at 101.

229. *Id.*

230. See *id.* at 101-03.

231. *Id.* at 102.

232. *Id.* at 100.

In 1962, in *Robinson v. California*,²³³ the Court followed its interpretation of the Eighth Amendment, and held, as in *Trop*, that a non-death penalty punishment violated the Eighth Amendment.²³⁴ *Robinson* involved a California law which declared drug addiction to be illegal.²³⁵ When the defendant was sentenced to jail after being convicted of drug addiction, even though he did not have any drugs in his possession,²³⁶ the Court held that the sentence violated the Eighth Amendment.²³⁷

The judicial interpretation involved in these landmark Eighth Amendment cases reveals three significant themes. First, the Court made it clear in *Trop* and *Weems* that the Eighth Amendment is not chained to history. Rather, the Eighth Amendment is a fluid concept, guided by contemporary standards of decency. Second, *Wilkerson* and *In re Kemmler* highlight the Court's consideration of the historical context of certain forms of punishment. These cases hint that an intuitive reaction, based on historical association, to a particular punishment can be a factor in determining whether that punishment is cruel and unusual. Finally, *Wilkerson* and *In re Kemmler* introduce the concept that cruel and unusual punishments may encompass more than just purely physical punishments. *Trop* and *Francis* confirm the Court's recognition that the psychological impact of punishment is a factor in determining whether it is unconstitutional. Although the *Trop* Court found the psychological evidence persuasive, while the *Francis* Court did not, mental anguish was central in both. In sum, the cases suggest that the historical importance and psychological impact of chain gangs are central to a constitutional analysis of whether the punishment satisfies evolving standards of decency.

3. *The Eighth Amendment as Applied to Prisoners*

With the exception of *Francis* and *Robinson*, all of the foundational cases discussed above considered the constitutionality of a particular criminal sanction. However, the Eighth Amendment also reaches beyond inmates' sentences. A prisoner's condition of confinement can also give rise to an Eighth Amendment violation.²³⁸

233. 370 U.S. 660 (1962).

234. *See id.* at 666. In *Robinson*, Justice Stewart wrote that the cruel and unusual punishment clause is not a static concept, but one that must be continually re-examined "in the light of contemporary human knowledge." *Id.* Similar language is found in *Trop*. *See supra* note 228 and accompanying text.

235. *See Robinson*, 370 U.S. 660.

236. *See id.* at 661.

237. *See id.* at 666.

238. *See Rhodes v. Chapman*, 452 U.S. 337 (1981) (finding that certain conditions of confinement may be proscribed by the Eighth Amendment); *Hutto v. Finney*, 437 U.S. 678 (1978) (discussing prison conditions that affect the prison population generally); *Estelle v. Gamble*, 429 U.S.

The prisoners' rights movement of the 1960s transformed the status of a prisoner from that of a "slave of the state," having scarcely any rights at all,²³⁹ into that of a "legal person." This transformation fostered new challenges under the Cruel and Unusual Punishments Clause. After being convicted and incarcerated, many prisoners found the conditions of their confinement, as well as their treatment by prison officials, inhumane.²⁴⁰ They turned to the Eighth Amendment for relief and the Court eventually responded by acknowledging that conditions of confinement could give rise to a violation.²⁴¹ Therefore, because serving on a chain gang is a condition of an inmate's confinement, chain gangs are subject to the scrutiny of the Eighth Amendment.

IV

THE EIGHTH AMENDMENT PROSCRIBES THE USE OF CHAIN GANGS AS PUNISHMENT

As an examination of the case law demonstrates, precise formulae do not exist for determining when a punishment offends the Eighth Amendment. However, the ultimate inquiry in any Eighth Amendment case seems to be whether the punishment is consistent with "evolving standards of decency."²⁴² This enunciation has become a guidepost for virtually all Eighth Amendment analyses subsequent to *Trop*.²⁴³

The "evolving standards of decency" doctrine recognizes that times change and that the Constitution must allow for the moral evolution of our nation. A punishment must reflect the progression of society, not regress to the days of institutionalized racial oppression. Chain gangs were eliminated in the 1960s because this country could no longer tolerate their inhumanity. Society expressed its notion of decent punishment, and the chain gang failed to meet this standard.

