Pain Speaks for Itself: Divorcing the Eighth Amendment from the Spirit of the Moment

BENJAMIN WHITE*

TABLE OF CONTENTS

I. INTRODUCTION 454
II. A BROAD ORIGINAL MEANING 457
III. FROM WANTON INFLICTION OF PAIN TO EVOLVING STANDARDS 462
IV. AN UNWORKABLE EVOLVING STANDARD 467
A. Evolving Standards as an Unconstitutional Trojan Horse 468
B. The Danger of Adherence to the Majority 473
1. The Fallacy of Progressive Societal Standards 474
2. Over-leniency and Judicially Mandated Comfort 478
C. Wanton and Unnecessary as a Constitutional and Practical Rule 484
1. Jones*: Enforcing the Limits of the Eighth Amendment* 485
2. Villarreal*: A Renewed Focus on Pain* 486
3. Gamble *Revisited: Same Outcome, Better Rule* 487
4. Colwell*: Avoiding Judicially Mandated Comfort* 489
V. SOLUTION 489
A. Proposed Analytical Framework 490
B. Overruling the Evolving Standards Rule 490
C. Addressing Potential Challenges 492
D. Complying with the New Rule 494
VI. CONCLUSION 495

* © 2021 Benjamin White. J.D. Candidate 2021, University of San Diego School of Law. I would like to thank Steven Smith, Warren Distinguished Professor of Law at the University of San Diego School of Law, for his guidance.

I. INTRODUCTION

Dispatch notifies police that John Doe is walking erratically down the middle of a busy street. At the scene, police quickly identify John, arrest him, and transport him to the county jail. During this initial contact, the arresting officers immediately notice John's irregular breathing, dilated pupils, pale and sweat covered face, and white saliva around his mouth. The booking process reveals John's history of substance abuse and preexisting health complications. Despite indications John will experience a dangerous and painful withdrawal process, jail staff place John in a padded cell and do not order a medical exam. John then experiences twenty-four hours of excruciating pain until the various bodily changes involved in drug withdrawals exacerbate his preexisting health condition. John begs the staff for help, but they do not call for medical assistance. When jail staff find him unconscious the following day and transport him to the hospital, it is too late. He dies a week later.[1]

Unfortunately, John's story occurs frequently in the United States, and recent trends predict future increases in contact between addicted detainees and the prison system.[2] In 2014, alcohol and drug abuse caused 8.5% of the deaths in local jails, and 1.4% of the deaths in state prisons.[3] About 25% of the country's inmates depend on or abuse opioids.[4] In California prisons, drug and alcohol overdoses increased 113% between 2015 and 2018,

---

1. *See* Villarreal v. County of Monterey, 254 F. Supp. 3d 1168, 1174–75 (N.D. Cal. 2017). This hypothetical is based on the facts of *Villarreal*, where officers detained Lara Gillis for over twenty-four hours and ignored her cries for help as she underwent medically unsupervised drug withdrawals in a county jail cell. *See id.* The withdrawal process aggravated her preexisting infection and caused lethal organ failure. *Id.*

2. *See* Michael Linden et al., *Prisoners as Patients: The Opioid Epidemic, Medication-Assisted Treatment, and the Eighth Amendment*, 46 J.L. MED. & ETHICS 252, 252 (2018). One study indicates state and federal reforms will reduce *prescription* opioid use; however, increases in *illicit* opioid use may outweigh these gains. *See* Michael Devitt, *Research Shows the Nation's Opioid Epidemic Is Far from Over*, AM. ACAD. FAM. PHYSICIANS (Feb. 20, 2019, 8:42 AM), https://www.aafp.org/news/health-of-the-public/20190220opioidprojections.html [https://perma.cc/T93W-EWTE]. Restricting prescriptions will likely cause addicts to turn to more dangerous, illicit opioids. *See id.* Without serious policy changes, annual opioid-related deaths could rise to 82,000 by 2025. *Id.* The study predicts more than 579,000 opioid-related deaths between 2016 and 2025, with 86% of these deaths attributable to illicit opioids. *Id.*

3. *See* Linden et al., *supra* note 2, at 257.

4. *See* Erick Trickey, *How the Smallest State is Defeating America's Biggest Addiction Crisis*, POLITICO (Aug. 25, 2018), https://www.politico.com/magazine/story/2018/08/25/rhode-island-opioids-inmates-219594 [https://perma.cc/FS3X-CFYT]. According to the National Institute on Drug Abuse, 65% of the American prison population has a substance use disorder. *See Criminal Justice DrugFacts*, NAT'L INST. ON DRUG ABUSE (June 2019), https://www.drugabuse.gov/publications/drugfacts/criminal-justice [https://perma.cc/7RWD-TQVH].

with much of the increase attributed to the opioid crisis.[5] When police detain an opioid addict without any treatment or monitoring, they risk subjecting the person to suffering and death.[6]

John's civil claim against the county jail would rely on a three-part legal theory: (1) the Eighth Amendment prohibits cruel and unusual punishment;[7] (2) 42 U.S.C. § 1983 provides individuals with a civil remedy when state and local governments violate a constitutional right;[8] (3) the Supreme Court in *Estelle v. Gamble* held that deliberate indifference to a serious medical need constituted cruel and unusual punishment under the Eighth Amendment.[9] John's case would hinge on whether drug addiction and withdrawals constituted a serious medical need, such that the jail's deliberate indifference to his condition violated the Eighth Amendment.[10] This Comment addresses the possible barrier to John's claim—the uncertain status of addiction as a serious medical need under the Eighth Amendment.

The Supreme Court employs a flawed framework for evaluating whether a particular state practice constitutes cruel and unusual punishment.[11] The Court's examination of a practice like forcing addicted detainees to withdraw "cold turkey" hinges on an objective question: does the practice fall below society's evolving standards of decency?[12] Some federal courts interpret

5. Megan Cassidy, *Overdoses in California Prisons Up 113% in Three Years*, S.F. CHRON. (May 5, 2019), https://www.sfchronicle.com/crime/article/Overdoses-in-California-prisons-up-113-in-three-13819811.php [https://perma.cc/XL5D-YNXF]. For more detail on the opioid crisis' increasing presence in prisons, see generally Emily Vaughn, *Opioid Addiction in Jails: An Anthropologist's Perspective*, NPR (Nov. 12, 2019, 5:00 AM), https://www.npr.org/sections/health-shots/2019/11/12/777586941/opioid-addiction-in-jails-an-anthropologists-perspective [https://perma.cc/4PTT-YVB5].

6. *See* COLUMBIA LEGAL SERVS., GONE BUT NOT FORGOTTEN: THE UNTOLD STORIES OF JAIL DEATHS IN WASHINGTON 2–3 (2019), https://columbialegal.org/wp-content/uploads/2019/05/Gone-But-Not-Forgotten-May2019.pdf [https://perma.cc/E9SX-X939].

7. U.S. CONST. amend. VIII.

8. *See* 42 U.S.C. § 1983.

9. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Pretrial detainees like John must sue under the Fourteenth Amendment's Due Process Clause; however, the court's actual legal analysis will revolve around Eighth Amendment interpretation. *See* Castro v. County of Los Angeles, 833 F.3d 1060, 1067–68 (9th Cir. 2016).

10. *See* Villarreal v. County of Monterey, 254 F. Supp. 3d 1168, 1181 (N.D. Cal. 2017).

11. *See* Atkins v. Virginia, 536 U.S. 304, 339–45 (2002) (Scalia, J., dissenting). The evolving standards of decency would uphold practices like the execution of child rapists, if a majority of states allowed the practice. *See* John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT'G REP. 87, 88 (2010).

12. *See Gamble*, 429 U.S. at 101–02.

society's standards as having sufficiently advanced to classify addiction as a serious medical need.[13] Other federal courts interpret these standards as not having sufficiently advanced.[14]

The problem with tethering Eighth Amendment jurisprudence to societal standards is twofold: (1) courts exploit the ambiguous guidelines for interpreting these standards to rule based on their own policy preferences;[15] and (2) societal standards can evolve in a direction that tolerates cruel and unusual punishments for certain detainees, or condemns practices well outside the Eighth Amendment's scope.[16] The Seventh Circuit and lower courts in the Ninth Circuit definitively placed drug addiction under Eighth Amendment protection,[17] while the Fourth, Sixth, and Eleventh Circuits repudiated this categorization.[18] Remedying the circuit split on whether addiction constitutes a serious medical condition requires more than a new deliberate indifference test.[19] The Supreme Court should place deliberate indifference to detainee addiction under Eighth Amendment protection

---

13. *See, e.g.*, *Villarreal*, 254 F. Supp. 3d at 1184 (holding drug addiction constituted a serious medical need); Hernandez v. County of Monterey, 110 F. Supp. 3d 929, 948 (N.D. Cal. 2015) (holding drug addiction constituted a serious medical need); Foelker v. Outagamie County, 394 F.3d 510, 513 (7th Cir. 2005) (holding opioid addiction constituted a serious medical need).

14. *See* Bruederle v. Louisville Metro Gov't, 687 F.3d 771, 777 (6th Cir. 2012) (finding addiction to powerful painkillers did not constitute a serious medical need); *see also* Grayson v. Peed, 195 F.3d 692, 696 (4th Cir. 1999) (finding decedent's addiction to PCP did not constitute a serious medical need, and to classify it as such "would be a startling step to take").

15. For example, compare the *Foelker* and *Bruederle* opinions, where an Obama appointee and a Bush appointee came to opposite conclusions despite very similar facts, with the *Foelker* judge sympathizing with the addict and the *Bruederle* judge sympathizing with law enforcement. *Compare Foelker*, 394 F.3d at 513 (holding drug addiction constituted a serious medical need), *with Bruederle*, 687 F.3d at 777 (holding drug addiction did not constitute a serious medical need).

16. *See* Jeffrey Omar Usman, *State Legislatures and Solving the Eighth Amendment Ratchet Puzzle*, 20 U. PA. J. CONST. L. 677, 697–98 (2018). Contemporary societal standards can condone punishments that the Founders viewed as cruel and unusual when they drafted the Eighth Amendment. *See Atkins*, 536 U.S. at 340–45 (Scalia, J., dissenting).

17. *See Foelker*, 394 F.3d at 513; *Villarreal*, 254 F. Supp. 3d at 1174; *Hernandez*, 110 F. Supp. 3d at 948.

18. *See Grayson*, 195 F.3d at 696; *Bruederle*, 687 F.3d at 777; Burnette v. Taylor, 533 F.3d 1325, 1333 (11th Cir. 2008).

19. *See* Haley Loutfy, *Health Care Behind Bars: Constructing a Uniform Deliberate Indifference Standard to Prevent the Use of Eighth Amendment as Broad Prison Reform*, 45 LINCOLN L. REV. 77, 95 (2018) (suggesting a modified deliberate indifference test). The Supreme Court could adopt the Ninth Circuit's test for evaluating serious medical needs. *See* McGuckin v. Smith, 974 F.2d 1050, 1059–60 (9th Cir. 1992). However, these tests would not solve the root problem in the Supreme Court's reliance on evolving standards of decency and could force courts to protect every medical condition under the Eighth Amendment. *See* discussion *infra* Section IV.B.2.

and simultaneously depart from its evolving standards of decency rule.[20] The historical rationale behind the Eighth Amendment supports a return to the objective question of whether wanton infliction of pain occurred, without considering whether a sufficient majority of the body politic deems a particular condition worthy of protection.[21]

This Comment will provide (1) the Eighth Amendment's original meaning with regard to passive deprivations; (2) the Supreme Court's shift from wanton and unnecessary infliction of pain to evolving standards of decency; (3) a critique of the evolving standards rule; and (4) a solution that eliminates the evolving standards rule, returns to the question of wanton and unnecessary infliction of pain, and recommends legislative reforms states should make in response.

II. A BROAD ORIGINAL MEANING

Several important historical events helped spur the Founders to create the Eighth Amendment. These events demonstrate a wider scope of potential cruel and unusual punishments than the Supreme Court initially identified in the nineteenth century.[22]

The American Founders behind the Cruel and Unusual Punishment Clause had in mind historical cases encompassing a wide range of punishments, including passive punishments that inflicted pain through deprivation.[23]

---

20. *See* Stinneford, *supra* note 11, at 89–90 (discussing how a return to the Eighth Amendment's original meaning would insulate the amendment's interpretation from volatile public opinion while effectively protecting against severe abuses in the criminal justice system). This return would also remedy the practical and constitutional issues with the Supreme Court's modern Eighth Amendment interpretation, although it would come at the expense of some protections for prison conditions. *See* Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 437 (1995).

21. *See Atkins*, 536 U.S. at 340–45 (Scalia, J., dissenting) (arguing that the Court's departure from the Eighth Amendment's original meaning necessitated the problematic evolving standards rule).

22. Courts in the nineteenth century narrowly construed the Eighth Amendment to prohibit only the worst forms of punishment. *See* Wilkerson v. Utah, 99 U.S. 130, 135–37 (1878) (finding the Eighth Amendment prohibited barbarous punishments resembling torture). However, the Founders likely considered a wide range of punishments when they penned the Eighth Amendment, including subjecting prisoners to harrowing prison conditions. *But see* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 231–37 (1999).

23. *See The HMS Jersey*, HIST. (Mar. 19, 2010), https://www.history.com/topics/american-revolution/the-hms-jersey [https://perma.cc/55E8-U77E]; Abraham Holmes,

The Founders and reformers before them identified instances of both active torture and passive neglect as particularly cruel and unusual.[24] The rationale behind the Cruel and Unusual Punishment Clause, as discussed and interpreted in *Wilkerson*, indicates the Founders sought to proscribe practices that subjected detainees to "terror, pain, or disgrace."[25]

The Supreme Court in *Trop v. Dulles* and *Gregg v. Georgia* adopted the evolving standards rule because it found the historical Eighth Amendment interpretation too rigid to sufficiently curtail government abuses.[26] However, from sixteenth century England to the time of the American founding, reformers took a wide view of potentially cruel and unusual practices, condemning and gradually eliminating those that inflicted disproportionate, arbitrary, or unnecessary pain and suffering on detainees.[27] For the purposes of this Comment, active infliction of pain generally involves torture or beatings, while passive infliction of pain generally involves deprivation and neglect.[28]

The Founders behind the Eighth Amendment considered a wide variety of practices when they proscribed cruel and unusual punishment.[29] The Tudor monarchy sanctioned numerous grotesque forms of torture and execution, including the "rack" in the Tower of London.[30] Robert Beale, an advisor

---

Judicial Power, Address Before the Massachusetts Convention on the Adoption of the Federal Constitution (Jan. 30, 1787), *reprinted in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 109, 111 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1901); LEVY, *supra* note 22, at 232–37.

