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EVOLVING STANDARDS OF DOMINATION: ABANDONING A FLAWED LEGAL STANDARD AND APPROACHING A NEW ERA IN PENAL REFORM

SPEARIT*

INTRODUCTION

Yo you youth, you not gwon grin, it's not no smiling ting
Dem looking at the future and the future looks so grim
And can't find no work, because the chances are too slim . . .
So dem out there hustling, cocaine and heroine
'This shotgun's ever-loaded, so boy don't try a ting'
Him think he beat the system, but the system is a win
Cause him living out the stereotype dem design for him[1]

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Dramatic increases in incarceration rates that began in the 1970s were part of conscious political campaigns to scale back advances of the Civil Rights Movement. The social and political struggles of the 1950s and 1960s gave birth to southern strategies and tough-on-crime politicking that deployed the criminal justice system as a means of perpetuating racism and maintaining traditional social hierarchies. The channeling of racial animus through the justice system, far from resembling anything of a natural sequence, represented full-blown appropriation of punishment as a means of oppressing select populations to *create* a permanent underclass. The United States Supreme Court's interpretation of "cruel and unusual" made this feat possible through its "evolving standards of decency" doctrine.[2] This test to determine proportionality was founded on the belief that society is ever-progressing toward more humane decency in attitudes toward punishment.

For prison sentencing, evolving standards effectively functioned by omission by putting punishment power into the hands of legislators at the dawning of the most draconian era of criminalization and punishment in American history. Punishment law in the decades that followed hardly reflected attitudes of a society progressing in humane decency, but instead, the country became a top killing state and the prison capital of the world.[3] The Court's evolutionary perspective of society was sharply at odds with the justice system's appropriation as a vehicle for racial wrath. So, how did the United States intensify punishment so drastically while simultaneously articulating a whiggish commitment to improving decency?

This Article contends that "evolving standards of decency" provided a system of review that was tailor-made for Civil Rights opponents to scale back racial progress. Although as a doctrinal matter, evolving standards sought to tie punishment to social mores, prison sentencing fell prey to political agendas that determined the course of punishment

1. Mayawaska, *Mayawaska - Deep Down Below [Rootstep Dub Mix]*, YOUTUBE (Jan. 30, 2014), http://www.youtube.com/watch?v=J_tQSsy01AU (this spoken word appears in the mix).

2. The origin of this phrase traces to Trop v. Dulles, 356 U.S. 86 (1958); see *infra* Part IIA.

3. See Simon Rogers & Mona Chalabi, *Death Penalty Statistics, Country by Country*, GUARDIAN (U.K.), Dec. 13, 2013, http://www.theguardian.com/news/datablog/2011/mar/29/death-penalty-countries-world (ranking the United States as fifth highest number of capital executions in the world); ROY WALMSLEY, WORLD PRISON POPULATION LIST 1, 3 (10th ed.), *available at* http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf (showing the United States as having the highest rate of incarceration and largest prison population in the world).

more than the benevolence of a maturing society. The Court's evolutionary model was betrayed by decisions that allowed states nearly unfettered authority over prison sentencing and use of solitary confinement, a self-fulfilling prophecy of sorts. The expanded incarceration of poor, uneducated, minorities—the very population that might be expected under an evolutionary frame—was a deep irony. This Article urges the Court to abandon evolving standards as a flawed and pernicious concept, and simultaneously, accept the duty to reinterpret the Eighth Amendment for prison sentencing and solitary confinement. The Court must move beyond its obsessive tinkering with the death penalty and focus on the realities of "doing time" in America.

The argument unfolds in three main parts. The first, *Critical Insights into Punishment Law in the Present*, outlines the doctrinal status quo for interpreting "cruel and unusual." It includes an overview of the "evolving standards of decency" doctrine, prison sentencing and solitary confinement, and core critiques of the doctrine. The second part, *Abandoning Social Myth*, argues that the time is ripe for abandoning the status quo as legally incorrect, analytically unprincipled, and socially harmful. It offers a comprehensive account of what it means to be "down by law" in America, and shows that rather than fierce competition that is supposed to fuel social progress, the justice system was appropriated by elites as a means of maintaining social hierarchies. Finally, *Toward Next-Era Penology* posits concrete solutions for freeing ourselves from this penal quagmire. This two-step solution includes an imperative to interpret "unusual" and to tether the meaning of "cruel" to the findings of science and research. Although the Court has engaged in an ongoing quest for objectivity in interpreting these terms, it has yet to look toward the obvious: scientific study as a means of understanding human cruelty. This Article offers a bold way forward for the law of punishment that is constitutionally grounded, socially advantageous, and convergent with advancing civil rights.

I. CRITICAL INSIGHTS INTO PUNISHMENT LAW IN THE PRESENT

> *Society is a living organism and must obey the laws of life, not of mechanics; it must develop. All that progressives ask or desire is permission—in an era when "development," "evolution," is the scientific word—to interpret the Constitution according to the Darwinian principle . . . .*[4]

4. RONALD J. PESTRITTO, WOODROW WILSON: THE ESSENTIAL POLITICAL WRITINGS 121 (2005).

The Eighth Amendment to the United States Constitution provides a basis for challenging the application or operation of punishment that may be inflicted on a convicted criminal. According to the language of the Amendment, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[5] The latter portion of the Amendment, known as the "cruel and unusual" punishment clause, is a constitutional hook for prisoners to make a claim against certain government punishment practices. This section details the body of law that has developed around this clause, focusing on the "evolving standards of decency" doctrine.

A. The Doctrinal Status Quo

The standard model of interpreting "cruel and unusual" under the Eighth Amendment has been divided by the Court along two general classes. The first involves challenges to the length of time sentenced given all the circumstances in a particular case.[6] In these cases, the Court has announced a principle of proportionality to determine whether a challenged punishment is constitutional, which forbids a sentence that is grossly disproportionate to the defendant's crime.[7] The second involves cases where the Court implements the proportionality standard by certain categorical restrictions—for example, prohibition of the execution of minors[8] or rapists.[9]

Proportionality review by federal courts, according to the Court, "should be informed by objective factors to the maximum possible extent."[10] To help determine proportionality, the Court has relied on "evolving standards of decency," a doctrine that owes its origins to *Weems v. United States*, where the Supreme Court used the Eighth Amendment to strike down a Philippine court's punishment of a U.S. Coast Guard officer.[11] The Court ruled that a fifteen-year sentence of

5. U.S. CONST. amend. VIII.

6. Graham v. Florida, 560 U.S. 48, 59 (2010).

7. For treatment of proportionality review in prison duration cases see E. THOMAS SULLIVAN & RICHARD FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW 134–46 (2009).

8. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005).

9. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); Coker v. Georgia, 433 U.S. 584, 599 (1977) (holding that a sentence of death for the crime of the rape of an adult woman was grossly disproportionate and excessive punishment forbidden by Eighth Amendment).

10. Harmelin v. Michigan, 501 U.S. 957, 1000 (1991).

11. 217 U.S. 349, 382 (1910).

being shackled to a ball and chain was cruel and unusual punishment.[12] In this initial foray into interpretation of the "cruel and unusual" clause, the Court refused to define cruel and unusual punishment in fixed terms, and instead pointed to ongoing progression, with punishment being guided by public opinion, which itself was a product of an ever-enlightening humanity.[13]

Thus, at the dawning of Eighth Amendment jurisprudence, the Court began to shift from a strictly originalist approach in favor of a "living" constitution view that embraced social evolution as a fact of life. With the scientific acceptance of evolution, the idea that public opinion was ever-enlightening went from rhetorical dicta in *Weems,* to a foundational concept half a century later in *Trop v. Dulles.*[14] In that opinion, the Court determined that "cruel and unusual" under the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[15] Exactly what this phrase meant on its own was vague and somewhat enigmatic. After all, what is a maturing society? And more importantly, what is proof of such a thing? A few years later, the Court indicated that whether punishment for a crime violates the Eighth Amendment should be determined "in the light of contemporary human knowledge."[16] More definite analysis of what these terms meant would not come until the 1970s, when the Court continued to develop the doctrine in the capital context.