A. Historical Association Should Matter

It can be argued that the Eighth Amendment "was intended to safeguard individuals from the abuse of legislative power."²⁴⁴ Thus, "legislative judgments alone cannot be determinative of Eighth

97 (1976) (finding that the Cruel and Unusual Punishments Clause could be applied to some deprivations that were not specifically part of the sentence).

239. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

240. *See Rhodes*, 452 U.S. 337; *Hutto*, 437 U.S. 678; *Estelle*, 429 U.S. 97.

241. *See Rhodes*, 452 U.S. 337.

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

243. Federal courts have cited the "evolving standards of decency" language used in *Trop* over 500 times. Search of WESTLAW, Allfeds database.

244. *Gregg v. Georgia*, 428 U.S. 153, 174 n.19 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Amendment standards.”²⁴⁵ Despite how state legislatures have treated certain punishments, the Court should always inquire further when evaluating whether a punishment is consistent with evolving standards of decency.

In determining whether a punishment comports with the constitutional standard, a court should consider a number of objective factors, including “whether the punishment . . . is *historically* associated with repression or tyranny.”²⁴⁶ A court should “[employ] the tools of philosophy, religion, logic, and *history*, in an effort to obtain a full understanding of the nature of a civilized society.”²⁴⁷

Although Eighth Amendment case law does not explicitly require an examination of history when evaluating whether a punishment is consistent with societal norms, the Court has never rejected history as a pertinent factor and has often discussed it in its analysis. Both the *Wilkerson* and *Kemmler* opinions factored history into their decisions, focusing on atrocities of the past and perhaps signaling the intuitive notion that historical connotation should matter in Eighth Amendment analysis. *Kemmler* and *Wilkerson* are formative cases, for they establish a foundation for defining the parameters of “cruel and unusual.” Both decisions mention history in their analyses, and both voice standards based on intangible, inchoate, perhaps visceral factors. Since the severe and agonizing punishments paraded and rejected in *Wilkerson* and *Kemmler*—disembowelment, beheading, and burning at the stake—can be considered “historical throwbacks to times of tyranny and repression,”²⁴⁸ perhaps part of the Court’s intuitive rejection of such punishments was their unique and horrific historical connotation.

What is disturbing about these punishments, besides their obvious physical atrociousness, is their use as instruments of oppression. For instance, Judge Reinhardt of the Ninth Circuit recently engaged in a historical analysis of hanging, discussing its horrifying historical associations:

Hanging is associated with lynching, with frontier justice, and with our ugly, nasty, and best-forgotten history of bodies swinging from the trees or exhibited in public places. To many Americans, judicial hangings call forth the brutal images of Southern justice Yet to all of us, hangings are a remnant of an earlier, harder time, a time when in meting out punishment we were far less concerned with human dignity and decency.²⁴⁹

245. *Id.*

246. *Campbell v. Wood*, 18 F.3d 662, 697 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting) (emphasis added).

247. *Id.* (emphasis added).

248. McLaughlin, *supra* note 199, at 185.

249. *Campbell*, 18 F.3d at 701 (Reinhardt, J., concurring and dissenting).

Judge Reinhardt calls attention to the historical significance of hanging and notes its connection to crude Southern justice.²⁵⁰ In condemning its use, he emphasizes that such a connotation should not be invoked in current forms of punishment.²⁵¹

This analysis and reasoning, in which history is a factor that aids in evaluating "evolving standards of decency," implies that knowledge of past racial discrimination must be an integral part of a present analysis of chain gangs. The chain gang is not only a mechanism of punishment, but a symbol of slavery. Today's images of chains conjure up images of the past. For instance, Flossie Hodges, an elderly white woman who has lived in Limestone County, Alabama her whole life, watched a gang intently, commenting that "I love seeing 'em in chains. They ought to make them pick cotton all day."²⁵² Indeed, today's chain gangs should be denounced because of a shameful past when chains were used to humiliate and dehumanize blacks. Slaves were chained in the abominable hulls of slave ships, chained on their way to and from the shameful auction blocks, chained as working slaves, and chained to maintain bondage in a time of supposed "freedom."²⁵³

Considering that minority criminals in general and black criminals in particular are disproportionately subjected to the chain gang, chain gangs have particular meaning to the typical inmate punished by such a method and to the society that witnesses such cruelty.²⁵⁴ At present, nearly seventy percent of the members on Alabama's chain gangs are black.²⁵⁵ The black inmates say they feel like slaves and the white inmates say they feel they are being treated like blacks.²⁵⁶ Says one black chain gang member, "These white boys are just like sprinklings on a cake."²⁵⁷ The composition of Alabama's prison population suggests that men in chains observed by thousands of passing citizens along Alabama's highways will be mostly African-American.