24. *See* Timothy J. Compeau, *Prisoners of War*, WASHINGTON LIBR., https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/prisoners-of-war/ [https://perma.cc/2XKD-4DRG]; Abraham Holmes, *supra* note 23, at 11; LEVY, *supra* note 22, at 232–37.

25. *See Wilkerson*, 99 U.S. at 135 (discussing how English monarchs frequently interceded to remove the "ignominious and more painful" aspects of a proscribed punishment, and how this practice inspired the Eighth Amendment).

26. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) (recognizing the Eighth Amendment's scope is "not static"); Gregg v. Georgia, 428 U.S. 153, 171 (1976) (finding the Eighth Amendment prohibits more than "barbarous" punishments when interpreted in a "flexible and dynamic manner").

27. *See Wilkerson*, 99 U.S. at 135–37 (finding that at the time of the founding, American courts upheld barbaric punishments like hanging, drawing, and quartering, but increasingly declined to prescribe these sentences in a general spirit of leniency).

28. *See* International Covenant on Civil and Political Rights art. 7, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (recognizing the distinction between "torture" and "cruel, inhuman, or degrading treatment").

29. *See Wilkerson*, 99 U.S. at 135–36 (listing several "atrocities" the English committed in punishing criminals, including dragging them to the place of execution, drawing and quartering, public dissection, and burning alive; noting "it is safe to affirm" the Eighth Amendment generally targeted torture and "unnecessary cruelty").

30. Geoffrey Abbott, *Rack*, ENCYCLOPEDIA BRITANNICA (Aug. 9, 2007), https://www.britannica.com/technology/rack-torture-instrument [https://perma.cc/M8PG-9P6Y]; *see* LEVY, *supra* note 22, at 234.

to King James I, condemned royal use of the rack, calling the practice "cruel, barbarous, contrary to law, and unto the liberty of English subjects."[31] In 1615, the Court of King's Bench declared that throwing a man into a dungeon with no bed or food for criticizing an officer of the crown represented an "unlawful or extreme" punishment.[32] In its condemnation of depriving the man of food and water, the Court of King's Bench acknowledged that passive cruelty inflicts just as much pain and suffering as active cruelty, and should be similarly protected against.[33]

The cruel and unusual language in the English Bill of Rights may have referenced the actions of Lord Chief Justice George Jeffreys, who notoriously sentenced 841 prisoners to slavery in the West Indies for no less than ten years.[34] The case of Titus Oates similarly influenced the Cruel and Unusual Punishment Clause.[35] As punishment for Oates's act of perjury, the English court stripped Oates of his religious title, fined him 2,000 marks, ordered him to be whipped continuously as he walked three and a half miles, then placed in the stocks four times every year, and imprisoned for life.[36] When Parliament subsequently debated and upheld his sentence in 1689, the dissenting lords described the punishment as barbarous, inhuman, unchristian, and unjust.[37] Parliament then drafted the punishment provision in the

31. LEVY, *supra* note 22, at 232 (quoting 1 THE LIFE AND ACTS OF JOHN WHITGIFT, D.D. 402 (John Strype ed., 1792)).

32. *Id.* In another contemporary case, English authorities arrested a man for murder and held him in a dungeon without food or light and forced him to lie in a coffin. ARTHUR GRIFFITHS, THE CHRONICLES OF NEWGATE 181 (1884).

33. *See* LEVY, *supra* note 22 at 232. In the 1615 case *Hodges v. Humkin*, the King's Bench applied the Magna Carta's prohibition on the "malicious kind of imprisonment," reflecting a longstanding concern with prison deprivations dating back to the thirteenth century. *See* Hodges v. Humkin (1615) 80 Eng. Rep. 1015, 1016; 2 Bulstrode Rep. 139, 140. The King's Bench took issue with Hodges's being "thrown into a dungeon, and so to be there kept, without any bed to lie on, or any bread or meat to eat." *Id.*

34. *See* LEVY, *supra* note 22, at 234. Jeffreys handed down both the enslavement and Oates judgments, and his draconian views on criminal punishment were widely publicized. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 854–57 (1969); *see also* LEVY, *supra* note 22, at 234.

35. *See* LEVY, *supra* note 22, at 236. Titus Oates falsely accused several Catholic clergymen of treason, resulting in their executions. *Id.* He subsequently stood trial for perjury, where the court could not issue a death sentence because the perjury was not a capital offense. *Id.* The dissenters in the House of Lords who sought to overturn the sentence made the first recorded use of "cruel and unusual punishment" to describe Oates's sentence. *See* Granucci, *supra* note 34, at 859.

36. *See* LEVY, *supra* note 22, at 236–37.

37. *Id.* at 237. Levy argues the Oates case most likely influenced the Cruel and Unusual Punishment Clause because Parliament debated the case the same year it passed

English Bill of Rights that same year.[38] This wide variety of punishments informed Parliament's drafting of the cruel and unusual clause, the direct precursor to the Cruel and Unusual Punishment Clause in the Eighth Amendment.[39]

The proposed American Constitution endeavored to create a strong central, federal government with limited powers.[40] At the Massachusetts Ratifying Convention, Abraham Holmes criticized the new government's ability to create and punish federal crimes without restraints preventing it from "inventing the most cruel and unheard-of punishments" that would make "racks and gibbets" seem mild in comparison.[41] Holmes referenced Tudor England with "racks and gibbets," and made another historical reference to the "diabolical" Spanish Inquisition.[42] The Spanish Inquisition began in 1478 and endured through the time of the American founding.[43] Spanish law forbade drawing blood and mutilation, thus torturers alternatively inflicted pain by pulling prisoners' arms with ropes until they dislocated, forcing prisoners to ingest water, and stretching them on the rack.[44] The inquisitors designed these techniques to inflict pain without permanently damaging the victim's body.[45] Holmes's invocation of the Spanish Inquisition's

---

the English Bill of Rights. *Id.* In *Weems v. United States*, the Supreme Court recognized the influence of the Oates case on the Eighth Amendment, arguing the amendment's original scope and power "will be found portrayed in the reasons assigned by the members of the House of Lords who dissented against two judgments for perjury entered in the King's bench against Titus Oates." 217 U.S. 349, 390 (1910) (White, J., dissenting) (citing 12 A COMPLETE COLLECTION OF STATE TRIALS 447 (T.B. Howell ed., 1812)).

38. *See* LEVY, *supra* note 22, at 237.

39. *See Cruel and Unusual Punishments*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-8/cruel-and-unusual-punishments [https://perma.cc/J5HV-N64N] ("It is clear from some of the complaints about the absence of a bill of rights including a guarantee against cruel and unusual punishments in the ratifying conventions that tortures and barbarous punishments were much on the minds of the complainants, but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.").

40. *See* Holmes, *supra* note 23, at 111.

41. *Id.*

42. *Id.*

43. Edward A. Ryan, *Spanish Inquisition*, ENCYCLOPEDIA BRITANNICA (May 28, 2015), https://www.britannica.com/technology/rack-torture-instrument [https://perma.cc/WDH2-A2RK].

44. *See* RAFAEL SABATINI, TORQUEMADA AND THE SPANISH INQUISITION: A HISTORY 106–07, 134–35, 190 (2003). The Inquisition followed a grotesque political theory that pain begets loyal subjects: "The Inquisition and its procedures look, above all, like a system of social control. Nothing seems more coercive than raw power, exerted by means of pain. Pain influences people effectively; it rams the collective will down the throat of its victims." ARIEL GLUCKLICH, SACRED PAIN: HURTING THE BODY FOR THE SAKE OF THE SOUL 172 (2001).

45. *See* SABATINI, *supra* note 44, at 190.

torture practices indicates the Founders understood the Constitution should protect detainees from all forms of torture.

British prison ships during the Revolutionary War represented the most recent example of cruel and unusual punishment for the Founders. An estimated 11,000 American prisoners died aboard decommissioned British ships during the Revolutionary War, primarily from disease and malnutrition.[46] Under these conditions, prisoners aboard the HMS Jersey died at a rate of twelve per night.[47] One prisoner who spent two years aboard a British prison ship wrote to his family, "[c]ould I draw the curtain from before you; there expose to your view a lean Jaw. [M]ortal hunger laid his skinny hand and whet to keenest Edge his stomach cravings, surrounded with tattered garments, Rotten Raggs close beset with unwelcomed vermin."[48] In denying these detainees food, sanitation, and medical care, the British subjected them to daily agony through systematic deprivation.[49]

George Mathews served in the Continental Army until his capture and imprisonment in the HMS Jersey.[50] Mathews survived his imprisonment and eventually attended Georgia's convention to ratify the U.S. Constitution.[51] The suffering and death from designed neglect on the prison ships made a lasting impression in the minds of the Founders from Mathews to George Washington.[52] Washington led negotiations to free prisoners of war aboard British prison ships and personally warned a British general about the inhumane conditions.[53] The massive loss of life and horrific experiences in the bellies of British prison ships provided the Founders with ample

46. *See The HMS Jersey*, *supra* note 23 (describing British prison ships as "[o]ne of the most gruesome chapters in the story of America's struggle for independence from Britain").

47. *See id.*

48. HARRY R. STILES, LETTERS FROM THE PRISONS AND PRISON-SHIPS OF THE REVOLUTION 11 (1865).

49. *See, e.g.*, *id.*

50. *See* G. Melvin Herndon, *George Mathews, Frontier Patriot*, 77 VA. MAG. HIST. & BIOGRAPHY 307, 308 (1969).

51. *See* GEORGE R. LAMPLUGH, POLITICS ON THE PERIPHERY: FACTIONS AND PARTIES IN GEORGIA, 1783–1806, at 64–65 (1986).

52. *See* Compeau, *supra* note 24.

53. *Id.* George Washington warned the British general that "[o]bligation arising from the Rights of Humanity, and claims of Rank are universally binding, and extensive . . . ." *Id.* (quoting Letter from George Washington to Thomas Gage, *in* 3 GEORGE WASHINGTON PAPERS 4 (Richard Varick ed., Aug. 11, 1775), https://www.loc.gov/resource/mgw3e.001/?sp=4 [https://perma.cc/55KD-8DDW].

motivation to prohibit cruel and unusual punishment, in its active and passive forms.[54]

III. FROM WANTON INFLICTION OF PAIN TO EVOLVING STANDARDS

Before the Supreme Court's adoption of the evolving standards rule in 1958, the Court construed the Cruel and Unusual Punishment Clause of the Eighth Amendment to protect against the wanton infliction of pain and suffering.[55] These earlier cases relied on the Eighth Amendment's history as a prohibition on torture and practices that resemble torture.[56] During the latter half of the twentieth century, the Supreme Court decided the Eighth Amendment should protect inmates from all possible abuses, as opposed to only those involving severe pain or risk of death.[57]

An 1852 Utah statute provided that persons convicted of capital offenses could be shot to death.[58] In 1878, the Supreme Court evaluated whether the Eighth Amendment's proscription on cruel and unusual punishment rendered that statute unconstitutional.[59] Ultimately, the Court upheld the state's use of a firing squad to execute capital offenders, but it took the opportunity to opine on the original meaning and spirit behind the Cruel and Unusual Punishment Clause.[60] While common law provided for many severe punishments at the time of the American founding, contemporary courts often declined to carry them out.[61] Therefore, the Cruel and Unusual

---

54. At Virginia's ratifying convention, Patrick Henry warned that without a prohibition on cruel and unusual punishment, Congress could "introduce the practice of France, Spain, and Germany of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government that they must have a criminal equity . . . ." *See* Patrick Henry, Speech Before Virginia Ratifying Convention (June 5, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS OF THE ADOPTION OF THE FEDERAL CONSTITUTION 299, 301 (Jonathan Elliot ed., 1827), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1907/Elliot_1314-03_EBk_v6.0.pdf [https://perma.cc/DE4Y-3LRF].

55. *See* Bukowski, *supra* note 20, at 422–23.

56. *See, e.g.*, *In re* Kemmler, 136 U.S. 436, 447 (1890) (finding punishments violated the Eighth Amendment when they involved torture or a lingering death).

57. *See* Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

58. *See* Wilkerson v. Utah, 99 U.S. 130, 130 (1878).

59. *Id.* In *Wilkerson*, the Court confined its analysis to the constitutionality of the manner of inflicting death, and not the death penalty itself. *See* Bukowski *supra* note 20, at 423.

60. *Wilkerson*, 99 U.S. at 135–37. After *Wilkerson*, Utah used the firing squad for executions for 125 years, abandoning the practice in 2004. *See Utah Brings Back Firing Squad Executions*, NPR (Apr. 5, 2015 7:15 PM), https://www.npr.org/2015/04/05/39 7672199/utah-brings-back-firing-squad-executions-witnesses-recall-the-last-one [https://perma.cc/W4TK-U36A]. Utah reinstated the firing squad in 2015, becoming the only state in the United States to employ the method of execution. *Id.*

61. *See Wilkerson*, 99 U.S. at 135.

Punishment Clause generally proscribed any unnecessarily cruel practices that inflict "terror, pain, or disgrace."[62] "[T]error, pain, or disgrace" encompass the wide range of potential cruel and unusual punishments indicated in the clause's conception.[63] The Court did not, however, tether its analysis to any notions of evolving societal decency.[64] Even when the Court expanded Eighth Amendment protection in 1910 to include punishments disproportionate to the underlying crime, it relied on the amendment's historical meaning and precedent caselaw.[65]

The evolving standards rule permits courts to interpret the Eighth Amendment in a "flexible and dynamic manner" that conforms to progressing societal attitudes toward a particular punishment.[66] The Supreme Court first invoked the evolving standards rule with regard to the Eighth Amendment in *Trop*.[67] Here, the Court considered whether denationalization constituted cruel and unusual punishment.[68] A military court convicted the petitioner of desertion and removed his American citizenship, pursuant to a federal statute.[69] The Court found denationalization disproportionately

62. *Id.*

63. *Id.* at 135–36. While later courts could have broadly interpreted the "terror, pain, or disgrace" from *Wilkerson*, they maintained a narrow interpretation focused on particularly barbarous practices. *See In re* Kemmler, 136 U.S. 436, 447 (1890).