"Invoking public sentiment as a guide to deciding cases is only half the battle, however; the Court must then determine what sources to use to gauge public opinion."[17] In death penalty jurisprudence, one scholar has identified no less than six factors that the Court understands as "objective" factors:

> (1) history—whether this class of defendants had been historically subjected to the death penalty; (2) judicial precedent—what has the Court previously said or presumed about the treatment of this class of defendants; (3) statutes—have the states subjected these defendants to the death penalty; (4) jury verdicts—have juries voted to impose a death sentence on these defendants in capital prosecutions; (5) penological goal—would deterrence or retribution be achieved

12. *Id.*
13. *Id.* at 378.
14. 356 U.S. 86, 100–01 (1958).
15. *Id.* at 101.
16. Robinson v. California, 370 U.S. 660, 666 (1962).
17. JOHN A. FLITER, PRISONERS' RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 36 (2001).

> by the execution; and (6) international and comparative law—how do other countries and international organizations deal with or suggest how this class of defendants should be treated?[18]

Although the Court has never offered guidance as to how much weight to accord each factor or whether all need to be considered, they have been designated by the courts as objective indicia of society's views on punishment. The principle of making this assessment is to find whether the "objective" indicia of prevailing community norms support the finding of a national consensus against the challenged punishment.

The complex brew of tests and inquiries did not stop here; the Court has repeatedly reserved the right to consider its own judgment. According to the Court, although evolving standards were of great importance, they did "not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty . . . ."[19] Thus, even though the six factors that make up the content of evolving standards are supposed to be the pillars of understanding society's views of punishment, it is ultimately the Court's own view that will prevail. As one scholar puts it, the Court has been willing to all but eviscerate the method, "replacing it with the Justices' individual predilections on when a practice violates . . . the Eighth Amendment."[20] More critically, the procedure has been described as amounting "to little more than the unconstrained exercise of judicial will,"[21] and as "merely a screen for the application of justices' personal opinions, even if those justices employ a test requiring them to determine whether the punishment at issue is excessive in that it fails to further the recognized goals of punishment."[22] The doctrine stands as something of a paradox since, in the name of human decency, it sanctioned the harshest era of punishment the country has ever known.

How the drastic increase occurred is visible in the case law that shows a Court that is reluctant to review challenges to prison sentences and likely to "treat proportionality as a purely theoretical require-

18. Dwight L. Aarons, *The Abolitionist's Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 PIERCE L. REV. 441, 445 (2008).

19. Coker v. Georgia, 433 U.S. 584, 622 (1977).

20. Aarons, *supra* note 18, at 447.

21. John F. Stinneford, *The Illusory Eighth Amendment*, 63 AM. U. L. REV. 437, 492 (2013) [hereinafter Stinneford, *Eighth Amendment*].

22. Susan M. Raeker-Jordan, *Parsing Personal Predilections: A Fresh Look at the Supreme Court's Cruel and Unusual Death Penalty Jurisprudence*, 58 ME. L. REV. 99, 126 (2006).

ment stripped of enforceable content."[23] Since 1980, the Court has decided six cases that challenged a sentence length based on the Eighth Amendment, all of which were 5-4 with only one ruling in favor of the prisoner.[24]

The first case declared that federal courts should be reluctant to review legislatively mandated imprisonment, ruling that the Eighth Amendment is not violated when a state imposes a mandatory life sentence for one convicted of three non-violent felonies.[25] Two years later, the Court upheld a forty-year prison sentence for possessing and intending to distribute nine ounces of marijuana, deeming that duration of a prison sentence for felonies was "purely a matter of legislative prerogative."[26] The following year, the Court struck down a life imprisonment sentence for a recidivist offender for a fraudulent one hundred dollar check.[27] Eight years later, the Court could not muster a majority opinion on whether a mandatory life term without possibility of parole was cruel and unusual for possessing 672 grams of cocaine.[28] The most recent cases were companion cases from the State of California that involved "three strikes" legislation, which mandates that repeat offenders should receive enhanced sentencing.[29] The first upheld a recidivist statute of a twenty-five-to-life sentence for the theft of three golf clubs;[30] the other held that habeas relief should not have been granted to challenge three strikes legislation that provided for a fifty-year minimum sentence for two counts of misdemeanor theft charged as felonies because of the defendant's prior property offences.[31]

As the Court is hesitant to interfere with statutory prison sentences, similar reluctance attends the Court's approach to use of solitary confinement units and use of "supermax" prisons for prolonged and

23. Thomas G. Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 478 (2005).

24. For more thorough treatment of these cases, see Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1995).

25. Rummel v. Estelle, 445 U.S. 263 (1980).

26. Hutto v. Davis, 454 U.S. 370, 370–73 (1982).

27. Solem V. Helm, 463 U.S. 277 (1983).

28. Harmelin v. Michigan, 501 U.S. 957 (1991).

29. JOHN CLARK ET AL., NAT'L INST. OF JUSTICE, "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION (Sept. 1997), *available at* http://sjra1.com/index_files/cjreports/1997%20NATL%20INST%20OF%20JUST-3-STRIKES%20REPORT-1997-165369.pdf.

30. Ewing v. California, 538 U.S. 11 (2003).

31. Lockyer v. Andrade, 538 U.S. 63 (2003).

sometimes permanent isolation, typically for 23 hours a day.[32] Although the use of solitary units is never a part of one's sentence, and thus not punishment per se, it is often a part of the punishment practices within a prison. Still, courts have been reluctant to reign in durations of solitary confinement or hold that the practice violates the Eighth Amendment.[33] In the leading case, *Madrid v. Gomez*, the California district court recognized that conditions of extreme social isolation are not to be trivialized, but do not significantly exceed "the kind of generalized psychological pain that courts have found compatible with Eighth Amendment standards."[34] Courts have not always taken this perspective, and indeed in 1890, the Supreme Court declared abhorrence toward the pernicious nature of the practice, describing:

> [a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[35]

Times have changed however, and today, prison administration may send individuals to solitary confinement for punitive or non-punitive reasons, including for administrative or management purposes.[36] While cases have permitted prolonged solitary confinement, none have addressed Eighth Amendment claims for prisoners that remain in solitary on a permanent basis.[37] Courts have been willing to recognize, however, that placing seriously mentally ill inmates in solitary confinement may cause psychological trauma that rises to the level of cruel and unusual punishment.[38] For ordinary prisoners who suffer comparable mental pain and anguish in solitary, there is little remedy as courts, corrections, and legislators have been unpersuaded that the

32. Keramet Ann Reiter, *The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960–2006*, *in* STUDIES OF LAW, POLITICS AND SOCIETY 71, 76 (Austin Sarat ed., 2012) (solitary confinement typically entails placing a prisoner in a cell alone).

33. For fuller treatment of the Constitutionality of Solitary, see generally Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115 (2008).

34. 889 F. Supp. 1146, 1265 (N.D. Cal.1995).

35. *In re* Medley, 134 U.S. 160, 160 (1890).

36. Angela A. Allen-Bell, *Perception Profiling & Prolonged Solitary Confinement Viewed Through the Lens of the Angola 3 Case: When Prison Officials Become Judges, Judges become Visually Challenged, and Justice Becomes Legally Blind*, 39 HASTINGS CONST. L.Q. 763, 768 (2012).

37. Lobel, *supra* note 33, at 117.

38. *See* Atkins v. Virginia, 536 U.S. 304, 340–41 (2002).

mental pain of solitary confinement rises to the level of an Eighth Amendment violation.[39]

B. Social Darwinism in the Judiciary

This section identifies the theoretical underpinnings of what is being termed "social Darwinism" as a means of understanding how evolving standards of decency fits within the concept.[40] It also offers a substantive critique of the doctrine and the social implications of the doctrine's adoption, and particularly, normalization of the view that poor, uneducated, and other marginalized portions of society are indeed the people who belong in prison.