Blacks as a group continue to grapple with the American experience of slavery, and chain gangs mock the history of racial injustice in

250. See *id.*

251. See *id.* Reinhardt, in his effort to emphasize the connection between hanging and lynching, quotes a Billie Holiday song, "Strange Fruit":

Black bodies swingin'
In the Southern breeze
Strange fruit hanging
From the poplar trees.

Id.

252. Leland, *supra* note 113, at 58.

253. See *supra* Parts I.A-B.

254. See Hull, *supra* note 12.

255. See *id.*

256. See Booth, *supra* note 10.

257. *Id.* Additionally, when the inmates were chained together and the men were allowed to form their own groups, blacks were mostly chained to blacks, whites to whites. See *id.*

this country. The potency of the image of men in chains undeniably draws power from the history of chain gangs, yet that history is one of racism and barbarism. They are a throwback to a time of oppression, repression, and hate. They remind us of the worst chapter in our national history. Racism and hate continue to exist in this country. Chain gangs, reminders of a time when racism was legal, feed this hate.

The actions of the chain gang guards serve to strengthen the parallel between slavery and today's chain gangs. "Move it up there! Shoulder to shoulder. Move it up. Hey you, hand, you don't hear me?" barks one guard.²⁵⁸ Inmates on the chain gang are often referred to as "hands."²⁵⁹

"Kneel down," Sgt. Mark Pelzer ordered to inmate Freddy Gooden on one particular occasion.²⁶⁰ Wearing black leather gloves and gripping a truncheon, he warned, "You know you're going to have to act right or I'll put this stick on you."²⁶¹ A guard cradling a shotgun issued a warning to the other inmates who had watched the showdown, yelling that "[t]his bullet ain't got no kinda name on it."²⁶² He is a crude reenactment of the whipping boss, parading his authority.

Chain gangs are particularly repugnant in Alabama, a state infamous for its history of civil rights atrocities. In the 1950s and 1960s, out of all the southern states, Alabama remained the stronghold of resistance to the civil rights movement in the United States.²⁶³ It was in Alabama that two prosperous brothers were found guilty of holding blacks in slavery. The date was May 14, 1954.²⁶⁴ It was the Alabama State Legislature that called the Court decision of *Brown v. Board of Education* "null, void and of no effect."²⁶⁵ It was in Montgomery,

258. Booth, *supra* note 13, at A1, A14.

259. *See id.*

260. Hull, *supra* note 12.

261. *Id.*

262. *Id.*

263. *See FIERCE*, *supra* note 48, at 211.

264. *See* Len Cooper, *The Damned: Slavery Did Not End with the Civil War. One Man's Odyssey Into a Nation's Secret Shame*, WASH. POST, June 16, 1996, at F1. The newspaper article read:

Two Guilty of Slavery

Birmingham, Ala.—Two prosperous Alabama brothers were found guilty tonight of holding Negroes in slavery. Fred N. Dial, 25 years old, and Oscar Edwin Dial, 34, were . . . convicted of conspiracy to hold Coy Lee Tanksly, 25, of Klindike, Miss., and Hubert Thompson, in voluntary servitude by acts of violence.

Fred Dial also was convicted on a peonage count involving Mr. Thompson. The jury held that Dial forced him to work in payment of an alleged debt.

The government charged that Mr. Thompson died three days after he was beaten when he attempted to escape from the brothers' farm in West Alabama last year.

. . . Witnesses said Thompson was tied by the neck, feet and waist with ropes to a bale of hay and beaten by eight men with ropes.

Id. (alterations in original) (emphasis omitted).