64. *See Wilkerson*, 99 U.S. at 135–37.

65. *See* Weems v. United States, 217 U.S. 349, 371–72, 375–76 (1910).

66. Gregg v. Georgia, 428 U.S. 153, 171 (1976). The evolving standards rule permitted the Court to apply constitutional principles "to a much wider set of circumstances than those which first gave rise to those principles." Bukowski *supra* note 20, at 423.

67. *See* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). The Court determined the Eighth Amendment's limited language necessitated an adaptable meaning that could change over time and not remain static. *Id.* at 101. One commentator later characterized this evolving, adaptable interpretation of the Eighth Amendment as "an old, simple-minded Whig view that human history reflects progressive moral development." Eric Posner, *The Eighth Amendment Ratchet Puzzle in* Kennedy v. Louisiana, SLATE (June 25, 2008, 11:06 AM), https://slate.com/news-and-politics/2008/06/the-eighth-amendment-ratchet-puzzle-in-kennedy-v-louisiana.html [https://perma.cc/4MEX-BSCB].

68. *See Trop*, 356 U.S. at 87. Denationalization is the administrative or legal practice of stripping an individual of his or her citizenship involuntarily. *Denationalization*, BLACK'S LAW DICTIONARY (11th ed. 2019).

69. *See Trop*, 356 U.S. at 87–88. The petitioner escaped from a military prison on an American military base in Morocco during World War Two. *Id.* at 87. He attempted to travel toward Casablanca, Morocco, and voluntarily surrendered himself to passing American military personnel. *Id.*

punished the crime of desertion.[70] The Court did not mention the broad historical condemnation of disproportionate punishments, which did in fact inform the original rationale behind the Cruel and Unusual Punishment Clause.[71] According to the *Trop* opinion, the Eighth Amendment precludes denationalization for desertion cases because the amendment's interpretation should conform to society's evolving standards and not remain static.[72]

Eighteen years after *Trop*, the Supreme Court declared in *Gregg* that the Eighth Amendment could eliminate any punishment that did not conform to the evolving standards of decency.[73] Here, the Court considered a defendant's appeal of his death penalty sentence for armed robbery.[74] The evolving standards rule required that any analysis of cruel and unusual punishment should objectively incorporate the "public attitude toward a given sanction."[75] The standards of decency permitted the death penalty as a constitutional punishment, given contemporary legislation authorizing the death penalty in thirty-five states, referenda upholding the practice, the frequency of jury death penalty verdicts, and public opinion polling.[76]

Expanding the evolving standards rule in *Gregg*, the Supreme Court simultaneously recognized that many punishments unavoidably involve pain, and these punishments are permissible under the Eighth Amendment provided that their infliction of pain was not unnecessary and wanton.[77]

---

70. *Id.* at 101.

71. *Id.* at 99–100. The Court advocated an evolving standard because historical precedent narrowly confined the Eighth Amendment protections to punishments resembling torture. *Id.* However, the English Parliament condemned Titus Oates's punishment primarily because it *disproportionately* punished perjury, and this condemnation likely inspired the Cruel and Unusual Clause. *See* LEVY, *supra* note 22, at 236–37. Condemnation of punishments for their asymmetry to the crime committed, as opposed to the pain they entailed, hails back to the Magna Carta in medieval England. *See* Granucci, *supra* note 34, at 845–46.

72. *See Trop*, 356 U.S. at 100–01.

73. *See* Gregg v. Georgia, 428 U.S. 153, 172–73 (1976) ("[T]he Eighth Amendment has not been regarded as a static concept. . . . [A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.").

74. *See id.* at 158.

75. *Id.* at 173. In *Gregg*, the court relied on state statutes, state referenda, jury verdicts, and public opinion polls to discern the public attitude. *Id.* at 179–82. In *Trop*, this analysis also incorporated international acceptance of a practice. *See Trop*, 356 U.S. at 103.

76. *See Gregg*, 428 U.S. at 179–82. After the Supreme Court temporarily struck down the death penalty schemes of every state in *Furman*, thirty-five states enacted statutes formally authorizing the practice for various offenses to protect its use. *Id.* at 179–80. The Court also cited Gallup polls indicating 59% of Americans supported the death penalty. *Id.* at 181 n.25. According to Gallup, support for the death penalty hit an all-time low of 40% around 1967, but grew over 19% during the subsequent decade. *See Death Penalty*, GALLUP, https://news.gallup.com/poll/1606/death-penalty.aspx [https://perma.cc/PSU9-A5BL]. Today, 56% of Americans favor the death penalty for convicted murderers. *Id.*

77. *See Gregg*, 428 U.S. at 173.

In *Gregg*, the Court referenced Justice Burger's dissent from *Furman v. Georgia* in arguing cruel and unusual punishments "involve the unnecessary and wanton infliction of pain."[78] However, evolving standards of decency should inform the necessity of the practice.[79] The original dissenting opinion from Justice Burger in *Furman* provided further that the Eighth Amendment prohibits any punishment that resembles torture in its extreme cruelty.[80]

In *Gamble*, the Court considered whether a prison's lack of medical attention to a prisoner's back injury constituted cruel and unusual punishment.[81] First, the Eighth Amendment could apply to deprivations suffered during imprisonment apart from the specific sentence.[82] Second, the evolving standards of decency rule should determine whether the prison violated the prisoner's Eighth Amendment right when it deliberately ignored his medical complaints.[83] Here, deliberate indifference to back pain did violate the evolving standards of decency because twenty-two states had statutes providing for a standard of medical care for inmates.[84] *Gamble* did not cite contemporary public opinion polls, jury verdicts, or state referenda.[85]

After *Gamble*, the Supreme Court held a wide variety of practices constituted deliberate indifference and violated the Eighth Amendment.[86] *Wilson v.*

78. *Id.* (citing Furman v. Georgia, 408 U.S. 238, 392–93 (1972) (Burger, C.J., dissenting)).

79. *Id.*

80. *See Furman*, 408 U.S. at 392–93 (Burger, C.J., dissenting).

81. *See* Estelle v. Gamble, 429 U.S. 97, 98 (1976). The plaintiff, an inmate of the Texas Department of Corrections, sustained an injury during a "prison work assignment." *Id.* at 98.

82. *See id.* at 103–04.

83. *Id.* at 106 (holding deliberate indifference to serious medical needs represented cruel and unusual punishment). The Court also noted medical malpractice did not amount to an Eighth Amendment violation unless the actor was deliberately indifferent and the medical need was serious. *Id.* Deliberate indifference is synonymous with recklessness or wantonness, requiring a conscious disregard of a known risk. *See* Farmer v. Brennan, 511 U.S. 825, 837–38 (1994).

84. *See Gamble*, 429 U.S. at 103 n.8. The regulations in a minority of states sufficed to establish a new standard of decency with regard to prison conditions. *See id.*

85. *See id.* at 103–04.

86. *See* Helling v. McKinney, 509 U.S. 25, 35 (1993) (finding that exposure to tobacco smoke constituted cruel and unusual punishment); Wilson v. Seiter, 501 U.S. 294, 296 (1991) (holding overcrowding, excessive noise, and unsanitary conditions constituted cruel and unusual punishment, which did not require any personal, physical injury); Hutto v. Finney, 437 U.S. 678, 682–83 (1978) (holding that overcrowding, lowered food rations, the mixing of sick and healthy inmates, and general maltreatment, constituted cruel and

Seiter rejected the idea that the Eighth Amendment only applied to the wanton infliction of *pain*.[87] Now, painless conditions like unsanitary and overcrowded prison cells or exposure to tobacco smoke could constitute cruel and unusual punishment.[88] These cases rested on the assertion in *Gamble* that societal standards could mature and place various medical conditions under the Eighth Amendment umbrella.[89]

Beginning in the 1970s, American society soured on the idea of lenience toward drug addiction, as manifested in public opinion and legislation.[90] Few states elected to provide formal detoxification facilities, procedures, and dedicated staff for addicted detainees.[91] Given this sustained trend away from lenience, and the lack of legislation providing for accommodation of addicted detainees, several circuit courts remain reluctant to categorize addiction as a serious medical need, while the Supreme Court has not ruled on the topic.[92]

In the 1990s, pharmaceutical companies and the medical community began to aggressively prescribe pain medication.[93] Patients developed intense addictions to these medications, and the medical community failed to address

---

unusual punishment); Erickson v. Pardus, 551 U.S. 89, 89–90 (2007) (finding a prison violated the Eighth Amendment when it stopped an inmate's hepatitis C treatment).

87. *See Wilson*, 501 U.S. at 305–06 (holding that deliberate indifference to overcrowding, excessive noise, insufficient locker space, inadequate heating and cooling, inadequate ventilation, unclean and inadequate restrooms, and unsanitary food preparation, could constitute cruel and unusual punishment).

88. *See id.*; *Helling*, 509 U.S. at 35.

89. *See Gamble*, 429 U.S. at 103–04.

90. *See War on Drugs*, HIST. (Dec. 17, 2019), https://www.history.com/topics/crime/the-war-on-drugs [https://perma.cc/2TH4-PPQR]. In 1971, President Richard Nixon called drug abuse "public enemy number one." *Id*. Contemporary Gallup polling found 48% of Americans identified drugs as a serious problem. Jennifer Robison, *Decades of Drug Use: Data From the '60s and '70s*, GALLUP (July 2, 2002), https://news.gallup.com/poll/6331/decades-drug-use-data-from-60s-70s.aspx?version=print [https://perma.cc/UXZ5-K4NE]. Subsequent measures involved increased funding for drug enforcement during the Nixon Administration, and mandatory sentencing guidelines during the Reagan Administration. *See War on Drugs*, *supra*. The United States still actively combats drugs, particularly opioid addiction. *See* Linden et al., *supra* note 2, at 252.

91. *See* Linden et al., *supra* note 2, at 252. In 2016, Rhode Island became the first state to enact a medication-assisted treatment program for opioid-addicted detainees. *Id.* at 253. Connecticut and Vermont subsequently enacted similar programs. *Id.*

92. *Compare* Foelker v. Outagamie County, 394 F.3d 510, 513 (7th Cir. 2005) (finding heroin addiction and withdrawal constituted a serious medical need such that deliberate indifference toward them was a form of cruel and unusual punishment), *with* Bruederle v. Louisville Metro Gov't, 687 F.3d 771, 777 (6th Cir. 2012) (finding addiction to powerful painkillers did not constitute a serious medical need).

93. *See What Is the U.S. Opioid Epidemic?*, U.S. DEP'T HEALTH AND HUM. SERVS., https://www.hhs.gov/opioids/about-the-epidemic/index.html [https://perma.cc/9ZNZ-J722] (last updated Sept. 4, 2019).

over-prescription and fraud.[94] This phenomenon combined with other factors, such as economic depression in certain communities and the availability of illicit opioids like heroin, to kill over 42,000 Americans in 2016 alone.[95] The opioid crisis will likely increase in severity, despite the Department of Health and Human Services (DHHS) classifying the crisis as a public health emergency in 2017.[96] DHHS estimated 10.3 million Americans abused opioids in 2018, while 130 Americans die from an opioid overdose every day.[97] Withdrawal symptoms often begin within twenty-four hours after the last dose, and range from discomfort and vomiting, to high blood pressure,[98] to death when they exacerbate a preexisting condition or cause the addict to commit suicide.[99] As prisons and jails struggle to accommodate increasing numbers of addicted detainees, more cases like John's will arise, necessitating a constitutionally sound and practical Eighth Amendment analysis to adjudicate them.

IV. AN UNWORKABLE EVOLVING STANDARD

The evolving standards rule presents two problems: (1) courts use the rule to disguise their own policy preferences as constitutional interpretation, coming to different conclusions when analyzing the same practice under the Eighth Amendment;[100] and (2) societal standards can evolve in a direction that tolerates cruel and unusual punishments for certain detainees, or condemns practices well outside the Eighth Amendment's scope.[101]

---

94. *See* SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC 137–38 (2015).

95. *See What is the U.S. Opioid Epidemic?*, *supra* note 93.

96. *See* Devitt, *supra* note 2 (finding increasing illicit opioid use may outweigh gains made from policies restricting prescription opioids); *What is the U.S. Opioid Epidemic?*, *supra* note 93 (declaring a public health emergency in 2017).

97. *What is the U.S. Opioid Epidemic?*, *supra* note 93.

98. *See Withdrawing from Opiates and Opioids*, HEALTHLINE, https://www.healthline.com/health/opiate-withdrawal [https://perma.cc/95DN-PRJ6] (last updated July 12, 2019).

99. *See* Estate of Abdollahi v. County of Sacramento, 405 F. Supp. 2d 1194, 1200 (E.D. Cal. 2005). The decedent in *Abdollahi* suffered from opioid withdrawals and committed suicide in his cell after a lapse in observation. *Id.*

100. *Compare* Foelker v. Outagamie County, 394 F.3d 510, 513 (7th Cir. 2005) (finding addiction constituted a serious medical need), *with* Bruederle v. Louisville Metro Gov't, 687 F.3d 771, 777 (6th Cir. 2012) (finding addiction did not constitute a serious medical need).

101. *See* Usman, *supra* note 16, at 697–711. Additionally, contemporary societal standards can condone punishments that the Founders viewed as cruel and unusual when

A. Evolving Standards as an Unconstitutional Trojan Horse

The Court provides inconsistent methods for ascertaining and applying society's standards in Eighth Amendment cases.[102] The seventy years of evolving standards cases since *Trop* reveal a pattern. Throughout these cases, the Court chooses varying indicators of societal standards to arrive at its desired conclusion, or ignores the indicators altogether and relies on its own independent judgment.[103] In this way, the evolving standards rule allows the Supreme Court, and lower federal courts, to substitute their own policy preferences under the guise of constitutional interpretation. Therefore, the evolving standards rule resembles a Trojan horse, disguising policy decisions as actual constitutional interpretation.[104] The Supreme Court supplants Congress's role as a policymaking body when it makes policy decisions without a precedential, statutory, or constitutional basis.[105]

Before *Trop*, Eighth Amendment interpretation did not invoke contemporary societal standards of decency.[106] When the Court handed down the *Trop*

---

they drafted the Eighth Amendment. *See* Atkins v. Virginia, 536 U.S. 304, 340–45 (2002) (Scalia, J., dissenting).