The label "social Darwinism," which derives from Charles Darwin's influence on social science, describes a movement that greatly influenced American jurisprudence:[41] "For many of the new social scientists Darwin's natural selection model invited economic determinism—the idea that resource scarcity explains everything that happens."[42] Particularly, it was Herbert Spencer, a contemporary evolutionary theorist, who coined the term "survival of the fittest," which was grounded in the notion that competition induced human beings to adapt themselves to their environments, improving mental and physical skills, which was then inherited by their descendants.[43] This perspective veered somewhat from Darwin's model since "in the struggle for existence, self-improvement came from conscious, planned exertion, not from the chance variation and natural selection that are the heart of Darwinism. As a result, evolution is progressive in Spencer, whereas, for Darwin, at least the early Darwin, evolution means only non-teleological change."[44] For Spencer, "[h]uman perfection [was] not only possible but inevitable."[45] Social Darwinists thus clung to the as-

39. See *Ruiz v. Brown*, a class action suit in which prisoners are arguing, among other claims, that solitary confinement is cruel and unusual punishment: "Defendants have no legitimate penological interest in retaining prisoners indefinitely . . . ." Plaintiffs' Second Amended Complaint at 40, Ruiz v. Brown, No. 4:09-cv-05796-CW (N.D. Cal. May 31, 2012).

40. For an overview of evolutionary models in jurisprudence, see Herbert Hovenkamp, *Evolutionary Models in Jurisprudence,* 64 TEX. L. REV. 645, 646 n.8 (1985).

41. *Id.* at 654.

42. *Id.*

43. RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 38–44 (1992) (summarizing Spencer's theory of evolution).

44. Thomas C. Leonard, *Origins of the Myth of Social Darwinism: The Ambiguous Legacy of Richard Hofstadter's Social Darwinism in American Thought*, 71 J. ECON. BEHAV. & ORG. 37, 41 (2009).

45. HOFSTADTER, *supra* note 43, at 40.

sumption "that evolution by natural selection was a theory of 'progress' and should therefore be valued for its own sake."[46]

The foundational aspects may be distilled to two major ingredients. The first is that people have intrinsic abilities that will manifest independent of social, economic, and cultural environments. Second, intense competition enables the most talented to develop their potential to make life better for all. Inherent in this worldview is a human culture that progresses through fierce competition, given that leaders do not support backward policy that protects the weak.[47] Accordingly, "[t]he most popular catchwords of Darwinism, 'struggle for existence' and 'survival of the fittest,' when applied to the life of man in society, suggested that nature would provide that the best competitors in a competitive situation would win, and that this process would lead to continuing improvement."[48]

1. Legally Wrong, Analytically Unprincipled

Although in theory the proposition that society is evolving in decency is appealing, life on the ground has proved otherwise. For example, the doctrine leads to classical tyranny of the majority problems. Whereas traditional judicial review has been the celebrated method by which the Court protects minorities from majority tyranny,[49] the Court has openly acknowledged that it will, to some extent, rely on prevailing social opinion to determine the meaning of "cruel and unusual." The posture challenges the theoretical underpinnings of judicial review and shakes "the bedrock principles of constitutional law."[50] According to one commentator, continued failure to recognize the importance of interpreting "unusual" means that "courts will be powerless when faced with the primary danger against which much of the Bill of Rights, including the Cruel and Unusual Punishments Clause, was designed to protect: the tyranny of enflamed majority opinion."[51] To be sure, the Eighth Amendment provides little protection when public opinion is

46. Hovenkamp, *supra* note 40, at 671.

47. In this regard, the theoretical frame is closely connected to ideas in eugenics, and in particular, that pampering the weak will lead to decline of society.

48. HOFSTADTER, *supra* note 43, at 6.

49. Marc Bacharach, *The Supreme Court, the Death Penalty, and Evolving Standards of Decency: A History of Interpretation*, CRITIQUE: A WORLDWIDE STUDENT J. OF POL. 21, 23 (2004), *available at* http://lilt.ilstu.edu/critique/spring2004docs/bacharach.pdf.

50. Corinna Barrett Lain, *The Unexceptionalism of Evolving Standards*, 57 UCLA L. REV. 365, 369–70 (2009).

51. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1747 (2008).

enraged or more prone to cruelty, which has prompted another to admonish: "[w]e ought to recognize that fact and rethink our reliance on the Supreme Court to protect unpopular minorities from the tyrannical potential of majority rule."[52]

Even after ascertaining what it believes is the evolving standard, the Court reserves the right to bring its "own opinion" to bear on a matter, which potentially obliterates the long quest for objectivity and objective indicia. Practically, this reservation recaptures some of the terrain forfeited to its machinations of social norm as determined by evolving standards since the Justices can supplant society with their own predilections of punishment.[53] Here, the Court is able to have its cake and eat it too, since ultimately any outcome dictated by evolving standards is nonetheless subject to the personal policies of the judiciary.

The evolving standards doctrine also suffers from problems of data capture and reliability.[54] For example, some criticize the use of jury data as an objective gauge of public sentiment since the approach assumes that jury decisions reflect public values. As has been noted, it is "absurd to pretend . . . that a jury's verdict always represents the values of a community."[55] Similar difficulties arise when the Court seeks to use state legislation as an objective measure. Despite the Court's bold proclamation that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures,"[56] there is much to doubt about this proposition and little evidence to support it.[57] Among other problems, this approach "rests on the assumption that the state legislatures are truly representative of the public will,"[58] what has elsewhere been described as the "inference from legislation to social values."[59] This position also

52. Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 74 (2007).

53. *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977).

54. *See* Pamela S. Karlan, *Pricking the Lines: The Due Process Clause, Punitive Damages and Criminal Punishment*, 88 MINN. L. REV. 880, 890 (2004) (noting that "[t]here are good reasons to think that the legislative process may produce statutes that systematically exaggerate a crime's seriousness. Legislators face powerful political pressures that lead them to ratchet up sentences.").

55. Aarons, *supra* note 18, at 450.

56. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

57. *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089 (2006).

58. Bacharach, *supra* note 49, at 26–27.

59. Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 884 (2013).

ignores other influences on legislation, including get-tough politics, racial animosity, and most recently, private prison corporations that have become notorious lobby forces for stiffer prison penalties. None of these have much to do with public sentiment, yet they have undoubtedly helped steer the course of punishment law. Hence, it is a great fallacy to pretend that popular will is reflected in the statutes created by legislatures.[60] The reaction to Furman v. Georgia illustrates this; in the wake of the Court's holding that capital punishment, as was being presently administered, violated the Eighth Amendment, states moved quickly to act. In response to this moratorium on capital punishment, the federal government and thirty-five states revamped capital sentencing laws to keep death alive as a punishment.[61] In the process, there was relatively little public debate or polling to determine what citizens thought, and instead, state legislators went to work largely on their own, and at a time when the death penalty was close to its own death. Their efforts hardly reflected the will of the people, and as some legal scholars have stressed, at the time, the public was relatively uninformed about the death penalty.[62]

To complicate the legislative tallying, the Court acknowledges "trends" as indicative of social consensus. As opposed to counting the laws among the states, trends refer to recent legislation that indicate a consistent and increasing support for abandoning or adopting a particular punishment. This means that a raw majority of states need not indicate a national consensus, but that a minority of states heading in that direction might indicate a trend toward consensus. The Court even undermines this approach, however, when it refuses to acknowledge such a trend; in *Kennedy v. Louisiana,* which proscribed capital punishment for the rape of a child, even though several states had enacted legislation recently to allow the punishment, the Court rejected the trend.[63]

State legislation is not only a false prophet for public attitudes, but objective indicia as a whole is amenable to multiple explanations, with some implying that a punishment is contrary to social standards, and others consistent with community approval of the punishment; to-

60. *Id.*

61. Gregg v. Georgia, 428 U.S. 153, 179–80 (1976).

62. Austin Sarat & Neil Vidmar, *Public Opinion, The Death Penalty, and The Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171, 178.