265. BLUMBERG, *supra* note 53, at 58.

Alabama, that Mrs. Rosa Parks refused to give up her seat in the bus. The march that has lived in American memories as "Bloody Sunday" took place from Selma to Montgomery.²⁶⁶ Eugene "Bull" Connor, Birmingham, Alabama's police commissioner, became the nation's most nefarious symbol of police authority. Under his command, Freedom Riders were dumped beside a highway in Tennessee and beaten unconscious, and protesters were deterred through the use of electric cattle prods, high-pressure hoses, billy clubs, and police dogs.²⁶⁷ Also, it was Alabama Governor George Wallace who made history as he stood in the doorway at the University of Alabama, blocking black students from registering, and proclaiming, "Segregation now! Segregation tomorrow! Segregation forever!"²⁶⁸ Alabama was the location of the Ku Klux Klan bombing of the all-black Sixteenth Street Baptist Church in Birmingham which killed four girls who were attending Bible school.²⁶⁹

The history of civil rights abuses in Alabama is long and particularly disgraceful. Thirty years ago, Alabama's governor blocked the school house door.²⁷⁰ Now, Alabama is the leader in resurrecting the chain gang. In Alabama today, images of the past are prevalent. A guard racks a round into his shotgun to hurry inmates along.²⁷¹ Restrained dogs howl from the sidelines, their clinking chains adding to the music of those of the inmates.²⁷² "They're treating us like . . . slaves," said William Cook, a 28 year old member of the rock-breaking detail in Alabama.²⁷³ As one reporter lamented, "[w]atching the chain gang at work, it's impossible to wipe away the images of the Old South."²⁷⁴

The chains serve as a reminder more than a restraint. "I think it's a reminder of the way it used to be, putting the African-American male in chains," states Alabama State Representative John Hilliard.²⁷⁵ Representative Alvin Holmes insists that "[t]he only reason they're doing it is

266. Heading into Montgomery, the marchers were greeted by armed troopers with gas masks. *See id.* at 131. One young girl later recalled, "I saw those horsemen coming toward me and they had those awful masks on; they rode right through the cloud of teargas [that they had thrown]. Some of them had clubs, others had ropes, or whips, which they swung about them like they were driving cattle." *Id.*

267. *See* ANNA KOSOF, *THE CIVIL RIGHTS MOVEMENT AND ITS LEGACY* 46, 51-52 (1989).

268. *Id.* at 52.

269. *See id.* at 57-58.

270. *See id.* at 52.

271. *See* Hull, *supra* note 12.

272. *See id.*

273. Bechetta A. Jackson, *Is the Alabama Prison System's Return to the Chain Gang Unfair to Blacks?*, *JET*, Sept. 18, 1995 at 17 (alteration in original).

274. Hull, *supra* note 12.

275. Jackson, *supra* note 273, at 12.

because an overwhelming majority of the prisoners are Black."²⁷⁶ Growing up outside of Montgomery, Holmes recalls never seeing a white man on the chain gang: "The only people you ever saw were Black. The whole purpose of having the chain gang is racist to the core. . . . [Certain white people] want things back the way they used to be."²⁷⁷

Bruce Jackson, professor of English and sociology at the State University of New York at Buffalo and author of ten books on crime and prison conditions, agrees, commenting that "[t]he whole image of the chain gang is part of the image of slavery. That is one of the reasons it is so offensive. There is a link."²⁷⁸

An association to hideous practices of the past can give power and meaning to a current form of punishment. Historical association is especially important when "history" presents a clear and conscious pattern of abuses based on race. This historical background should be a factor in Eighth Amendment analyses of cruel and unusual punishment.

*B. The Psychological Trauma of Chain Gangs
Degrades the "Dignity of Man"*

In evaluating punishments under the Eighth Amendment, the Court has taken due care in upholding dignity in the punishment. Whether the punishment upholds the dignity of those affected seems to be a requisite factor in evaluating whether the punishment comports with society's standards of decency. Judge Reinhardt advocates considering whether a punishment "may fairly be characterized as dehumanizing or degrading."²⁷⁹

It is not only the individual's dignity that is at stake, but the nation's and society's as well. Reinhardt emphasizes this social dignity in his analysis, commenting that "[w]e reject barbaric forms of punishment as cruel and unusual not merely because of the pain they inflict but also because we pride ourselves on being a civilized society."²⁸⁰ In his *Furman v. Georgia* concurrence, Justice Brennan agreed that, "[w]hen we consider why [barbaric punishments] have been condemned, . . . we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans. . . ."²⁸¹

276. *Id.* at 13.