102. *See* discussion *infra* Section IV.A. Supreme Court rulings indicate a practice can fall below society's standards where a majority of states prohibit the practice, but also when a small minority of states prohibit the practice, indicating "how far beyond any cognizable constitutional principle the Court has reached to ensure that its own sense of morality and retributive justice pre-empts that of the people and their representatives." Graham v. Florida, 560 U.S. 48, 124 (2010) (Thomas, J., dissenting).

103. Stinneford, *supra* note 11, at 87 ("The evolving standards of decency test is inherently majoritarian, and is thus a poor protection for criminal offenders when public opinion turns against them. Unfortunately, the Supreme Court has effectively replaced this test with an unfettered reliance on its own 'independent judgment,' with no external constitutional standard to guide its decisions."). In *Graham v. Florida*, the Court declined to use the evolving standards rule and based its authority on its own independent judgement. 560 U.S. at 61–62.

104. *See* Stinneford, *supra* note 11, at 87. Supreme Court cases like *Graham* and *Atkins* highlight the shift toward full reliance on independent judgment, without any guiding principles or doctrines. *See id. Colwell* provides an example of how the Trojan horse method has seeped into the lower courts. *See* Colwell v. Bannister, 763 F.3d 1060, 1063 (9th Cir. 2014). Here, the Ninth Circuit invoked the evolving standards rule without actually analyzing society's standards, then concluded the Eighth Amendment required medical intervention for an inmate's painless, benign cataract. *See id.* at 1063,1066–68.

105. *See* Loutfy, *supra* note 19, at 78. The Constitution does not exist to "address all ills in our society." Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting). The Eighth Amendment should not function as a "National Code of Prison Regulation." *Id.*

106. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) (asserting for the first time in Supreme Court jurisprudence that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"). Before *Trop*, cruel and unusual punishments were those that disproportionately punished an offense, inflicted pain in a manner resembling torture, or caused death in a barbaric way. *See* Wilkerson v. Utah, 99 U.S. 130, 135 (1878).

decision in 1958, it contained no references to domestic opinion polls, jury verdicts, or recent legislation.[107] Instead, the Court focused on international standards, where only two out of eighty-four countries imposed denationalization as a penalty for desertion.[108] The Court claimed the international community almost unanimously rejected denationalization for any crime, but only cited countries that used the penalty for desertion.[109] This formula looks internationally to establish contemporary standards of decency, examining how other countries almost unanimously treat the specific crime.[110]

After *Trop*, the Supreme Court declined to wield the evolving standards of decency as an effective rule, and narrowly applied the *Trop* holding in other denationalization cases.[111] Between *Trop* (1958) and *Gregg* (1976), the Court only wielded the evolving standards rule once, holding in *Witherspoon v. Illinois* that the practice of selecting jurors based on their approval of the death penalty violated the Eighth Amendment.[112] Here, one domestic public opinion poll indicated 47% of Americans opposed the death penalty for convicted murderers, while 43% favored the practice.[113] The Eighth Amendment's modern interpretation depended on the evolving standards of decency, and public opinion polls demonstrated society's

107. *See Trop*, 356 U.S. at 101–04 (finding denationalization constituted "the total destruction of the individual's status in organized society").

108. *Id.* at 103. Out of eighty-four countries, only the Philippines and Turkey punished desertion with denationalization. *Id.*

109. *Id.* at 102 ("The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.").

110. *See id.* at 102–03.

111. *See* Nishikawa v. Dulles, 356 U.S. 129, 136–37 (1958) (holding the United States could not withhold citizenship from a former member of the Japanese army without proving voluntary service); Mackey v. Mendoza-Martinez, 362 U.S. 384, 386–87 (1960) (holding collateral estoppel applied in a case involving an individual losing his citizenship after going to Mexico to flee the draft); Rusk v. Cort, 369 U.S. 367, 379 (1962) (holding a person denied citizenship for draft evasion need not sue the government through the procedures outlined in the Immigration and Nationality Act); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 186 (1963) (holding any statute divesting a citizen of his citizenship for leaving the country to avoid military service violated the procedural guarantees in the Fifth and Sixth Amendments).

112. *See* Witherspoon v. Illinois, 391 U.S. 510, 522–23 (1968). The Court cited data indicating less than half of Americans approved of the death penalty, and held juries crucially imported these "community" values into the penal system, and the evolving standards of decency require this link. *Id.* at 519–20.

113. *Id.* at 520 n.16. The International Review on Public Opinion poll found 47% opposed the death penalty, 42% favored it, and 11% were undecided. *Id.*

rejection of the death penalty.[114] *Witherspoon* ignored other reputable polls indicating significantly higher public support for the death penalty.[115] According to Justice White, the majority's disdain for the death penalty compelled it to engage in policymaking under the guise of dubious constitutional interpretation, instead of deferring to democratically elected legislators.[116]

Justice Stewart, writing for the majority in *Gregg*, ironically described "evolving standards of decency" as an "oft-quoted phrase,"[117] when the Supreme Court only mentioned it once for substantive analysis during the eighteen years between *Trop* and *Gregg*.[118] In 1976, *Gregg* discussed a challenge to Georgia's death penalty scheme, relying on a new methodology for determining the evolving standards of decency.[119] Now Eighth Amendment meaning hinged on domestic public opinion polling, legislative enactments, and jury verdicts, as opposed to international norms.[120] First, two domestic public opinion polls showed between 57% and 59% support for the death penalty.[121] Second, state referendums in Massachusetts and Illinois upheld the death penalty, thirty-five states enacted statutes providing for the death penalty, and Congress penalized airplane piracy with death in 1974.[122] Third, juries infrequently imposed the death penalty when

---

114. *See id.* at 519–20. The Court found that public opinion rejected the death penalty, and eliminating potential jurors based on their disapproval of the practice would create unrepresentative juries. *Id.*

115. *Compare Death Penalty*, *supra* note 76 (indicating the death penalty enjoyed 54% support in 1967, a year before the Court decided *Witherspoon*), *with Witherspoon*, 391 U.S. at 520 (describing death penalty supporters as a "distinct and dwindling minority").

116. *Witherspoon*, 391 U.S. at 542 (White, J., dissenting) ("If the Court can offer no better constitutional grounds for today's decision than those provided in the opinion, it should restrain its dislike for the death penalty and leave the decision about appropriate penalties to branches of government whose members, selected by popular vote, have an authority not extended to this Court.").

117. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (describing "evolving standards of decency" as an "oft-quoted phrase" (quoting Trop v. Dulles, 356 U.S.86, 101 (1958)).

118. *See Witherspoon*, 391 U.S. at 519 n.15 (finding the evolving standards of decency indicated society disapproved of jury selection based on death penalty opinion (quoting *Trop*, 356 U.S. at 101)).

119. *See Gregg*, 428 U.S. at 181 n.25.

120. *See id.*

121. *Id.* (citing Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1249 n.22 (1974)). One Gallup poll from 1972 found 57% of Americans favored the death penalty, a stark increase from 42% cited in *Witherspoon*. *Id.* (citing Vidmar & Ellsworth, *supra*, at 1249 n.22). A Harris survey from 1973 found 59% of Americans favored the death penalty. *Id.* (citing Vidmar & Ellsworth, *supra*, at 1249 n.22).

122. *Id.* at 179–80 (first citing H.B. 212, §§ 2-4, 6-7 (Ala. 1975); ARIZ. REV. STAT. ANN. §§ 13-452 to 13-454 (1973); ARK. CODE ANN. § 41-4706 (1975); CAL. PENAL CODE §§ 190.1, 209, 219 (West 1976); 1974 Colo. Sess. Laws 52, § 4; CONN. GEN. STAT. §§ 53a-25, 53a-35(b), 53a-46a, 53a-54b (1975); DEL. CODE ANN. tit. 11, § 4209 (1975); FLA.

given the opportunity.[123] While this statistic could indicate public disapproval of the death penalty, the Court found infrequency only meant juries reserved capital punishment for the most severe crimes.[124] *Gregg* discerned the evolving standards of decency with several domestic indicators of majority public support for a particular practice, deriving Eighth Amendment meaning from this support.[125]

In *Gamble*, the Court narrowly confined its analysis to legislative enactments in a minority of states to discern the evolving standards of decency.[126] Twenty-two states provided for a standard of medical care in prisons, indicating the evolving standards of decency now required Eighth Amendment protection in cases of deliberate indifference to serious medical

---

STAT. ANN. §§ 782.04, 921.141 (West 1975–1976); GA. CODE ANN. §§ 26-3102, 27-2528, 27-2534.1, 27-2537 (1975); IDAHO CODE § 18-4004 (1975); 38 ILL. COMP. STAT. §§ 9-1, 1005-5-3, 1005-8-1A (1976–1977); IND. CODE § 35-13-4-1 (1975); KY. REV. STAT. ANN. § 507.020 (1975); LA. STAT. ANN. § 14:30 (1976); MD. CODE ANN. § 27-413 (LexisNexis 1975); MISS. CODE ANN. §§ 97-3-19, 97-3-21, 97-25-55, 99-17-20 (1975); MO. ANN. STAT. §§ 559.009, 559.005 (West 1976); MONT. CODE ANN. § 94-5-105 (1976); NEB. REV. STAT. §§ 28-401, 29-2521 to 29-2523 (1975); NEV. REV. STAT. § 200.030 (1973); N.H. REV. STAT. ANN. § 630:1 (1974); N.M. STAT. ANN. § 40A-29-2 (1975); N.Y. PENAL LAW § 60.06 (McKinney 1975); N.C. GEN. STAT. § 14-17 (1975); OHIO REV. CODE ANN. §§ 2929.02-2929.04 (LexisNexis 1975); OKLA. STAT. ANN. tit. 21, §§ 701.1-701.3 (1975–1976); 1974 Pa. Laws Act No. 46; R.I. GEN. LAWS ANN. § 11-23-2 (West 1975); S.C. CODE ANN. § 16-52 (1975); TENN. CODE ANN. §§ 39-2402, 39-2406 (1975); TEX. PENAL CODE ANN. § 19.03(a) (1974); UTAH CODE ANN. §§ 76-3-206, 76-3-207, 76-5-202 (LexisNexis 1975); VA. CODE ANN. §§ 18.2-10, 18.2-31 (1976); WASH. REV. CODE §§ 9A.32.045, 9A.32.046 (1975); WYO. STAT. ANN. § 6-54 (1975); and then citing Antihijacking Act of 1974, 49 U.S.C. § 1472(i), (n)). A 1968 Massachusetts initiative upheld the death penalty, with 49% approving and 31% disapproving. *See id.* at 181 n.25. A 1970 Illinois referendum upheld the death penalty, with 64% approving and 36% disapproving. *See id.* After *Furman* struck down all death penalty schemes in the United States for their arbitrary nature, thirty-five states enacted statutes reinstating the practice. *See id.* at 179–80. In 1974, Congress passed the Antihijacking Act, making airplane piracy a capital offense. *See* Antihijacking Act of 1974, Pub. L. No. 93-366, § 104, 88 Stat. 409, 411 (codified as amended 49 U.S.C. § 1472(i)).

123. *Gregg*, 428 U.S. at 182. Death sentence jury verdicts varied widely between 1961 and 1972, and only 20% of murder convictions resulted in the death penalty in states authorizing the practice. *Id.* at 182 n.26.

124. *Id.* at 182 ("[T]he relative infrequency of jury verdicts does not indicate rejection of capital punishment *per se*.").

125. *See id.* at 187 (holding that the country's "moral consensus" supporting the death penalty helped indicate the practice was "not without justification and thus is not unconstitutionally severe"). In *Gregg*, the Court's chosen factors indicated a societal consensus supporting the death penalty, but in subsequent cases it struck down laws despite similar indicators of support. *See* Stinneford, *supra* note 11, at 87.

126. *See* Estelle v. Gamble, 429 U.S. 97, 103–04 (1976).

needs.[127] This method rested on legislative enactments in a minority of states, and not international norms, domestic public opinion, or jury verdicts.[128]

Sometimes, the Supreme Court ignores broad acceptance of a particular condition or punishment, and declares evolving standards of decency necessitate its prohibition.[129] In *Graham v. Florida*, the Court held life sentences for non-homicide juvenile offenders violated the Eighth Amendment despite broad authorization of the practice in the federal system, thirty-seven states, and the District of Columbia.[130] The 109 non-homicide juvenile offenders serving life sentences at the time outweighed the broad legislative approval of the practice, even though the Court made the complete opposite finding in *Gregg*.[131] In *Atkins v. Virginia*, the evolving standards rule prohibited the execution of any mentally challenged person, when only seven of the thirty-eight states permitting capital punishment prohibited the entire practice.[132] Therefore, when a practice complies with the wanton and unnecessary rule, and enjoys majority support under the metrics from *Gregg*, the Court may still invoke the evolving standards rule to prohibit it.[133]

This approach acknowledges both the traditional wanton and unnecessary rule and the newer evolving standards rule, but applies neither.[134] In these cases, the evolving standards rule resembles a Trojan horse, disguising

---

127. *Id.* at 103–05 (holding deliberate indifference to serious medical needs represented cruel and unusual punishment).

128. *See id.* at 103 n.8.

129. *See* Graham v. Florida, 560 U.S. 48, 82 (2010) (holding the Eighth Amendment does not permit sentencing a juvenile offender to life in prison for a non-homicide crime, despite broad acceptance of the practice). Justice Thomas assailed this approach in his dissent in *Graham*. *See supra* note 102.

130. *See Graham*, 560 U.S. at 82; *see also id.* at 97 (Thomas, J., dissenting); Stinneford, *supra* note 11, at 87. Additionally, state legislation failed to indicate any trend toward prohibition. Stinneford, *supra* note 11, at 88. Between 2002 and 2010, the Court made four similar counter-majoritarian declarations despite invoking the majoritarian evolving standards rule. *Id.* at 87.

131. *See Graham*, 560 U.S. at 62–67 (finding that the infrequency of life sentences for juvenile defenders indicated society rejected the practice). *But see* Gregg v. Georgia, 428 U.S. 153, 182 (1976) ("[T]he relative infrequency of jury verdicts does not indicate rejection of capital punishment *per se*.").

132. *See* Atkins v. Virginia, 536 U.S. 304, 342 (2002) (Scalia, J., dissenting). According to the Court, eighteen states prohibiting some executions of mentally challenged persons, with only seven states prohibiting the practice outright, constituted enough of a "national consensus" to compel its prohibition nationally. *See id.* at 313–16, 342.