63. Kennedy v. Louisiana, 554 U.S. 407 (2008) (at the time of the decision, there were 6 states that allowed the penalty and 5 states with legislation pending in that direction).

gether, they "undercut the role of objective indicia as determinative decision-making tools for the Court."[64] Indeed, the tallying of states has proved vexing, since state tallies can be manipulated in ways to achieve desired outcomes, and because the Court has never been certain as to what counts as a "consensus,"[65] as illustrated in case law that reflects these uncertainties.[66]

As this section shows, there are multiple levels of critique against the "evolving standards of decency" standard, many of which apply to other well-established standards of judicial review. Perhaps the greatest difference to stress, however, is the direct bearing the doctrine has on an inmate's existence; that is, the stakes are at their highest with loss of liberty through imprisonment, or more severely, loss of sense and dignity in solitary confinement. As the next section details, there are significant social costs involved in the Court's reluctance to interfere with state sentencing schemes, including structural harms that oppress already disadvantaged communities. The effects are devastating and hardly bring the idea of "evolving" to mind. More importantly, they undermine the core principle of natural selection.

2. Survival of the Fittest?

As history demonstrates, dramatic increases in incarceration that began in the 1970s were part of conscious political campaigns to scale back victories of the Civil Rights Movement.[67] Instead of the fierce competition espoused by social Darwinists, the political manipulation of the justice system produced *false* competition. Criminal defendants

64. Farrell, *supra* note 59, at 863.

65. *Id.* at 881; *see* Atkins v. Virginia, 536 U.S. 304, 313–16 (2002) (The Court does not follow previous decisions by including in the count non-death penalty states that do not execute anyone); Raeker-Jordan, *supra* note 22, at 109–12 (detailing the statistical problems with the *Atkins* decision).

66. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 334 (1989) (finding no consensus that executing mentally retarded defendants violated the Eighth Amendment; abrogated by *Atkins*, 536 U.S. 304); Enmund v. Florida, 458 U.S. 782, 789–93 (1982) (rather than examining positive legislation, the Court found a consensus in the fact that thirty-nine states did not authorize the challenged penalty for unintended felony murder); *see* Miller v. Alabama, 132 S. Ct. 2455, 2459 (2012) (holding that mandatory juvenile life sentences without parole violates society's evolving standard of decency despite a majority of states authorizing the penalty); *Atkins*, 536 U.S. at 314–15 (finding consensus that executing the mentally retarded was unconstitutional due to a trend of eighteen states enacting legislation forbidding the practice).

67. *See generally* Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as 'Law and Order' in Postwar American Politics*, *in* RACE AND AMERICAN POLITICAL DEVELOPMENT 234 (Joseph Lowndes, Julie Novkov & Dorian T. Warren eds., 2008); SpearIt, *Legal Punishment as Civil Ritual: Making Cultural Sense of Harsh Punishment*, 82 MISS. L.J. 1 (2013); Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230 (2007).

and their communities instead were made to face additional obstacles in competing with the rest of society that had little to do with natural phenomena and everything to do with oppression. The developments suggest that the "fittest" are so just because they wield the awesome power of the criminal justice system; far from developing along natural selection lines, punishment was a tool for some to keep others down—on lockdown, to be specific.[68]

The dominant character of the shift is stunning. The prison population increased over 700 percent from 1972 to 2008.[69] In these decades, both the number of new crimes was greatly expanded and sentences for existing crimes were lengthened.[70] In addition:

> Drug offenders and recidivists face drastically increased sentences. Sex offenders have been hit with numerous new penalties, including longer prison sentences, the death penalty for certain sex offenses, new forms of civil commitment designed to keep them locked up after they serve their prison sentences, registration laws, residency restrictions, and even chemical castration. Juveniles have increasingly been moved into the adult system and punished to the same degree as adults.[71]

The Court's attitude toward solitary confinement has made it a standard practice in prison, with "supermax" prisons consisting solely of solitary confinement.

The breadth and depth of the impact is more stunning when considered alongside the effects on the offender and the offender's community. Some researchers stress that even though the rate is now at nearly eight times its historic average, "the scale of punishment today gains its social force from its unequal distribution."[72] At the individual level, imprisonment itself is rife with threats of physical and psychological violence.[73] At the social level, the aggregate effect of mass incarceration is at the early stages of understanding, but for communities

68. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS (The New Press 2010).

69. PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATIONS DECLINE FOR THE FIRST TIME IN 38 YEARS 1 (2010), *available at* http://www.cjpc.org/Prison_Count_2010%20Pew%20%20Center%20report.pdf.

70. PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 2 (2012), *available at* http://www.cdcr.ca.gov/realignment/docs/Report-Prison_Time_Served.pdf.

71. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 919–20 (2011) [hereinafter Stinneford, *Rethinking Proportionality*].

72. Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, 2010 DÆDALUS 8, 9.

73. *See* JAMES BYRNE ET AL., THE CULTURE OF PRISON VIOLENCE (2007).

that supply the bulk of criminal defendants, the news is far from positive.[74]

For the individual, the closing of the prison gates opens up a world of punishment beyond the loss of liberty. Technically, these experiences are not punishment, despite their infliction of additional pain and suffering on the prisoner. Most critical in an inmate's life is the threat of violence. Fights, beatings, gang rapes, and assaults of all varieties behind bars are common, particularly the threat of sexual violence, which is systemic in some prison systems.[75]

Psychic maladies afflict inmates, including the harmful effects of prolonged solitary confinement.[76] Psychological stressors arise from multiple sources, including guards, institutional policies, and from other inmates, a significant portion of whom suffer mental illness.[77] Mental illness is exacerbated in prison through multiple means, including through interruptions in medication and placing ill inmates in solitary confinement.[78] Even for inmates with no history of mental illness, solitary confinement has negative outcomes, some of which were noted in studies offered by plaintiffs in *Madrid v. Gomez* that indicated that even the healthiest inmates run a significant risk of hyper-responsiveness and severe forms of anxiety under solitary confinement.[79] The mental well-being of inmates may be further compromised by the high concentrations of mental illness in the general prison population.[80]

Problems behind bars hamper prospects for survival on the outside. Having burdened family and friends during the time spent in prison, the burdens are heavier when ex-prisoners reenter society. One study identified over sixty significant barriers to successful reintegration faced by offenders at this stage.[81] As noted,

74. *See* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2009).

75. *See generally* SpearIt, *Gender Violence in Prison & Hyper-Masculinities in the 'Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL'Y 89 (2011).

76. *See, e.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325 (2006).

77. See SpearIt, *Mental Illness in Prison: Inmate Rehabilitation & Correctional Officers in Crisis*, 14 BERKELEY J. CRIM. L. 277 (2009).

78. *Id.* at 282–83.

79. Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 EMORY L.J. 1089, 1130 (1996).

80. TARA HERIVEL & PAUL WRIGHT, PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 170 (2002).

81. PHILA. CONSENSUS GRP. ON REENTRY & REINTEGRATION OF ADJUDICATED OFFENDERS, THEY'RE COMING BACK: AN ACTION PLAN FOR SUCCESSFUL REINTEGRATION OF OFFENDERS THAT WORKS FOR EVERYONE 4 (2002).