277. *Id.* at 14.

278. Parish, *supra* note 131.

279. See *Campbell v. Wood*, 18 F.3d 662, 697 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting).

280. *Id.* at 701.

281. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

The institution of slavery treated humans like nonhumans.²⁸² Since chain gangs draw on the historical connection to slavery, the punishment similarly absorbs the connotations surrounding slavery. Members of chain gangs support this notion, expressing that they feel like slaves.²⁸³ Therefore, the punishment must be cruel, for as Justice Brennan articulated, the Constitution condemns punishments that treat people as nonhumans, robbing people of their dignity.

Both the *Wilkerson* and *Kemmler* decisions establish that punishment cannot be tantamount to "terror, pain, or *disgrace*,"²⁸⁴ establishing that, at its core, the Cruel and Unusual Punishments Clause seeks to preserve the "dignity of man."²⁸⁵ The Court has found a lack of this dignity in certain punishments that are unduly humiliating. For instance, in *Trop*, the Court took offense at the psychological effects of a punishment on an individual.²⁸⁶ Indeed, the Court explicitly linked the cruelty of a punitive measure with its emotional effects and political connotations.²⁸⁷ Even in *Francis*, although the Court ultimately did not find that a punishment was cruel and unusual, Justices were nonetheless willing to consider psychological impact in their determination of whether the punishment violates common standards of decency.²⁸⁸

Notably, the *Trop* and *Francis* courts did not limit their inquiries to whether the punishments involved unnecessary infliction of pain. Indeed, even the most painless punishments may still evidence utter disregard for "the dignity of man."²⁸⁹ For example, although no pain is involved,

the Eighth Amendment prohibits the public exhibiting of carcasses on yardarms, . . . the stringing up of bodies in public squares. . . . the dragging by caissons of corpses through the public streets after a state-sponsored execution drawing and quartering not only before but after the death sentence has been fully carried out.²⁹⁰

Since pain is not the objective of these punishments, perhaps they were chosen for their symbolic value. What is cruel about these pun-

282. See *supra* notes 47 and accompanying text.

283. See *supra* text accompanying notes 256, 282.

284. *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (emphasis added).

285. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

286. See *id.* at 101-03.

287. See *id.*

288. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947).

289. As Justice Reinhardt notes, the guillotine is a relatively painless method, but no court would hold that beheading is consistent with our current standards of decency. See *Campbell v. Wood*, 18 F.3d 662, 706 (9th Cir. 1994) (Reinhardt, J., concurring and dissenting). Additionally, any punishments involving postmortem mutilation would be proscribed by the Eighth Amendment, although they would not cause any infliction of pain. See *id.*

290. *Id.* at 702 (citing *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879)).

ishments is their manifest indignity. Such practices could be considered atrocities because of their symbolic use as instruments of repression:

There is no torture involved in the act of beheading, but no American court would uphold its constitutionality. There is no lingering death in a mock execution, but the ritual is roundly condemned. On the other hand . . . malfunctions of the electric chair have caused incidents of slow, singeing deaths. Yet no court has questioned the propriety of electrocution.²⁹¹

As Flossie Hodges' quotation suggests,²⁹² the citizen sees the chain gang and makes an historical association to slavery and oppression. Because of this historical connotation, the chain gang punishment, though relatively painless, unduly removes an inmate's dignity, thus falling short of the constitutional standard. If a black man bound by chains prompts memories of slavery or black oppression, his dignity is violated. Therefore, in light of remarks like Hodges', it is difficult to reconcile chain gangs with the Eighth Amendment's mandate that a punishment uphold the "dignity of man."

Like being expatriated, being a black member of an Alabama chain gang implicates the inmate's status in society. With an undeniable reference to the days of slavery and forced labor, chain gangs are both humiliating and degrading. The inmate receives more than punishment; he receives a disproportionate stigma from society, reducing him again to the role of a slave. The political and social connotations of a chain gang harken to days of explicit racial injustice in this country—days when blacks were forced to work, forced to leave family and loved ones, and callously bred to bear more slaves.