133. *See Graham*, 560 U.S. at 62–67 (finding that because only 109 non-homicide juvenile offenders were serving life sentences, the practice's infrequence indicated a national consensus against it). While the Court still invokes the authority from *Trop* and the evolving standards rule, "it no longer uses the test as a true ground for its decisions." Stinneford, *supra* note 11, at 87.

134. *See* Stinneford, *supra* note 11, at 87.

policy decisions as actual constitutional interpretation.[135] The Supreme Court oversteps its mandate and undermines state and federal legislatures when it makes policy decisions without a legal or constitutional basis.[136]

B. The Danger of Adherence to the Majority

Strict adherence to a majoritarian evolving standards rule, as demonstrated in *Gregg*, tethers Eighth Amendment understanding to society's opinion about a practice at that moment in time.[137] Deferring to society's opinion cuts against the Supreme Court's mandate as an anti-majoritarian institution that can protect unpopular positions and minorities.[138] Society can become (1) intolerant toward certain groups and condone their mistreatment;[139] or (2) overly lenient toward certain groups and require their accommodation

135. *Id.* When the Supreme Court ignores both the Eighth Amendment's original meaning and the evolving standards rule, and relies solely on its own independent judgement, it operates without any "external constitutional standard to guide its decisions." *Id.* The American scheme of ordered liberty relies on "uniformly applied legal principle" and not "*ad hoc* notions of what is right and what is wrong in a particular case." John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, *in* THE EVOLUTION OF A JUDICIAL PHILOSOPHY: SELECTED OPINIONS AND PAPERS OF JUSTICE JOHN M. HARLAN 289, 291–92 (David L. Shapiro ed., 1969). According to Justice Brennan, "[t]he principle that our Government shall be of laws and not of men is so strongly woven into our constitutional fabric that it has found recognition in not just one but several provisions of the Constitution." McGautha v. California, 402 U.S. 183, 252–53 (1971) (Brennan, J., dissenting).

136. *See* Loutfy, *supra* note 19, at 95. The Constitution does not exist to "address all ills in our society." Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting). The Eighth Amendment should not function as a "National Code of Prison Regulation." *Id.* When the judiciary makes decisions without a connection to any constitutional or legal principle, it simply substitutes its own policymaking agenda for that of democratically elected legislatures. *See supra* note 102. Justice Frankfurter argued the judiciary should refrain from policymaking because "[c]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society." Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

137. *See* Gregg v. Georgia, 428 U.S. 153, 186–87 (1976) (holding that society's opinion, as manifested in legislation, jury verdicts, and polling data, indicated a standard of decency that condoned the death penalty).

138. *See* Stinneford, *supra* note 11, at 87. Determining constitutional law based purely on policy preferences "runs contrary to basic principles of separation of powers." *Id.*

139. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 841–904). Congress passed the Anti-Drug Abuse Act in 1986, reflecting societal attitudes opposed to lenience for drug offenders. *See War on Drugs*, *supra* note 90.

well above constitutional standards.[140] The late Justice Scalia summarized these concerns when he said, "A Bill of Rights that means what the majority wants it to mean is worthless."[141] Drug addicts and inmates often find themselves on the list of unpopular minorities, and depend on anti-majoritarian institutions like the Constitution and the Supreme Court to vindicate their rights, regardless of society's lenient or punitive stance toward them.[142] The evolving standards rule, as it functioned after *Trop*, permits federal courts to exclude addicted detainees from Eighth Amendment protection, even when their cases exhibit signs of cruel and unusual punishment.

1. The Fallacy of Progressive Societal Standards

Society's standards can evolve away from leniency.[143] The evolving standards rule emerged due to "overconfidence in the moral superiority of the present."[144] In reality, societal tastes rarely progress in a single direction and change quickly in response to events or new information about a topic.[145] For example, movement toward leniency for prison conditions during the late twentieth century mirrored a simultaneous movement in the opposite direction with regard to domestic and sexual violence.[146] In *Kennedy v. Louisiana*, the evolving standards rule required the elimination of capital punishment for child rapists.[147] This decision focused on legislative approval for the penalty as outlined in *Gregg*.[148] Originally, eighteen states

140. *See* Rhodes v. Chapman, 452 U.S. 337, 349 (1981) ("[T]he Constitution does not mandate comfortable prisons.").

141. Steven F. Hayward, *Two Kinds of Originalism*, 45 NAT'L AFFS. 146, 155 (2017). Justice Scalia's jurisprudence demonstrates his fear of "unqualified majoritarianism" influencing constitutional interpretation. *Id.* Justice Scalia's warning echoed Justice Frankfurter's *Dennis* concurrence: "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic, and social pressures." *Dennis*, 341 U.S. at 494 (Frankfurter, J., concurring).

142. The Kansas-Nebraska Act is another example of the problems with unfiltered majoritarianism. *See* George F. Will, *The Limits of Majority Rule*, 28 NAT'L AFFS. 160, 161 (2016). Under the Act, Kansas and Nebraska could permit slavery with a majority popular vote. *Id.* Abraham Lincoln opposed the Act because "there is more to America's purpose, more to justice, than majorities having their way." *Id.* at 161–62.

143. *See* Stinneford, *supra* note 11, at 90.

144. *See* Usman, *supra* note 16, at 699.

145. *Id.*

146. *Id.* at 701.

147. *See* Kennedy v. Louisiana, 554 U.S. 407, 419–21 (2008).

148. *Id.* at 422. While the contemporary standards of decency would have permitted the death penalty for child rapists, the Court followed the principle that "their own judgment will be brought to bear on issues when a national consensus is not clear" to reach the desired outcome of prohibiting the practice. Matthew C. Matusiak, Michael S. Vaughn & Rolando V. del Carmen, *The Progression of "Evolving Standards of Decency" in U.S. Supreme Court Decisions*, 39 CRIM. JUST. REV. 253, 264–65 (2014).

and the federal government authorized execution of child rapists, and that number dropped to three states after *Furman* forced all states to reenact their death penalty statutes.[149] While the decision left out public opinion polling, the other metrics indicated the political and judicial systems disfavored the practice.[150] Given the strong public support for executing child rapists, and the frequency with which societal values change, the evolving standards could easily permit the practice in the future.[151] Basing interpretation on the spirit of the moment runs afoul of the Constitution's role as an enduring, principled document.[152]

Public attitudes toward juvenile offenders soured during the 1990s, due to a moral panic around young "superpredators."[153] Highly publicized acts of juvenile violence combined with statistics predicting a 23% increase in the juvenile male population to generate public fears of a coming crime wave.[154] American politicians and public figures invoked the "superpredator" concerns, and forty-five state legislatures moved to facilitate trying juvenile offenders as adults.[155] Because societal attitudes toward this demographic

149. *See Kennedy*, 554 U.S. at 422 (finding the last execution for child rape occurred in 1964).

150. *See* Usman, *supra* note 16, at 702 (finding that contemporary public polling strongly suggested broad public support for executing child rapists). History follows a less "sequential and progressive path" toward leniency, and instead, "[c]yclic processes are far closer to the truth." STEPHEN P. HINSHAW, THE MARK OF SHAME: STIGMA OF MENTAL ILLNESS AND AN AGENDA FOR CHANGE 54 (2007).

151. *See* Usman, *supra* note 16, at 702.

152. *See* Stinneford, *supra* note 11, at 87–88. Writing for the majority in *West Virginia v. Barnette*, Justice Jackson argued,

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts . . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

153. *See* PETER ELIKANN, SUPERPREDATORS: THE DEMONIZATION OF OUR CHILDREN BY THE LAW, at xi (1999).

154. *Id.* at 24. The series of schoolyard murders in the late 1990s stoked public fears about a coming crime wave. *See id.* at 26, 29. In reality, overall and juvenile crime decreased during this period, contrary to public fears around the topic. *Id.* at 26.

155. *See* Stinneford, *supra* note 11, at 90. During a televised discussion on the 1994 Violent Crime Control and Law Enforcement Act, First Lady Hillary Clinton invoked the "superpredator" label for juvenile offenders. *See* Allison Graves, *Did Hillary Clinton Call African-American Youth 'Superpredators?'*, POLITIFACT (Aug. 28, 2016, 4:46 PM), https://www.politifact.com/truth-o-meter/statements/2016/aug/28/reince-priebus/did-hillary-clinton-call-african-american-youth-su/ [https://perma.cc/2948-MYT4].

evolved away from leniency during this period, as expressed in legislative enactments, strict adherence to the evolving standards rule would have compelled the Court in *Graham* to uphold life sentences toward juvenile offenders.[156]

American public opinion followed a similar pattern with regard to drugs. Beginning in the 1970s, American society assumed a punitive stance against drug use.[157] This stance manifested in consistent public opinion and legislation severely punishing drug related crimes.[158] In 1969, 48% of Americans identified drug use as a "serious problem in their community."[159] In 1986, 56% thought the United States did not spend enough on the war on drugs.[160] In 1995, 63% still identified drug use as a serious problem, while 31% called it a "crisis."[161] In 2018, drug convictions constituted 27% of the overall criminal convictions in federal court, second only to immigration-related convictions.[162] Much of the anti-drug legislation from this period remains effective, although Congress recently reduced some punitive measures in 2010 and 2019.[163] Few states enacted legislation providing formal detoxification facilities, procedures, and dedicated staff for detainees.[164] Accordingly, Supreme Court jurisprudence interpreting various amendments followed society's intolerance toward drug use.[165]

---

156. *See* Stinneford, *supra* note 11, at 90.

157. *See* Robison, *supra* note 90.

158. *See supra* note 90 and accompanying text (discussing the American public's hostility toward drugs beginning in the 1970s).

159. *See* Robison, *supra* note 90.

160. *Id.*

161. *Id.*

162. *See Table D-4*, U.S. CTS. (Dec. 31, 2018), https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2018/12/31 [https://perma.cc/MHT7-XULV].

163. *See War on Drugs*, *supra* note 90. Congress passed the First Step Act in 2018, in part helping federal prisoners reduce their sentences with good behavior. *See* Tim Lau, *Historical Criminal Justice Reforms Begin to Take Effect*, BRENNAN CTR. FOR JUST. (July 25, 2019), https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reforms-begin-take-effect [https://perma.cc/S3F9-STR7].

164. *See* Linden et al., *supra* note 2, at 252.

165. *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (holding the Controlled Substances Act, as applied to growers of marijuana for personal use, did not violate the Commerce Clause); Emp. Div. v. Smith, 494 U.S. 872, 882 (1990) (holding Oregon's regulation of ceremonial ingestion of peyote did not violate the Free Exercise Clause); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 825 (2002) (holding random drug tests of students participating in sports did not violate the Fourth Amendment); Florida v. Riley, 488 U.S. 445, 452 (1989) (holding a police officer's observation from a helicopter of a partially covered marijuana greenhouse did not constitute a search under the Fourth Amendment).

Today, these attitudes persist around addiction,[166] and the evolving standards rule allows judges to inject into deliberate indifference cases their reservations about accommodating addicts. Consequently, circuit court rulings diverged on whether addiction constituted a serious medical need, while the Supreme Court has not ruled on the topic.[167] In *Shaver v. Brimfield Township*, an unpublished opinion, a U.S. district court in Ohio disregarded the high risk of pain and death for withdrawing detainees, finding addiction did not constitute a serious medical need.[168] In *Bruederle v. Louisville Metro Government*, the Sixth Circuit found that despite the risks involved in cold turkey withdrawal, the intensity varied too often to designate withdrawal as a serious medical need.[169] In *Grayson v. Peed*, the Fourth Circuit likewise declined, arguing such a ruling would force officers to bring all suspects to the hospital instead of detention centers when they exhibited any signs of drug addiction.[170] Providing Eighth Amendment protection for addicted detainees, the court added, "would be a startling step to take."[171] In *Burnette v. Taylor*, the Eleventh Circuit displayed identical reservations about medically evaluating addicted arrestees to determine the risk level.[172]

Finally, the ruling in the unpublished case *Estate of Hellman v. Kenton County Jailer* tellingly remarked, "[t]he day may yet come where a failure to have medical personnel evaluate a severely intoxicated detainee is deemed

166. *See, e.g.*, Bruederle v. Louisville Metro Gov't, 687 F.3d 771, 777 (6th Cir. 2012) (finding addiction to powerful painkillers did not constitute a serious medical need).

167. *Compare* Foelker v. Outagamie County, 394 F.3d 510, 513 (7th Cir. 2005) (finding heroin addiction and withdrawal constituted a serious medical need such that deliberate indifference toward them constituted cruel and unusual punishment), *with Bruederle*, 687 F.3d at 777 (finding addiction to powerful painkillers did not constitute a serious medical need).

168. *See* Shaver v. Brimfield Township, No. 5:11 CV 154, 2014 WL 7506908, at *10 (N.D. Ohio Oct. 31, 2014).

169. *See Bruederle*, 687 F.3d at 773.

170. *See* Grayson v. Peed, 195 F.3d 692, 696 (4th Cir. 1999). Such a ruling would instead compel jails to adopt detoxification facilities and procedures, and would not mandate hospital visits. *See* Hernandez v. County of Monterey, 110 F. Supp. 3d 929, 959 (N.D. Cal. 2015) (granting injunctive relief compelling the county jail to provide for detoxification procedures and staff).

171. *Grayson*, 195 F.3d at 695–96. Officers detained the decedent after observing erratic and drug-influenced behavior and finding evidence he had ingested PCP. *Id.* at 694. After forcing the decedent to withdraw cold turkey, he resisted relocation from his cell and died after wrestling with officers. *Id.* at 694–95.

172. *See* Burnette v. Taylor, 533 F.3d 1325, 1333 (11th Cir. 2008) ("The Constitution does not require an arresting police officer or jail official to seek medical attention for every arrestee or inmate who appears to be affected by drugs or alcohol.").