> The lifelong debilitating effects of exposure to the criminal justice system and incarceration produce a set of consequences that incapacitate these individuals in quite another way, making them far less able to return to a productive life once their prison term ends. This is the long tail of incarceration, incapacitating individuals for their life after release from prison.[82]

Part of the difficulty stems from the many who return with substance abuse problems, including hard drug addiction and alcoholism. According the Bureau of Justice Statistics, most prisoners with abuse and addiction problems do not receive treatment while they are incarcerated.[83] Unlike these badly needed services, drugs and homemade intoxicants are widely available, allowing some ex-convicts to leave prison without substantial time in sobriety, while most prisoners with substance abuse problems receive no treatment for those problems while they are in prison.[84]

Returning convicts face familial difficulties upon reentry. For released individuals who are parents, it is unlikely that they will be able to organize their children's lives and exercise other responsibilities that parenting requires.[85] For some, the point is moot since a conviction may force a parent to forfeit custody rights or adoption rights altogether, or to terminate parental rights.[86] Finding a stable partner is equally problematic for ex-felons, since they are perceived as undesirable marriage partners. With few prospects for making a living wage, diminished social status, and lack of self-esteem and resources, they are limited in appeal as a marriage partner,[87] and young men in particular face reduced prospects for marriage.[88]

Prospects for successful partnerships also diminish due to distorted sexual identities among ex-prisoners, which compromise healthy

82. ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA 110 (2011).

83. CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 9 (2006), *available at* http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf.

84. *Id.*

85. Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 55 (Jeremy Travis & Michelle Waul eds., Urban Inst. Press 2003) (prepared for the "From Prison to Home" Conference from Jan. 30–31, 2002, sponsored by the U.S. Department of Health and Human Services).

86. McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L. J. 795, 825 (2011).

87. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 140 (2006).

88. CLEAR, *supra* note 74, at 97.

sexual intimacy outside of prison.[89] The negative impacts on communities directly relates to the high rates of gender and sexual violence in prison,[90] and as criminologists have long maintained, men who are victimized by others in prison often leave the institution more violent and anti-social than when they entered.[91] Released prisoners who experienced sexual violence in prison become harmful to the community because they are more likely to become sexual offenders themselves.[92] Prisons contribute to the culture of violence through the acts and ommissions of prison employees—guards, staff and administrators, who routinely ignore constitutional, statutory, and institutional rules that obligate them to protect inmates against physical and sexual violence.[93]

Furthermore, felony convicts face numerous collateral consequences that thwart successful reentry. Such consequences include housing restrictions, training restrictions, and others, including exclusion of certain felons from federal, grand, and petit jury service.[94] Drug-related felons are denied federally funded food stamps,[95] and there are restrictions on federal educational grants.[96] Moreover, just as they did while the convict was in prison, legal financial obligations continue to accrue interest, as do child support payments and their arrears. As a further burden, a felon's right to vote may be suspended until all debts are repaid, while for some felons, release from probation or parole itself may be contingent on paying all of one's legal financial obligations.[97]

With respect to financial obligations, ex-prisoners are often the least prepared to earn a living. As many prisoners are illiterate and unable to perform basic tasks such as filling out a job application, pro-

89. JOHN IRWIN, THE WAREHOUSE PRISON: DISPOSAL OF THE NEW DANGEROUS CLASS 158–60 (2005).

90. Kim S. Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 5 (2010).

91. Dyan M. McGuire, *The Impact of Prison Rape on Public Health*, 3 CAL. J. HEALTH PROMOTION 72, 76 (2005).

92. LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 27 (1997).

93. Kim S. Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1651–53 (2012).

94. 28 U.S.C. § 1865(b)(5) (2006).

95. 21 U.S.C. § 862(a) (2012).

96. 20 U.S.C. § 1091(r)(1) (2012).

97. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 355 (2012).

spects are limited.[98] Educational deficiencies result in permanent reduction in earning potential and many return to society no better equipped to contribute to the labor force than before incarceration.[99] Furthermore, the 1994 Violent Crime Control and Law Enforcement Act[100] effectively wiped out higher education within the prison system.[101]

Communities of released offenders are especially burdened since they already struggle with high unemployment and a shortage of available jobs.[102] The twin problem of being a felon and being in a surplus market coincides with the fact that every state restricts felons from certain jobs and professional licenses.[103] According to one study, there are almost 300 restricted jobs for felony convicts that result in not just an economic penalty in the labor market, but a restriction to jobs characterized by high turnover and little upward mobility.[104]

Under federal law, felony offenders are subject to an exclusive set of restrictions. For example, a federal felony conviction makes one ineligible to enlist in the armed forces,[105] obtain federal employment,[106] obtain a license to fly an aircraft,[107] and obtain a private radio license,[108] among other jobs and licenses.[109] Moreover, these professional disqualifications need not have a connection between the prior

98. ELIZABETH GREENBERG, ERIC DUNLEAVY, & MARK KUTNER, NAT'L CTR. FOR EDUC. STATISTICS, LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 473 (2007), *available at* http://nces.ed.gov/pubs2007/2007473.pdf.

99. CLEAR, *supra* note 74, at 107.

100. Act of Nov. 8, 1965, Pub. L. No. 89-329, 79 Stat. 1219.

101. *See* Mary Rachel Gould & SpearIt, *Introduction Twenty Years after the Education Apocalypse: The Ongoing Fall Out From the 1994 Omnibus Crime Bill*, 33 ST. LOUIS U. PUB. L. REV. 283 (2014).

102. JEREMY TRAVIS, AMY L. SOLOMON, & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSION AND CONSEQUENCES OF PRISONER REENTRY 40–42 (1999), *available at* http://www.urban.org/pdfs/from_prison_to_home.pdf.

103. CLEAR, *supra* note 74, at 58.

104. WESTERN, *supra* note 87.

105. 10 U.S.C. § 504 (2006).

106. *See* U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 3, *available at* http://www.justice.gov/pardon/collateral_consequences.pdf (last visited Feb. 17, 2015) (outlining various statutes that result in federal employment disqualification).

107. 7 U.S.C. § 12a (West 2014) (CFTC); 7 U.S.C. § 504 (West 2014); 7 U.S.C. § 1111 (repealed 1974); 12 U.S.C. § 1818(g)(1)(C) (2011); 15 U.S.C. § 80b-3(e)(2) (2011); 15 U.S.C. § 708(b)(4)(B) (repealed 2002) (SEC); 18 U.S.C. § 1033(e)(1)(A) (West 2014); 49 U.S.C. § 44101 (West 2014); 49 U.S.C. § 44106 (West 2014); 49 U.S.C. § 44703(f) (2012); 49 U.S.C. § 44709 (2012); 49 U.S.C. § 44710 (2012).

108. 47 U.S.C. § 312(a) (2004).

109. 19 U.S.C. § 1641(d)(1)(B) (1999); 22 U.S.C. § 2778(g)(3)(A) (2014); 50 U.S.C. § 2410(h)(1) (2013).

crime and the employment.[110] For defendants who are non-citizens, the severity reaches a zenith through deportation proceedings that may result from certain felony convictions.[111]

At the local level, ex-prisoners are ineligible for an array of social services, health benefits, or public housing.[112] The bans in housing are superfluous since returning prisoners rarely have the financial resources or references to compete for housing in the private market.[113] Prisoners typically must live with their family after release, which is risky for some families in public housing, considering that illegal drug activity by the released individual puts the entire family at risk of eviction. This possibility raises the stakes for taking in a family member from prison, and these risks increase when recalling the significant number of inmates who leave prison with substance abuse problems.

The mental and physical health problems in prison increase exposure to communities through the release of ailing inmates. Released mentally ill offenders are likely to recidivate, which poses a unique threat to communities, since their inhabitants are future victims of recidivist offending. Physical health problems become the community's problem as well, as prisoners have high rates of tuberculosis,[114] hepatitis C,[115] and other sexually transmitted diseases, including syphilis and Chlamydia, ailments that put home communities at high risk of exposure.[116] HIV infection in the United States exemplifies these trends since prisoners are more than three times more likely than the general population to be infected, with nearly three-fourths of AIDs-related deaths being suffered by African Americans.[117]

It is speculated that the high rates of HIV infection in prison are directly related to the rates found in Latino communities.[118] Some have

110. Mahler v. Eby, 264 U.S. 32, 39 (1924).

111. Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 261 (2002).