The humiliation of the cruel punishment extends also to those who witness such indignity, and to society as a whole. Like public hangings in the nineteenth century, people drive miles to view the spectacle of the chain gang.²⁹³ On many days, tour buses carrying curious citizens drive through the entrance of the Limestone Facility to catch a glimpse of the chain gangs. On one occasion, an officer directed a chain of five to line up and face the bus. The men stood there for ten minutes as the tourists

291. McLaughlin, *supra* note 199, at 186 (footnotes and internal quotations omitted). On May 4, 1990, during a bungled execution, a defective sponge in Florida's electric chair caused Jesse Tafero to be slowly burned alive as twelve-inch blue and orange flames burst from the sides of his head. See *id.* at 186 n.49 (citing Jacob Weisberg, *This Is Your Death: Capital Punishment, What Really Happens*, NEW REPUBLIC, July 1, 1991, at 23). A 1989 malfunction of Alabama's electric chair also caused "an agonizing death" for the inmate. *Id.* (citing Note, *The Madness of the Method: The Use of Electrocution and the Death Penalty*, 70 TEX. L. REV. 1039, 1050-54 (1992)). See also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (permitting Louisiana to proceed with a second attempt to execute an inmate when the first attempt failed because of a malfunctioning electric chair).

292. See *supra* text accompanying note 252.

293. Christi Parsons, *Tourists, Other States Curious About Alabama Chain Gangs*, CHI. TRIB., May 10, 1996, at 10.

observed them. On that particular chain, most of the prisoners were black, and most of the tourists were white. "I've heard so much about them, I just had to see it for myself," exclaimed Sheila Bolt, a homemaker from Birmingham.²⁹⁴

CONCLUSION

Their undeniable historical association with oppression, compounded by the accompanying humiliation, renders chain gangs repugnant to civilized notions of common decency and a violation of prisoners' dignity and humanity. Therefore, chain gangs offend the Eighth Amendment's tenet of "evolving standards of decency."

Resurrection of the chain gangs offends a progression of decency rooted in American history. A devolution to the chain gang contradicts the constitutional mandate that we must progress away from punishments that society has already found to offend the "dignity of man." There is an unambiguous historical connection between chain gangs and slavery. Advocates of the modern chain gang in Southern states trade on this historical connection. Says one native Alabaman, "One of my lingering hometown memories [of Tuscaloosa, Alabama] is of a chain gang decked out in white herded about by armed guards on horseback. Laying aside the lynching bee, no other image was as vivid a reminder of the days of the slave South terror and its ensuing oppressiveness."²⁹⁵

Slavery's image is inescapable. Resurrecting a punishment so intimately connected with American slavery offends the mandate of decency. We cannot ignore the fact that chains are loaded with symbolism. The sad story of a past of chaining African-Americans and a currently disproportionate number of incarcerated African-Americans have filtered into the collective consciousness. The image of chains and African-Americans is the image of slavery. We must evolve from this history. "[A] penalty that was permissible at one time in our Nation's history is not necessarily permissible today."²⁹⁶

Using chains as punishment in a culture where chains are intimately connected with the subjugation of a race implicitly embraces slavery. The enslavement of people is unacceptable by any standard of decency.

To the litany of such historically disfavored punishments as drawing and quartering, disemboweling, and beheading, society has added another—chain gangs. Just as beheading represented state-sanctioned oppression, so do chain gangs represent this nation's physically, emotionally, and mentally oppressive system of black slavery and forced

294. *Id.*

295. Payne, *supra* note 105, at A42.

296. Furman v. Georgia, 408 U.S. 238, 329 (1972) (Marshall, J., concurring).

labor. Chain gangs' close association with racial inequality, deliberate humiliation, and intentional dehumanization puts it in a category with other historically repressive punishments, and thus should render the punishment cruel and unusual by Eighth Amendment standards. As a direct descendent from slavery and as a symbol of human degradation, chain gangs fail to pass the constitutional mandate that punishments must meet a current standard of decency. This country must break its shackles of racial inequality and leave the chains where they were left thirty years ago: abandoned as relics of a shameful past.