Constitutionally deficient under the 'deliberate indifference' standard, but that day—should it arise—clearly lies in the future."[173]

2. Over-leniency and Judicially Mandated Comfort

Strict adherence to evolving standards also risks judicially mandating "comfortable prisons."[174] Several cases demonstrate how adherence to the majority risks an overly lenient Eighth Amendment interpretation that transforms the federal courts into a prison regulatory regime.[175] Growing public sympathy for particular groups or concern for particular conditions could compel a federal court to enact publicly desired policy reforms, as demonstrated in *Helling v. McKinney*.[176] Here, the Supreme Court held exposure to tobacco smoke constituted a serious medical need.[177] Long term detrimental effects of exposure to secondhand tobacco smoke, combined with growing public concern around tobacco, indicated the Eighth Amendment should protect inmates from secondhand smoke.[178] The analysis ignored the likelihood of suffering and death, or how long this process would take, or the various issues with expanding Eighth Amendment protection to include all medically detrimental conditions.[179] A wide variety of conditions could plausibly lead to negative health defects, without causing any pain, suffering, or death in the short term.[180] This vision of the Eighth Amendment as a functional health code differs significantly from one restricted to more imminent, dangerous, and severe inflictions and deprivations.[181]

---

173. Estate of Hellmann v. Kenton Cty. Jailer, No. 05–31–JGW, 2007 WL 1100730, at *9 (E.D. Ky. Apr. 12, 2007). The evolving standards rule functions as it did in *Graham*, allowing the court to ignore actual constitutional analysis and substitute its own policy preferences. *See* Graham v. Florida, 560 U.S. 48, 67–70 (2010).

174. Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

175. *See* Loutfy, *supra* note 19, at 91.

176. *See* 509 U.S. 25, 35 (1993).

177. *Id.*

178. *Id.* at 36–37.

179. *Id.* at 35–36.

180. For example, conditions exposing detainees to asbestos fibers on a regular basis could eventually cause various forms of cancer. *See Asbestos Exposure and Cancer Risk*, NAT'L CANCER INST. (June 7, 2017), https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos/asbestos-fact-sheet#what-are-the-health-hazards-of-exposure-to-asbestos [https://perma.cc/54YF-U65W] ("[T]hose who develop asbestos-related diseases show no signs of illness for a long time after exposure. It can take from 10 to 40 years or more for symptoms of an asbestos-related condition to appear." (citing AGENCY FOR TOXIC SUBSTANCES & DISEASE REGISTRY, U.S. DEP'T OF HEALTH & HUM. SERVS., TOXICOLOGICAL PROFILE FOR ASBESTOS 49, 103 (2001), https://www.atsdr.cdc.gov/toxprofiles/tp61.pdf [https://perma.cc/U2KT-BPEH].).

181. *See* Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting) (arguing the Eighth Amendment should not function as a "National Code of Prison Regulation"); *see also* Rhodes v. Chapman, 452 U.S. 337, 349 (1981) ("[T[he Constitution does not

In the Ninth Circuit case *Colwell v. Bannister*, a detainee developed cataracts in both eyes during his sentence, and the prison only had one of the cataracts removed.[182] The remaining cataract did not cause pain, require urgent medical attention, or pose a risk of permanent vision loss.[183] The untreated cataract represented a serious medical need because (1) it affected the inmate's daily activities and (2) a reasonable doctor would deem the injury "worthy of comment or treatment."[184] This rule casts a massive net to include any condition that could plausibly hinder a detainee, or earn a doctor's "comment."[185] The Ninth Circuit's rule completely circumvents the wanton infliction of pain requirement.[186] Society might prefer prisons repair inmates' cataracts, but providing Eighth Amendment protection in this case opened the door to almost any medical condition.

Decisions like *Helling* and *Colwell*, while perhaps reflective of societal standards, dilute the Eighth Amendment's meaning. What began as a baseline prohibition on the wanton infliction of pain now risks transforming into a powerful, court-driven regulatory tool to determine the finer points of health policy in prisons.[187]

Hypothetically, the reasoning from *Helling* and *Colwell* could extend Eighth Amendment protection to inmates with long-term mental or emotional conditions. Long periods of detainment can cause detrimental mental health conditions like anxiety and depression.[188] Prison subjects detainees to constant feelings of entrapment, detachment from family and friends, memories of their own acts, and fear of harm.[189] A highly enclosed prison design could, perhaps, exacerbate these feelings. Therefore,

---

mandate comfortable prisons."). A more restricted Eighth Amendment analysis would set a clear minimum baseline for treatment and leave the finer points of prison regulation to state legislatures. *See* Loutfy, *supra* note 19, at 78.

182. *See* Colwell v. Bannister, 763 F.3d 1060, 1064–65 (9th Cir. 2014).

183. *Id.*

184. *Id.* at 1066–67 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by* WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc)). The condition affected the inmate's daily activities because it caused him to run into objects. *Id.*

185. *See* Loutfy, *supra* note 19, at 91. Many conditions worthy of a medical professional's comment lack any pain or immediate negative health effects.

186. *Id.*

187. *See* Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting).

188. *See* Liji Thomas, *Prisoner Depression and Low Mood*, NEWS MED. (Aug. 23, 2018), https://www.news-medical.net/health/Prisoner-Depression-and-Low-Mood.aspx [https://perma.cc/KLS2-C7PL].

189. *Id.*

depression represents a condition worthy of a doctor's comment, and a court in the Ninth Circuit could invoke the Eighth Amendment to protect this condition and compel a prison redesign.[190]

A district court in the Ninth Circuit has already granted relief for an inmate with a mental condition under a similar theory. The medical community identifies gender dysphoria, which involves a person expressing a different gender than their biological sex, as a medical condition.[191] This condition often involves anxiety, depression, and suicidal thoughts.[192] Some argue gender reassignment surgery represents a necessary medical remedy for this condition, in certain situations.[193] It follows that the Ninth Circuit's test would identify the condition as a serious medical need, and a prison's refusal to provide the surgery would constitute deliberate indifference, i.e., cruel and unusual punishment. Faced with an inmate suffering from gender dysphoria, the U.S. District Court for the Northern District of California granted an injunction in *Norsworthy v. Beard*, compelling a prison to provide the surgery.[194] The Ninth Circuit did not review this decision because California released the plaintiff before the hearing, although some suggest it would have upheld the injunction.[195]

McGuckin v. Smith enshrines this all-inclusive approach to determining serious medical needs and creates several problems in the process. The Ninth Circuit in *McGuckin* established a formal test for evaluating serious medical needs, to provide for more consistency and less room for courts to substitute their own policy preferences.[196] Under this test, a finding of a serious medical need requires "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment

---

190. *See* McGuckin v. Smith, 974 F.2d 1050, 1059–60 (9th Cir. 1992) (finding a serious medical condition is one worthy of a reasonable doctor's comment), *overruled on other grounds by* WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc)).

191. *See* Victor J. Genchi, Comment, *Sex Reassignment Surgery & the New Standard of Care*, 22 BARRY L. REV. 93, 93–94 (2016).

192. *Id.* at 94.

193. *Id.* (explaining how treatments for less severe forms of dysphoria include psychotherapy and hormone therapy, while gender reassignment surgery addresses more severe forms). Gender reassignment surgery involves surgically reshaping genitalia to resemble those of the desired sex. *See* Ross Toro, *How Gender Reassignment Surgery Works (Inforgraphic)*, LIVE SCI. (Aug. 26, 2013), https://www.livescience.com/39170-how-gender-reassignment-surgery-works-infographic.html [https://perma.cc/G9HV-J55G]. Female-to-male reassignment costs over $50,000, while male-to-female reassignment costs between $7,000 and $24,000. *Id.*

194. *See* Norsworthy v. Beard, 87 F. Supp. 3d 1164, 1187, 1190, 1192 (N.D. Cal. 2015) (granting injunctive relief under an Eighth Amendment theory).

195. *See* Genchi, *supra* note 191, at 95, 106.

196. *See* McGuckin v. Smith, 974 F.2d 1050, 1059–60 (9th Cir. 1992), *overruled in part on other grounds by* WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain."[197] Several federal appeals courts adopted the *McGuckin* test or a similar version of it.[198] These tests strike a balance between restricting policy-based judicial intervention, and recognizing a constitutional duty to provide medical care for prisoners. Only conditions acknowledged as serious in the medical community have Eighth Amendment implications, theoretically replacing the court's potential policy preferences with objective medical expertise.[199]

In some cases, the *McGuckin* test succeeded in striking this balance between restricting policy input and requiring care for inmates with severe needs. A Seventh Circuit decision categorized drug addiction as a serious medical need under its formulation of the *McGuckin* test.[200] The Eighth Circuit came to the same conclusion with regard to a plaintiff's inguinal hernia.[201] Meanwhile, under the *McGuckin* test, the Fifth Circuit declined to categorize swollen wrists as a serious medical need,[202] and the Eleventh Circuit similarly declined with regard to a shaving-induced sensitive skin condition.[203]

197. *Id.*

198. *See* Perez v. Oakland County, 466 F.3d 416, 423 (6th Cir. 2006) (finding a serious medical need was "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention" (quoting Blackmore v. Kalamazoo County, 390 F.3d 890, 897 (6th Cir. 2004))); Gutierrez v. Peters, 111 F.3d 1364, 1371 (7th Cir. 1997) ("[A] class of cases in which the medical condition involved, while far from life-threatening, is nevertheless sufficiently serious that the deliberately indifferent denial of medical care for such a condition . . . [is] fully capable of supporting an Eighth Amendment claim."); Mata v. Saiz, 427 F.3d 745, 751 (10th Cir. 2005) (requiring that the prisoner "produce objective evidence that the deprivation at issue was in fact 'sufficiently serious'" as well as "evidence of the prison official's culpable state of mind" (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994))); Farrow v. West, 320 F.3d 1235, 1243–44 (11th Cir. 2003) (defining a serious medical need as "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." (quoting Hill v. Dekalb Reg'l Youth Det. Ctr., 40 F.3d 1176, 1187 (11th Cir. 1994))).

199. *See* Loutfy, *supra* note 19, at 91.

200. *See* Foelker v. Outagamie County, 394 F.3d 510, 513 (7th Cir. 2005).

201. *See* Johnson v. Lockhart, 941 F.2d 705, 706–07 (8th Cir. 1991) (finding plaintiff's inguinal hernia constituted a serious medical need).

202. *See* Wesson v. Oglesby, 910 F.2d 278, 284 (5th Cir. 1990).

203. *See* Shabazz v. Barnauskas, 790 F.2d 1536, 1538 (11th Cir. 1986).

However, the *McGuckin* test presents several problems. After adopting versions of this test, the Sixth and Eleventh Circuits declined to categorize addiction as a serious medical need.[204] The Sixth Circuit declined to analyze the pain and risk associated with drug addiction, and instead focused on policy, i.e., the potential burden on jail staff if the court designated drug addiction as a serious medical need.[205] The Eleventh Circuit similarly based its decision on the implications of requiring jail officials and police officers to seek medical attention for all drug-affected arrestees.[206] Meanwhile, federal courts used the *McGuckin* test to grant Eighth Amendment protection for cases involving an infected toenail, a painful nasal condition, infected teeth, a broken hand, tobacco smoke exposure, and cataracts.[207] None of these conditions poses a substantial risk of death or suffering, and some completely lack pain as a symptom. Because the *McGuckin* test provides Eighth Amendment protection for any condition a doctor could identify as requiring treatment, courts can wield the constitution as a general health code for nearly every condition.[208]

The evolving standards rule and its arbitrary application reveal an inconsistent, unconstitutional, and unworkable method for evaluating cruel and unusual practices.[209] Generally, domestic majority opinion determines the evolving standards of decency,[210] except when the Court relies

---

204. *See* Bruederle v. Louisville Metro Gov't, 687 F.3d 771, 773, 777 (6th Cir. 2012) (finding opioid withdrawal did not automatically constitute a serious medical need because prison staff cannot predict withdrawal intensity); *see also* Burnette v. Taylor, 533 F.3d 1325, 1333 (11th Cir. 2008) ("[T]he Constitution does not require an arresting police officer or jail official to seek medical attention for every arrestee or inmate who appears to be affected by drugs or alcohol.").

205. *See Bruederle*, 687 F.3d at 777.

206. *See Burnette*, 533 F.3d at 1333.

207. *See* Warren v. Fanning, 950 F.2d 1370, 1373–74 (8th Cir. 1991) (infected toenail); Dace v. Solem, 858 F.2d 385, 388 (8th Cir. 1988) (painful nasal condition); Fields v. Gander, 734 F.2d 1313, 1314–15 (8th Cir. 1984) (infected teeth); Bunton v. Englemyre, 557 F. Supp. 1, 4 (E.D. Tenn. 1981) (broken hand); Helling v. McKinney, 509 U.S. 25, 35 (1993) (tobacco smoke exposure); Colwell v. Bannister, 763 F.3d 1060, 1063–65 (9th Cir. 2014) (cataracts).

208. *See Colwell*, 763 F.3d at 1072 (Bybee, J., dissenting) ("But *McGuckin* cannot be a correct reading of the Court's Eighth Amendment cases, and unless we overturn it en banc, we will make ourselves the authors of a 'National Code of Prison Regulation . . . .'" (quoting Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting))).

209. *See* Stinneford, *supra* note 11, at 87.

210. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) (declining to abolish the death penalty because of domestic majority approval manifested in public opinion polling and recent legislation).

on minority public opinion,[211] its own independent judgment,[212] or international norms.[213] The Supreme Court would struggle to reconcile these different methods to a complex issue like detainee addiction, where gauges of public opinion, such as polls,[214] jury verdicts,[215] international norms,[216] and legislative enactments,[217] prove inconclusive or difficult to apply. Accordingly, lower federal courts struggle to categorize detainee addiction and withdrawals, with regard to the Eighth Amendment.[218]

---

211. *See* Estelle v. Gamble, 429 U.S. 97, 103–04 (1976) (finding the evolving standards of decency required treatment for an inmate's injury despite only twenty-two states providing for standards of care in prisons).

212. *See* Graham v. Florida, 560 U.S. 48, 67 (2010) (deriving the evolving standards of decency from the Court's "independent judgement").

213. *See* Trop v. Dulles, 356 U.S. 86, 103 (1958) (assessing international citizenship practices to determine the evolving standard of decency).

214. *See Illegal Drugs*, GALLUP, https://news.gallup.com/poll/1657/illegal-drugs.aspx [https://perma.cc/93H6-YRQC]. When asked how much they blamed different causes for the opioid problem, respondents primarily blamed the pharmaceutical industry, doctors overprescribing pain medication, lack of public knowledge, and patients demanding painkillers, with 47% of respondents blaming patients "a lot." *Id.*

215. *See Table D-4*, *supra* note 162. In federal courts, guilty jury verdicts for drug offenders decreased incrementally from 932 in 2008, to 426 in 2018. *See Table D-4 U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Major Offense (Excluding Transfers), During the 12-Month Period Ending December 31, 2008*, U.S. CTS., https://www.uscourts.gov/sites/default/files/statistics_import_dir/D04Dec08.pdf [https://perma.cc/2PGG-2X2V]; *Table D-4*, *supra* note 162.