112. James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101 nn.28–32 (2012).

113. TRAVIS, SOLOMON & WAUL, *supra* note 102, at 35.

114. SUSAN M. GRAHAM & PHYLLIS E. CRUISE, CTRS. FOR DISEASE CONTROL, PREVENTION AND CONTROL OF TUBERCULOSIS IN CORRECTIONAL FACILITIES: RECOMMENDATIONS OF THE ADVISORY COUNCIL FOR THE ELIMINATION OF TUBERCULOSIS (June 7, 1996), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00042214.htm.

115. JEREMY TRAVIS & CHRISTY A. VISCHER, PRISONER REENTRY AND CRIME IN AMERICA 36 (2005).

116. Robert E. Fullilove, *Mass Incarceration in the United Sates and HIV/AIDS: Cause and Effect?*, 9 OHIO ST. J. CRIM. L. 353, 356 (2011).

117. Laura M. Maruschak, *HIV in Prisons*, BUREAU OF JUSTICE STATISTICS tbl.4, 7, http://www.bjs.gov/content/pub/pdf/hivp06.pdf (last revised Apr. 22, 2008).

118. CLEAR, *supra* note 74.

argued that the War on Drugs policies and subsequent incarceration of so many African-American males were the principal causes of the increasing levels of HIV in African American communities. According to one scholar, drug use exposed significant numbers of prisoners to HIV, while drug-related arrests and imprisonments that were a part of the "War on Drugs" put large numbers of drug users, a group at great risk for infection, behind bars; this burden fell largely on ethnic minorities, creating "the perfect engine for generating new infections and for disseminating the virus throughout the communities from which these men and women were taken."[119] Others have noted that forced sex in prison may be a contributing factor to the heightening rates of sexually transmitted diseases.[120] The virus follows patterns of community concentration, and by 2006, it was noted that three states accounted for fifty percent of known prison cases.[121] Four years later, one researcher reported that upwards of 15,000 HIV-positive inmates are released from prison each year.[122] Those who contract the virus while incarcerated bring it home to their family and others within the community.[123]

II. ABANDONING SOCIAL MYTH

> *Social Darwinists believed that genetics determined criminal behavior, and that nothing reformed the 'criminal type'; instead the criminal should be placed where he could not harm society.*[124]

The evolving standards doctrine distorts punishment law and must be abandoned. As a legal standard, it is as unprincipled as unpredictable, and hardly helps advocates or lower courts do their work. Moreover, with the United States wielding "the most punitive criminal justice system in the modern industrialized world,"[125] the time has never been riper to make moves to retire as the world leader in incarceration. This current state of mass imprisonment resonates little with the notion of evolving standards of decency, and instead cripples economically weak communities that already struggle with high rates of

119. Fullilove, *supra* note 116, at 354.
120. TRAVIS & VISCHER, *supra* note 115, at 36.
121. Maruschak, *supra* note 117, at 2.
122. TRAVIS & VISCHER, *supra* note 115, at 36.
123. Lisa C. Schneider, *Racism, Drug Policy, and AIDS*, 113 POL. SCI. Q. 427, 443 (1998).
124. Hovenkamp, *supra* note 40, at 684.
125. Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27, 31 (1998).

intergenerational crime and poverty.[126] As the doctrine leads to the sort of pain and misery the constitutional framers sought to limit, there are compelling reasons to reject it, and move forward with the task of interpreting the Constitution. The foundational deficiencies make it unworkable as a guide for determining proportionality, and by extension, cruel and unusual punishment.

The idea of abandoning evolving standards is not entirely foreign to the Court. In the juvenile context, the Court has indicated for the first time that evolving standards and objective indicia may need to be abandoned as an approach. In *Graham v. Floria*[127] and *Miller v. Alabama*,[128] the Court found that a majority of jurisdictions permitted each of the challenged punishments, yet on both counts, the Court failed to find a national consensus. Instead, the Court emphasized that simply counting up statutes presents a "distorted view."[129] From one commentator's perspective, the *Miller* case "signals the Court's readiness to abandon Objective Indicia Analysis across all its Eighth Amendment decisions."[130]

Legal scholarship is critical of the evolving standards doctrine on both substantive and procedural grounds.[131] It is even argued that the doctrine is limited in efficacy because the Justices selectively adhere to its tenants.[132] Even when they stick to objective indicia, unfortunately, the "evolving standards of decency test does not enable the Supreme Court to strike down any of these new punishments so long as they enjoy public support, for the fact that they enjoy public support shows that they comport with current standards of decency."[133] The theoretical and practical shortcomings of the doctrine involve uncertainty

126. Western & Pettit, *supra* note 72, at nn.3 & 8.

127. 560 U.S. 48 (holding that the "Eighth Amendment prohibits imposition of life without parole sentence on juvenile offender who did not commit homicide, and State must give juvenile nonhomicide offender sentenced to life without parole meaningful opportunity to obtain release.").

128. 132 S. Ct. 2455 (2012) (holding that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments).

129. *Id.* at 2459.

130. Farrell, *supra* note 59, at 858.

131. *See generally* Bacharach, *supra* note 49; Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J 1 (2007).

132. Lain, *supra* note 131, at 6 ("The Justices do not follow doctrine in any meaningful way. Doctrine follows them.").

133. Stinneford, *Rethinking Proportionality*, *supra* note 71, at 920.

across multiple dimensions that magnify the indeterminacy and malleability of whether a punishment violates evolving standards.[134]

Proposing abandonment of the doctrine to the reader might instinctually raise the specter of what should replace evolving standards. Yet as this Article asserts, the evolving standards philosophy has led punishment law astray, and simply being rid of this faulty metric will help clean up the "mess" of Eighth Amendment jurisprudence.[135] To be certain, the task of interpretation is not insurmountable. Indeed, it was not too long ago that the Court adjudicated cruel and unusual claims before evolving standards ever fell into favor, so it is not an unimaginable task for the present. As the next section advocates, better interpretive methods and advances in science should help determine the course.

III. TOWARD NEXT-ERA PENOLOGY

> *In many ways, the use of long-term segregation needs to be reviewed. It can create or exacerbate serious psychological change in some inmates and make it difficult for them to return to the general population of a prison or to the community outside prison . . . use of this practice is best minimized, and accompanied by specific criteria for placement and regular meaningful reviews for those that are thus confined. . . . In all cases, it is important to ensure that those prisoners who are confined in segregation are monitored closely and effectively for any sign of psychological deterioration.*[136]

As this Article contends, under evolving standards, the Court abdicated its task of determining "cruel and unusual" for prison sentencing and solitary confinement. The aftermath of this hands-off approach led to a decades-long punishment binge that has become the ultimate setback for civil rights progress, which paradoxically occurred in the name of progress: "The actions and omissions of legislative bodies and executive agencies have created the impetus for judicial intervention."[137] The case for intervention is bolstered by the fact that the Constitution does not detail the proper relationship between the three branches of government with much specificity, nor does it outline the relationship between the federal government and states. Hence, "there

134. Farrell, *supra* note 59, at 877.

135. *See* Stacy, *supra* note 23.

136. JEREMY TRAVIS ET AL., NAT'L ACADEMIES PRESS, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 201 (2013), *available at* http://www.nap.edu/openbook.php?record_id=18613.

137. FLITER, *supra* note 17, at 12.

is no compelling reason why concerns about propriety and capacity should dominate the judicial function, especially if constitutional rights are being violated. It is a mistake to view each governmental branch as a separate actor with easily defined, narrowly focused functions."[138] The point is important for this work since the U.S. Sentencing Commission lies at the center of implementing a science-based approach to sentencing duration.