216. *See* UNITED NATIONS OFF. ON DRUGS & CRIME & WORLD HEALTH ORG., TREATMENT AND CARE FOR PEOPLE WITH DRUG USE DISORDERS IN CONTACT WITH THE CRIMINAL JUSTICE SYSTEM 41 (2018), https://www.unodc.org/documents/UNODC_WHO_Alternatives_to_Conviction_or_Punishment_2018.pdf [https://perma.cc/ZPW3-YWD8]. The UN provides an aspirational timetable for immediately evaluating and treating drug offenders after first contact. *Id.* Seven countries have implemented some form of medication-assisted treatment for opioid addicts. *See* BEAU KILMER ET AL., CONSIDERING HEROIN-ASSISTED TREATMENT AND SUPERVISED DRUG CONSUMPTION SITES IN THE UNITED STATES 14 (2018), https://www.rand.org/pubs/research_reports/RR2693.html [https://perma.cc/88X7-SCFZ].

217. *See* ROBERT CHILDS, N.C. HARM REDUCTION COALITION, LAW ENFORCEMENT AND NALOXONE UTILIZATION IN THE UNITED STATES 11, https://www.fda.gov/media/93172/download [https://perma.cc/HVH7-94BT]. Out of around 18,000 police departments in the United States, 577 carry naloxone, an emergency opioid overdose inhibiting drug. *Id.*; DUREN BANKS ET AL., BUREAU OF JUST. STATS., U.S. DEPT. OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT DATA 1 (2016), https://www.bjs.gov/content/pub/pdf/nsleed.pdf [https://perma.cc/J74M-YW9D]. Only Rhode Island, Connecticut, and Vermont enacted medication-assisted treatment programs for opioid-addicted detainees. *See* Linden et al., *supra* note 2, at 253.

218. *See* Foelker v. Outagamie County, 394 F.3d 510, 513 (7th Cir. 2005) (finding opioid addiction constituted a serious medical need). *But see* Bruederle v. Louisville Metro

C. Wanton and Unnecessary as a Constitutional and Practical Rule

The problems with tethering Eighth Amendment understanding to society's evolving standards of decency necessitate a new approach to evaluating claims of cruel and unusual punishment. This approach should avoid trimming around the edges of *Gamble* and the factors for evaluating serious medical needs, and instead focus on the wanton and unnecessary infliction of pain.

"Wanton" commonly means "unreasonably or maliciously risking harm while being utterly indifferent to the consequences."[219] Including wanton as a modifier for infliction of pain captures the originally broad spirit behind the Eighth Amendment, in which the Founders had in mind affirmative tortures like hanging, drawing, and quartering, in addition to more passive tortures, like conditions on prison ships.[220] Conditions on British prison ships subjected detainees to constant agony and death, and the consistent British policy of ignoring these conditions would render them just as liable under the Eighth Amendment as a prison utilizing the rack.[221]

Requiring the wanton and unnecessary infliction of pain or death brings together passive and active forms of torture under the Eighth Amendment.[222] Justice Burger's dissent in *Furman* argued that the Eighth Amendment prohibits punishments similar to torture in their extreme cruelty.[223] This rule appropriately encompasses the range of punishments the Founders considered when writing the Cruel and Unusual Punishment Clause, without providing a blank check to courts seeking to categorize any deprivation of comfort as a form of cruel and unusual punishment.

Despite the Supreme Court's promulgation of the evolving standards rule, some courts still focus on the wanton and unnecessary infliction of pain, exemplifying a more constitutional and practical approach.[224] Meanwhile, retroactively applying this focus to past decisions further illustrates the rule's benefits.[225]

Gov't, 687 F.3d 771, 777 (6th Cir. 2012) (finding opioid withdrawal did not automatically constitute a serious medical need because prison staff cannot predict withdrawal intensity).

219. *Wanton*, BLACK'S LAW DICTIONARY (11th ed. 2019).

220. *See* LEVY, *supra* note 22, at 232; Compeau, *supra* note 24.

221. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (recognizing that wanton and unnecessary conduct includes deprivations); *see also The HMS Jersey*, *supra* note 23 (describing prison ship conditions).

222. *See Farmer*, 511 U.S. at 834.

223. *See* Furman v. Georgia, 408 U.S. 238, 392–93 (1972) (Burger, C.J., dissenting).

224. *See* discussion *infra* Section IV.C.1–2 (discussing *Jones* and *Villarreal*).

225. *See* discussion *infra* Section IV.C.3–4 (discussing *Gamble* and *Colwell*).

1. Jones*: Enforcing the Limits of the Eighth Amendment*

The Florida Supreme Court followed this spirit in *Jones v. Florida*, providing a template of a modern Eighth Amendment analysis focused purely on wanton and unnecessary infliction of pain.[226] The Florida Supreme Court invoked its "all writs" jurisdiction to hear the case, in which Leo Jones sought to preclude his electric chair execution under the Eighth Amendment.[227] The court found that the electric chair, when appropriately tested, did not violate the Cruel and Unusual Punishment Clause.[228] The Florida Supreme Court ignored the question of whether societal standards condoned the electric chair, and instead evaluated the necessity and degree of the pain involved in the practice.[229] Like any method of punishment, the electric chair involves pain.[230] However, the Constitution does not protect convicted persons from "necessary suffering involved in any method employed to extinguish life humanely."[231] Here, the electric chair execution occurred as part of a carefully regulated process in which Florida tested its equipment and closely supervised the execution.[232] This evidence did not indicate a wanton and unnecessary practice because Florida carefully regulated electric chair executions and they involved minimal, necessary pain.[233] Despite the Florida Supreme Court's complete divergence from modern Eighth Amendment interpretation, the U.S. Supreme Court denied Jones's petition for certiorari.[234] While denial of certiorari does not automatically mean

226. *See* Jones v. Florida, 701 So. 2d 76, 79–80 (Fla. 1997).

227. *Id.* at 76.

228. *See id.* at 79–80. The petitioner in *Jones* relied on a contemporary electric chair execution that involved flame and smoke emanating from the apparatus. *Id.* at 79.

229. *Id.* at 79 (finding the national trend away from the electric chair should not influence its decision about the practice's constitutionality). The Florida Supreme Court sometimes focuses purely on the prisoner's pain, suffering, and torture-like experience, without considering society's preferences. *See* Erin Schatz, Comment, *Deliberate Indifference: Is There More to Cruel and Unusual Punishment?*, 51 FLA. L. REV. 171, 172 (1999).

230. *See Jones*, 701 So. 2d at 79–80.

231. *Id.* at 79 (quoting *Louisiana* ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947)). In Louisiana v. Resweber, the U.S. Supreme Court determined Louisiana could attempt a second execution after the first execution in the electric chair had failed. *See* 329 U.S. 459, 465–66 (1947).

232. *See Jones*, 701 So. 2d at 79–80.

233. *Id.* at 79 ("[T]h[e] record [was] entirely devoid of evidence suggesting deliberate indifference to a prisoner's well-being on the part of state officials.").

234. *See* Timothy S. Kearns, Note, *The Chair, the Needle, and the Damage Done: What the Electric Chair and the Rebirth of the Method-of-Execution Challenge Could Mean for the Future of the Eighth Amendment*, 15 CORNELL J.L. & PUB. POL'Y 197, 212

the Supreme Court agreed with the ruling, it does mean at least six justices determined the *Jones* ruling did not warrant a review.[235]

2. Villarreal*: A Renewed Focus on Pain*

In *Villarreal v. County of Monterey*, the U.S. District Court for the Northern District of California arrived at its conclusion fully relying on a wanton infliction of pain analysis, without mention of evolving standards or *Trop*.[236] Here, law enforcement arrested the decedent, Lara Gillis, and quickly discerned that she suffered from drug addiction and mental illness and had preexisting injuries.[237] As her condition deteriorated over the next twenty-eight hours, she begged for help and exhibited outward signs of intense withdrawals.[238] Despite officers noticing her condition during her arrest and medical staff routinely observing her in the padded cell, Gillis received no medical care during her detainment and died at a hospital two weeks later.[239] The jail subjected Gillis to immense suffering. She exhibited outward signs of suffering with her cries and moans, and medical analysis of her symptoms–drug withdrawal, organ failure, sepsis, low blood oxygen, and low blood sugar–indicates these conditions involve severe pain.[240]

The *Villarreal* court acknowledged the Ninth Circuit's division of deliberate indifference into subjective and objective components,[241] but ignored the broader *McGuckin* test. The district court instead worked from the premise that serious medical conditions are those involving serious pain and risk of death.[242] *McGuckin* divided deliberate indifference analysis

---

(2005) (arguing that in *Jones*, the Florida Supreme Court "openly neglected" the evolving standards rule set out in *Trop* (first citing Trop v. Dulles, 356 U.S. 86 (1958), and then citing *Jones*, 701 So. 2d at 77–78)); *see also* Jones v. Florida, 523 U.S. 1014 (1998) (denying certiorari).

235. *See* Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U.L. REV. 611, 612 (1984).

236. *See* Villareal v. County of Monterey, 254 F. Supp. 3d 1168, 1181 (N.D. Cal. 2017).

237. *Id.* at 1174.

238. *Id.* at 1174–75.

239. *Id.*

240. *Id.* Low blood oxygen and blood sugar can cause shaking, chills, dizziness, migraines, seizures, difficulty breathing, and chest pain. *See* Joana Cavaco Silva, *Low and Normal Blood Oxygen Levels: What to Know*, MED. NEWS TODAY (Jan. 28, 2020), https://www.medicalnewstoday.com/articles/321044.php [https://perma.cc/6YP9-3RJQ]; *Hypoglycemia (Low Blood Sugar)*, AM. DIABETES ASS'N, https://www.diabetes.org/diabetes/medication-management/blood-glucose-testing-and-control/hypoglycemia [https://perma.cc/6FQF-43S3]. Abuse and withdrawal from stimulants like cocaine can cause cardiac arrhythmias, cardiac arrest, strokes, and death. *See* DRUG ENFORCEMENT ADMIN., U.S. DEP'T OF JUST., DRUGS OF ABUSE 51–52 (2017), https://www.dea.gov/sites/default/files/drug_of_abuse.pdf [https://perma.cc/Q52L-DLEE].

241. *See Villarreal*, 254 F. Supp. 3d at 1181.

242. *Id.*

into two elements: "the seriousness of the prisoner's medical need and the nature of the defendant's response to that need."[243] *McGuckin* noted, "[a] serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'"[244] For the first element, the *Villarreal* court cited the characteristics of withdrawal as manifested in the present case, then for the second element, it cited the jail staff's behavior.[245] The district court also acknowledged the "seizures, hallucinations, agitation, and increased blood pressure" associated with drug withdrawal.[246] Finally, the district court concluded, "[d]rug withdrawal constitutes a serious medical need requiring appropriate medical care under the Eighth Amendment."[247]

The *Villarreal* court analyzed the Monterey County Jail's routine practice and the extent to which it wantonly inflicted pain and suffering on addicted detainees, and concluded the Cruel and Unusual Punishment Clause of the Eighth Amendment prohibited the practice.[248] This analysis ignored the historical considerations behind the Eighth Amendment, but the Founders familiar with the routine pain, suffering, and death involved in the mistreatment of detainees aboard British prison ships would agree the Amendment exists to prevent situations like that in *Villarreal*.[249]

3. Gamble *Revisited: Same Outcome, Better Rule*

When a court focuses its analysis on the context and level or risk of suffering placed on a detainee, the Cruel and Unusual Punishment Clause still protects them in a wide variety of instances, suggesting courts need not rely on the "evolving standards of decency" rule.[250] In *Gamble*, the plaintiff sustained an injury from a falling bale of cotton.[251] He experienced

243. *Id.*
244. McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)).
245. *Villareal*, 254 F. Supp. 3d at 1184–85.
246. *Id.* at 1184 (quoting Hernandez v. County of Monterey, 110 F. Supp. 3d 929, 948 (N.D. Cal. 2015)).
247. *Id.* (citing Pajas v. County of Monterey, No. 16-CV-00945-LHK, 2016 WL 3648686, at *17 (N.D. Cal. July 8, 2016)).
248. *Id.* at 1184–87.
249. *See* Compeau, *supra* note 24.
250. *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).
251. *See* Estelle v. Gamble, 429 U.S. 97, 99 (1976).

"intense" pain, and a doctor diagnosed his injury as a lower back strain.[252] The doctor provided pain medication and eventually cleared the plaintiff, despite the continued intense back and chest pain, high blood pressure, and migraines.[253] The plaintiff's supervisors ordered him to return to work, and when he refused, they placed him in solitary confinement.[254] With full knowledge of the plaintiff's condition, prison staff forced him to endure worsening pain for almost two months and threatened further punishment to coerce him to work.[255] The prison intentionally initiated this punishment outside the bounds of his actual sentence, and inflicted severe and enduring pain.[256] Retroactively applying the *Jones* approach to *Gamble* still finds the prison liable for cruel and unusual punishment because the pain was not minimal, and it was not a necessary part of his scheduled punishment.[257] Such behavior fell within the range of the original concerns behind the Cruel and Unusual Punishment Clause, and within the meaning of the wanton and unnecessary rule.[258]

If only three states provided for prison standards of medical care in 1976, instead of the actual number of twenty-two, strict adherence to the evolving standards rule may have sanctioned the prison's conduct in *Gamble*. Despite the fact that a prison forced a detainee to perform manual labor with a severely painful back condition, the requisite societal standards would not have sufficiently evolved.[259] The Supreme Court followed this strict adherence in *Gregg*, upholding the death penalty because of its wide legislative approval.[260] Meanwhile, ignoring the evolving standards rule and using "independent judgment" to make the same ruling invokes constitutional issues involving the separation of powers.[261] The forced prison labor represented cruel and unusual punishment because the prison consciously disregarded the risk of exacerbating the plaintiff's severe back condition, and consciously ignored his repeated requests for help or

252. *Id.* at 99. Lower back strains involve radiating pain, stiffness that restricts range of motion and posture, muscle spasms, and persistent pain. *See Low Back Strain and Sprain*, AM. ASS'N NEUROLOGICAL SURGEONS, https://www.aans.org/Patients/Neurosurgical-Conditions-and-Treatments/Low-Back-Strain-and-Sprain [https://perma.cc/6JM9-D3BU]. Doctors recommend avoiding strenuous activity, which will exacerbate the injury and cause more severe pain. *See* Kojo Hamilton, *Pulled Back Muscle and Lower Back Strain*, SPINE-HEALTH (Sept. 8, 2017), https://www.spine-health.com/conditions/lower-back-pain/pulled-back-muscle-and-lower-back-strain [https://perma.cc/D6HN-9FY2].