A. The Imperative to Interpret "Unusual"

The first step entails the Court taking on the task of interpreting "unusual" as requiring something distinct from "cruel." In the past, members of the Court have expressed doubt as to whether the word has any qualitative meaning different from "cruel,"[139] dismissed the import of the word as of minor significance,[140] described the word as "inadvertent,"[141] and most drastically, stated that it cannot be read as limiting the ban on "cruel" punishments.[142] This failure has been critiqued for defying basic statutory construction that makes the conjunctive "and" the basis for an additional elementary requirement.[143] It represents an additional restraint on government power and must not be ceded by omission. In the exceptional instances when the Court has bothered interpreting the term, it has typically understood it as an objective measure of the novelty or foreignness of a punishment.[144] From this perspective, "unusual" punishments were measured against practices of the common law.

"Unusual" lends itself to a different meaning, however, depending on how "new" punishments are defined. As one critic argues, new punishments not only consisted of those

> never seen before anywhere in the legal system, but also the application of existing punishments to a class of crimes to which they were not previously applied. A punishment such as the life sentence for petty larceny would be new in the latter sense. Treating a child or retarded person like a criminal adult would also be new and thus unu-

138. *Id.*

139. Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958).

140. Furman v. Georgia, 408 U.S. 238, 277–78 n.20.

141. *Id.* at 318.

142. *Id.* at 379.

143. *See* Stinneford, *Eighth Amendment*, *supra* note 21 at 442.

144. Stacy, *supra* note 23, at 486 ("An 'unusual' punishment is one that is out of the ordinary, one that is not regularly employed."); Stinneford, *Rethinking Proportionality*, *supra* note 71, at 968 (defining unusual as "new practices that ran contrary to long usage.").

> sual. . . . Thus 'unusual' captures some of the force of the principle of 'equality before law.'[145]

This view is less concerned with the objective understanding of which punishments were unfamiliar, and more with the subjective expectations of society. In other words, "[t]here are times when 'unusual' should not be understood to mean 'what usually does not happen,' but rather should be interpreted as 'what we think does not usually happen."[146] For example, if society believed that capital execution was never imposed on the innocent, the punishment would be unusual given society's subjective expectations.[147] In this sense, punishment would be unusual since citizens expect that judicial outcomes are based on objective interpretation of the law.[148] This view of expected application harkens to an originalist perspective, which

> asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with some legal terms of art). Thus, the original expected application includes not only specific results, but also the way that the adopting generation would have expected the relevant constitutional principles to be articulated and applied.[149]

Accordingly, punishment visited on the "despised minority" would be unusual if society believed in distributive justice. In these instances, "unusual" is not a matter of determining exactly which punishments were or were not familiar in the constitutional era, but about what society expects under the rule of law.

Here, it is crucial to notice that under either the objective or subjective meaning, imprisonment qualifies as "unusual" punishment. On the first count, in objective terms, it cannot be said that imprisonment is usual since it was uncommon, virtually unheard of as a sentence in itself, during the colonial period. In fact, it was not until the Constitution was ratified that the first jails and penitentiaries were built. Hence, imprisonment is objectively unusual, which would hold for solitary confinement, since its origins trace to the Walnut Street Jail in the 1780s.[150] On the second count, the situation is obvious since, for exam-

145. John Stinneford, *Why Must Punishment be Unusual as well as Cruel to be Unconstitutional?* UNIV. OF BUFFALO 7, http://www.acsu.buffalo.edu/~dh25/articles/WhyMustPunishmentbeCruelandUnusual.pdf (last visited Feb. 17, 2015).

146. *Id.*

147. *Id.* at 20.

148. FLITER, *supra* note 17, at 18.

149. JACK M. BALKIN, LIVING ORIGINALISM 7 (2011).

150. REITER, *supra* note 32, at 78.

ple, the great majority of drug users and distributors are white, yet the majority imprisoned for drug offenses are minority.[151]

B. Using Research to Reinterpret "Cruel" and Recalibrate the Scales

An affirmative finding that imprisonment is an unusual punishment renders critical the question of when a sentence crosses the threshold of "cruel." This Article asserts that rather than continue to tether punishment to the vagaries of the evolving standards doctrine, the Court must now do what has never been done before in American penal history—obligate federal and state governments to justify the scale of prison sentencing with scientific study. Such a stance would inaugurate a revolution in penology. As legislatures have been free of the obligation to justify sentence lengths, they have gone on to author some of the longest prison sentences in the world. It is thus long overdue to reconsider how long is too long. Even though there is a dearth of empirical research on this point, there is a need to know when imprisonment results in diminishing returns for the human psyche and ultimately for society. Although it has been decades since the Stanford Prison Experiment[152] gave a glimpse of how quickly conditions can deteriorate for "inmates" when punishment power goes unchecked, the Court has never inquired into the empirical basis for assigning a given amount of time to a crime.

To assert that punishment law in the United States has never been guided by the findings of rigorous research and study may seem radical, but it is hardly so. The primary reference point for punishment has been the common law, including punishments like the stocks, whippings, pillories, branding, banishing, and other corporal punishments. However, with the turn to incarceration beginning in the early 1800s, incarceration has become the dominant mode of corporal punishment,[153] which entailed a shift in calculus to determine punishment, since the focus was previously on how much pain was appropriate, whereas in imprisonment, the question was how much time was appropriate. In determining how long sentences should be, lawmaking has been steeped in arbitrariness with nothing close to a justification for assigning a certain amount of time for a particular crime. Still, it has

151. See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257 (2009).

152. STANFORD PRISON EXPERIMENT, http://www.prisonexp.org (last visited Feb. 17, 2015).

153. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

been several decades since one researcher noted, "[I]t is uncontested that no prisoner can endure more than 15 years without fundamental damage to his personality."[154]

Despite such admonitions, use of scientific studies plays a limited role in determining whether a punishment is "cruel" for Eight Amendment purposes. Even though the Court seeks objectivity, at times, scientific knowledge has been shunned directly by the Court, as in *Rhodes v. Chapman*,[155] which overturned a District Court's ruling that Arkansas prisons were violating the Eighth Amendment. In that case, the lower court rooted its assessment of contemporary standards in several published works by practitioners in the field that recommended more space than the double bunking permitted. Here, the Court demonstrated the instability of evolving standards since the Court flatly rejected the objective recommendations of experts in the field. Thus, even though in *Trop*, the opinion propounded that punishment should be judged "in light of the contemporary human knowledge," this promise has gone largely unfulfilled.[156]

In the context of solitary confinement, there is limited research, some of which owes to the difficulty of obtaining access to prisoners. As one researcher has noted, United States' prisons are generally not willing to allow its otherwise isolated inmates to participate in research efforts.[157] Nonetheless, there is broad consensus among mental health practitioners that deep psychological harm can result from prolonged solitary confinement,[158] with the American Bar Association defining long-term solitary confinement as longer than thirty days.[159] The American Psychological Association has further advocated that

154. Wilfried Rasch, *The Effects of Indeterminate Detention: A Study of Men Sentenced to Life Imprisonment*, 4 INT'L J. L. & PSYCHIATRY 418 (1981).

155. 452 U.S. 337 (1981).

156. Robinson v. California, 370 U.S. 660, 666 (1962) (citing Trop v. Dulles, 356 U.S. 86 (1958)).

157. Joseph Stromberg, *The Science of Solitary Confinement: Research Tells us That Isolation is an Ineffective Rehabilitation Strategy and Leaves Lasting Psychological Damage*, SMITHSONIAN (Feb. 19, 2014), http://www.smithsonianmag.com/science-nature/science-solitary-confinement-180949793/?no-ist. For a review of the literature, see SHARON SHALEV, MANNHEIM CTR. FOR CRIMINOLOGY, A SOURCEBOOK ON SOLITARY CONFINEMENT: THE HEALTH EFFECTS OF SOLITARY CONFINEMENT 9–14 (2008).

158. N.M. CTR. ON LAW & POVERTY, INSIDE THE BOX: THE REAL COSTS OF SOLITARY CONFINEMENT IN NEW MEXICO'S PRISONS AND JAILS 8 (2013); *but see* Philip Bulman et al., *Study Raises Questions About Psychological Effects of Solitary Confinement*, 2012 NIJ J. 5 (2012) (a small study that contradicted earlier findings to show "initial improvements in psychological well-being in all three groups of inmates.").

159. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS 23-1.0(o) (3d ed. 2011).

"[p]rolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates."[160]

Review of prison sentencing and solitary confinement sits in stark contrast to the Court's use of research in the death penalty context. Here, the Court has been more resourceful in its reliance on research, which provided a foundation for the prohibition of capital execution of minors[161] and the mentally retarded.[162] The Court must embrace a similar approach for its prison sentencing jurisprudence, which thus far has simply assumed that legislation reflects humane decency without seriously considering all the leaps of faith required. Although the modern hands-off approach to prisons has likely prevented the Court from investigating the basic premises of imprisonment as simply a matter of doing one's "time," it is time to update punishment law and bring it in line with scientific and technological innovations. As this Article has shown, a punishment can be "unusual" and still constitutional. This leaves the door wide open for innovation—as long as the punishment is not also cruel.

Deciding when a sentence of time crosses the threshold of being cruel is not a job for which the Court is particularly well-suited, in part because Supreme Court Justices rarely have practical experience with imprisonment. Perhaps no Supreme Court Justice has ever spent one night in jail let alone years in solitude, yet many have been willing to rubberstamp some of the most dreadful sentences, even for nonviolent offenses. Recreating jurisprudence and the administration of punishment with a research-based approach would be unlike anything ever known in American penal history. Although it may be argued that the Federal Sentencing Commission, which created the Federal Sentencing Guidelines, relies on research to devise sentencing ranges, it is employed for greater uniformity and for helping to "eliminate wide disparity," more than justifying an amount of time for particular crime.[163]

This Article calls for something more foundational—to revise the sentencing duration schemes in conversation with scientific

160. *Position Statement on Segregation of Prisoners with Mental Illness*, AM. PSYCHIATRIC ASS'N (Apr. 2013), http://www.dhcs.ca.gov/services/MH/Documents/2013_04_AC_06c_APA_ps2012_PrizSeg.pdf.

161. *See* Roper v. Simmons, 543 U.S. 551 (2005).

162. Atkins v. Virginia, 536 U.S. 304 (2002).

163. U.S. SENTENCING COMM'N, 2014 GUIDELINES MANUAL, *available at* http://www.ussc.gov/guidelines-manual/2014/2014-chapter-1#1a1.

knowledge. Research is a necessary ingredient to help create punishment laws that accord with humane decency to the best of human knowledge, not nine justices' speculations about society. This call to justify sentencing, then, is different from the classical theories of punishment, which justify punishment in the abstract. Here, the need is to tie prison sentencing and solitary confinement to knowledge about human psychology and when punishment crosses the threshold to torture. As the final arbiter of what constitutes constitutional punishment, the Court should mandate evidence-based punishment as the litmus for passing constitutional muster. This would in effect be a mandate to the U.S. Sentencing Commission to rescale sentencing guided by scientific study.

The determination of what exactly constitutes "research" or "scientific study" is not an easy task, but there are tools available. These include methods to help select and assess what counts as evidence as a means of avoiding intractable "battle of the experts" difficulties or situations where private interests fund their own studies. As a political means of implementing this mode, this Article advocates a two-tiered method of scaling sentencing in accord with available and future research.

The Commission should employ meta-analysis as an immediate mechanism for determining sentence lengths. As a method, meta-analysis contrasts and combines results from different studies as a means of identifying patterns among studies, sources of disagreement among studies, and other relationships that are discernible in the context of multiple studies.[164] This approach arguably offers the most objective way to proceed with interpreting "cruel" and would be a giant step toward aligning imprisonment practices with the dictates of objectivity. Although this method is not free from criticism, the major critiques are known and can be monitored for optimal understanding of what constitutes the scientific middle ground.[165]

As a long-term strategy for scaling prison and solitary sentences, triangulation may be the most objective approach to future research. This method facilitates validation of data through cross-referencing of two or more sources, and refers to multiple research methodologies studying the same phenomenon. "The basic idea underpinning the con-

164. SANDER GREENLAND & KEITH O'ROURKE, "META-ANALYSIS" IN MODERN EPIDEMIOLOGY 652 (3d ed. 2008).

165. *See e.g.*, Jeffrey D. Scargle, *Publication Bias: The "File-Drawer Problem" in Scientific Inference*, 14 J. SCI. EXPLORATION 91, 94–106 (2000).

cept of triangulation is that the phenomena under study can be understood best when approached with a variety or a combination of research methods. Triangulation is most commonly used in data collection and analysis techniques, but it also applies to sources of data. It can also be a rationale for multiple investigators in team research."[166] The approach aims to raise confidence when different studies lead to similar results and aims to alleviate problems that attend research, including bias in governmental studies, dominance of large companies that can afford to pour millions of dollars annually to produce "evidence," and "cherry-picking" problems in the marshaling of evidence. Triangulation thus offers a long-term strategy that is designed specifically with objectivity as the goal as well as determining "what" constitutes valid research. As an example, the Commission might adopt a model that triangulates Department of Justice-funded research, private research, academic research, and foreign research as sources of data.

CONCLUSION

This Article attempts to explain how the judicial morass of evolving standards leads to real human suffering. The Court's embrace of evolutionary principles in its cruel and unusual jurisprudence allows full abdication of the duty to render a just interpretation of the Eighth Amendment for prison sentencing purposes, and facilitates the greatest rise in imprisonment the United States has ever known. The power to incarcerate became a matter of legislative fiat with only the sky as the limit. In these decades, the Court has engaged in pseudo-science on multiple levels, including the embrace of progressive evolutionary theory, its application to society, and its means of ascertaining the content of social norm. It is past time for the Court to relinquish these machinations and look to scientific study and research for the objectivity it has been seeking all along.

Exactly what model of social organization should supplant the current adherence to social Darwinism is uncertain, but whatever that understanding is, it must have a more skeptical countenance than the rosy-red teleology of evolving standards. It should be particularly vigilant in matters related to legal punishment since the power to punish has been described as "protean force that is eminently fertile and must

166. Paulette Rothbauer, *Triangulation*, *in* THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS 892–94 (Lisa Given ed., Sage Publications 2008).

be given pride of place in the study of contemporary power."[167] From this principle, it is clear that the criminal justice system is always at risk of appropriation to the ends of power rather than justice. Moreover, making the determination is fraught with subjectivity, which can be legitimated only when "rule is governed by articulable and reproducible objective standards."[168] This reality makes judicial review of punishment an absolute, ongoing necessity. Yet, for far too long the Court has been preoccupied with death penalty cases premised on "death is different" assumptions, despite that capital convicts represent but a tiny fraction of the mammoth prison population, which omits "99.999% of offenders from the protection of the Cruel and Unusual Punishments Clause."[169] Hence, while the bulk of defendants are subject to seemingly endless imprisonment and solitary confinement, the Court, rather than watching the watchers, has had its eye on a different creature.

Moving forward will entail consciousness of the fact that punishment power is unlike others wielded by the government, and as this Article has demonstrated, left unchecked, it can wreak havoc over individual lives and promote underdevelopment among underdeveloped communities. Inequitable distribution of punishment, aside from betraying the notion of humane decency, more basically shows evolutionary ideology as simply that—ideology—one whose time has come.

167. Loic Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25 SOC. F. 197, 204 (2010).

168. Margaret Raymond, *"No Fellow in American Legislation": Weems v. United States and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 253 (2006).

169. Stinneford, *Rethinking Proportionality*, *supra* note 71, at 925.