253. *See Gamble*, 429 U.S. at 99–101.

254. *Id.* at 100.

255. *Id.* at 100–01.

256. *Id.*

257. *See* Jones v. Florida, 701 So. 2d 76, 79 (Fla. 1997).

258. *See* Wilkerson v. Utah, 99 U.S. 130, 135–37 (1879).

259. *See Gamble*, 429 U.S. at 105–06.

260. *See* Gregg v. Georgia, 428 U.S. 153, 179–82 (1976).

261. *See* Stinneford, *supra* note 11, at 87.

reassignment.[262] The objectively severe pain involved in the prison's choice, and the prison's culpable mental state, could have appropriately guided the Court's analysis.

4. Colwell*: Avoiding Judicially Mandated Comfort*

This focus on wanton and unnecessary infliction of pain would preclude certain conditions from Eighth Amendment protection.[263] Retroactively applying the *Jones* approach to *Colwell*, the prison satisfies the subjective mental state requirement of wantonness, because the inmate repeatedly requested care for his other eye and the prison consciously denied these requests.[264] While the case would still hinge on whether this deprivation constituted cruel and unusual punishment, the absence of any severe pain or life-threatening danger indicates the prison's conduct conformed to Eighth Amendment standards. When the prison denied the inmate's requests for a second surgery, the inmate continued his incarceration without pain, the risk of pain, or even the possibility of permanent vision damage.[265] Walking about a prison without full use of an eye differs significantly from forced manual labor with a painful back condition, as described in *Gamble*.[266] The Ninth Circuit could reasonably conclude the prison's neglect of this plaintiff's particular condition did not constitute cruel and unusual punishment.

V. SOLUTION

This Comment proposes a solution to reconcile the applicability and constitutionality of *Wilkerson* with the concerns of *Trop*. The proposal returns the Cruel and Unusual Punishment Clause to the original dichotomy described in *Wilkerson*, but with the understanding that any active or passive practice can resemble torture in its wanton and unnecessary infliction of pain or exposure to a substantial risk of death. The Supreme Court would have the opportunity to enact this solution after granting certiorari to a lower court decision on cruel and unusual punishment.

---

262. *See Gamble*, 429 U.S. at 100–01.
263. *See* Colwell v. Bannister, 763 F.3d 1060, 1064–65 (9th Cir. 2014).
264. *Id.*
265. *Id.* at 1063, 1071.
266. *See Gamble*, 429 U.S. at 99–101.

A. Proposed Analytical Framework

This Comment's solution would conduct cruel and unusual analysis in the following manner: A particular practice constitutes cruel and unusual punishment if it involves the wanton infliction of severe pain or death.[267] Arbitrary, unregulated, drawn out, and inconsistent processes wantonly inflict pain.[268] Any pain resembling torture in its severity represents unnecessary pain.[269] The Eighth Amendment prohibits the active, affirmative infliction of severe pain,[270] and passive infliction of severe pain through deprivation.[271] Depriving a detainee of medical care for a serious medical need only constitutes cruel and unusual punishment when doing so results in the wanton infliction of severe pain.[272] Wanton, reckless, or deliberately indifferent conduct satisfies the subjective mental state requirement for cruel and unusual punishment cases.[273]

B. Overruling the Evolving Standards Rule

Cruel and unusual analysis relying solely on the wanton and unnecessary infliction of pain overrules *Trop* in eliminating the evolving standards rule.[274] The Supreme Court adheres to its own precedent under the doctrine of stare decisis, but recognizes that this doctrine does not represent an "inexorable command."[275] The Court has identified several factors when

---

267. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("First, the punishment must not involve the unnecessary and wanton infliction of pain." (citing Furman v. Georgia, 408 U.S. 238, 392–93 (1972) (Burger, C.J., dissenting))).

268. *See id.* at 188, 206–07 (finding Georgia's sentencing scheme sufficiently reduced the possibility of arbitrary and capricious punishments to pass constitutional muster).

269. *See* Wilkerson v. Utah, 99 U.S. 130, 136 (1879).

270. *See* Hudson v. McMillian, 503 U.S. 1, 4 (1992) (holding unnecessary prison beatings constituted cruel and unusual punishment even when they did not result in serious injury).

271. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) (recognizing that wanton and unnecessary conduct includes deprivations); *see also Gamble*, 429 U.S. at 104 (finding that deliberately depriving detainees of medical care for serious medical needs constitutes cruel and unusual punishment).

272. *See* McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992).

273. *See Farmer*, 511 U.S. at 836–38 (recognizing that the definition of "deliberate indifference" is consistent with the definition of recklessness or wanton under the criminal law, which holds a person accountable when he "disregards a risk of harm of which he is aware").

274. *See* Trop v. Dulles, 356 U.S. 86, 100–01 (1958) ("[T]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

275. Pearson v. Callahan, 555 U.S. 223, 233 (2009) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

considering whether to overrule its own precedent.[276] These factors include: "the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."[277]

The problems facing the evolving standards rule from the *Trop* decision fall into each of these categories. The decision contained flawed reasoning, namely that societal standards evolve in a continuously lenient or progressive direction, and that courts can consistently deduce these standards through objective indicators like public opinion polling.[278] The evolving standards rule from the *Trop* decision proved unworkable as the Court struggled to apply it consistently and sometimes ignored it outright.[279] The decision contradicts precedents like *Wilkerson* and the constitutional separation of powers.[280] Since the *Trop* decision, societal standards evolved away from leniency for drug users, demonstrating societal standards do not reliably evolve toward leniency for all classes of detainees.[281] *Trop* did not create "a clear or easily applicable standard," indicating "arguments for reliance based on its clarity are misplaced."[282] The evolving standards rule from the *Trop* decision may provide cover for jails and prisons that force addicted detainees to withdraw cold turkey, indicating some level of reliance, but these public institutions can readily reverse these policies with appropriate changes in procedure.[283] These arguments provide the necessary legal basis for overruling *Trop*.

276. *See* Janus v. Am. Fed'n of State, Cty. & Mun. Emps., 138 S. Ct. 2448, 2478–79 (2018).
277. *Id.*
278. *See* discussion *supra* Section IV.B.1.
279. *See* discussion *supra* Section IV.A.
280. *See* discussion *supra* Section IV.A.1.
281. *See* discussion *supra* Section IV.B.1.
282. *See Janus*, 138 S. Ct. at 2484 (quoting South Dakota v. Wayfair, 138 S. Ct. 2080, 2098 (2018)) (acknowledging a rule's clarity could strengthen the reliance argument in favor of the rule's preservation); *see also* discussion *supra* Part IV (arguing courts inconsistently apply the evolving standards rule, relying on different factors and using the rule's ambiguity to decide cases based on their policy preferences).
283. *See* Hernandez v. County of Monterey, 110 F. Supp. 3d 929, 959–60 (N.D. Cal. 2015) (outlining procedural changes to adequately treat detoxifying detainees); *see also* Trickey, *supra* note 4 (finding Rhode Island's successful medication-assisted treatment program in its prison system costs the state $2 million annually).

C. Addressing Potential Challenges

This solution would expand the umbrella of cruel and unusual punishment to cover any practices that deliberately ignore objectively high levels of pain or life-threatening conditions. It would also retract the umbrella of cruel and unusual punishment from practices lacking any severe pain or life-threatening conditions.[284] One criticism of the new formulation would point out that the new umbrella provides substantial latitude for courts to place a bevy of new conditions under Eighth Amendment protection.[285] It would seem the new formulation simply replaces one mechanism for inserting policy preferences—the evolving standards rule—for another.

This line of criticism ignores the constraints that the proposed solution places on courts, compared to the present approach. First, a court could not pick and choose favorable societal indicators to arrive at a desired outcome, because the solution scraps the evolving standards rule.[286] Eliminating the evolving standards rule and providing a specific legal analysis would also prevent a court from inserting its independent judgement when societal indicators point toward an undesirable outcome.[287] Second, the proposed solution excludes deliberate indifference to conditions causing less than severe pain or a substantial risk of death. Under this solution, a court would be hard pressed to extend Eighth Amendment protection in cases that fail to clear the threshold of severe pain or risk of death, such as those featuring mere discomfort, aches, deficient sanitation, nuisances, inconveniences, and elective procedures.[288] Courts could not wield the *McGuckin* test, where any condition "that a reasonable doctor or patient

---

284. *See* discussion *supra* Section IV.C.2.

285. A different proposed solution argues that the Cruel and Unusual Punishment Clause originally meant "contrary to long usage," and only a return to *this* original meaning will sufficiently constrain judicial policymaking and insulate the Eighth Amendment from public opinion. *See* Stinneford, *supra* note 11, at 89–90. This formulation would compel courts to enforce longstanding practice, without making value or policy-based assessments of a punishment's seriousness. *Id.* The Eighth Amendment would prohibit life sentences without parole for juveniles simply because those sentences became common during the 1990s and contradicted longstanding practice. *Id.* at 90. Courts favored this approach in the years following the American founding. *See* Barker v. People, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823) (upholding a state statute depriving convicted duelers of their right to vote because it conformed to longstanding practice), *aff'd*, 3 Cow. 686 (N.Y. 1824); Jones v. Commonwealth, 5 Va. (1 Call) 555 (Va. 1799) (striking down a joint fine imposed on four defendants convicted of assaulting a magistrate because joint fines violated the longstanding ban on punishing one for the wrongdoing of another).

286. *See* Witherspoon v. Illinois, 391 U.S. 510, 519–20, 520 n.16 (1968) (citing a favorable death penalty poll while ignoring contemporary reputable polls showing much higher support).

287. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 61 (2010).

288. *See* discussion *supra* Section IV.C.2.

would find important and worthy of comment or treatment" or any "condition that significantly affects an individual's daily activities" would receive Eighth Amendment protection.[289] Third, this solution maintains the mental state requirement of recklessness, wantonness, and deliberate indifference. Negligent or accidental failures to identify or address conditions would not constitute cruel and unusual punishment.[290]

Capital punishment would pose an immediate challenge to this new cruel and unusual analysis. In previous Supreme Court cases, the evolving standards rule protected capital punishment, because the American body politic widely approved of the practice.[291] This Comment's formulation eliminates this protection for capital punishment, but it does not eliminate the rules for limiting capital punishment only when arbitrarily applied or involving a lingering death. *Furman* temporarily struck down capital punishment because of its widespread unregulated and arbitrary application.[292] Scheduled capital punishment, when applied in a regulated regime without risk of a lingering death, conforms to the original spirit behind the Cruel and Unusual Punishment Clause, and this Comment's solution.[293] Death violates the Cruel and Unusual Punishment Clause in the context of *unscheduled* capital punishment, resembling the death of Lara Gillis in *Villarreal*,[294] or in the context of arbitrarily applied capital punishment, resembling the plaintiff's treatment in *Furman*,[295] or when it subjects one to a lingering

289. McGuckin v. Smith, 974 F.2d 1050, 1059–60 (9th Cir. 1992).

290. *See* Farmer v. Brennan, 511 U.S. 825, 836–38 (1994).

291. *See* Gregg v. Georgia, 428 U.S. 153, 179–83 (1976) (finding legislative activity, jury verdicts, and public opinion indicated the standards of decency condoned the death penalty).

292. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972).

293. *Id.* at 242–43 (Douglas, J., concurring) ("There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature . . . ." (citing Granucci, *supra* note 34, at 845–46)). Under one historical theory, the replacement of Saxon with Norman law in eleventh century England brought an end to the emphasis on consistency and proportionality between crime and punishment, necessitating the return to this emphasis in the Magna Carta. *See* Granucci, *supra* note 34, at 845–46.

294. *See* Villareal v. County of Monterey, 254 F. Supp. 3d 1168, 1174–75 (N.D. Cal. 2017).

295. *See Gregg*, 428 U.S. at 153–54 ("[W]here this court held to be violative of those Amendments death sentences imposed under statutes that left juries with untrammeled discretion to impose or withhold the death penalty . . . ." (citing *Furman*, 408 U.S. at 239–40)).

death, i.e., pain outside of the "necessary suffering involved in any method employed to extinguish life humanely."[296]

D. Complying with the New Rule

Under the solution offered in this Comment, reckless, deliberately indifferent, or wanton failures to treat detainee addiction and withdrawal will often constitute cruel and unusual punishment. States can respond to this change with legislation providing for adequate detoxification procedures, facilities, and staff in state prisons and jails.[297] Processing potential addicts and ensuring their detainment does not subject them to suffering and risk of death requires (1) timely, professional medical evaluation; (2) monitoring; and (3) immediate and sustained pharmacological treatment.[298] Different types of addiction require different protocols for adequate assessment.[299]

Over 50% of inmates in prisons and jails depend on or abuse drugs in some way.[300] Opioid abuse accounts for an increasing share of addiction in the United States, and an estimated 42,000 Americans died from opioid abuse in 2016.[301] Consequently, about 25% of the country's inmates depend on or abuse opioids.[302] The literature suggests prisons adopt medication-assisted treatment (MAT) for opioid withdrawal,[303] to avoid tragic cases like *Estate of Abdollahi v. City of Sacramento*.[304] MAT involves administering "opioid agonists" like methadone and buprenorphine-naloxone.[305] These chemicals counteract the dangerous effects of withdrawal and suppress powerful opioid cravings.[306]

---

296. Jones v. Florida, 701 So. 2d 76, 79 (Fla. 1997) (quoting *Louisiana* ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947)); *see also In re* Kemmler, 136 U.S. 436, 447 (1890) (finding punishments are cruel and unusual when they involve a "lingering death").

297. *See* Linden et al., *supra* note 2, at 261–62.

298. *See* Hernandez v. County of Monterey, 110 F. Supp. 3d 929, 959–60 (N.D. Cal. 2015) (granting injunctive relief providing for adequate detoxification treatment for detainees).

299. *Id.* at 960.

300. *See* Linden et al., *supra* note 2, at 252.

301. *Id.*

302. *See* Trickey, *supra* note 4.

303. *See* Linden et al., *supra* note 2, at 252. Inmate deaths most often occur during the days immediately following booking, with drugs and alcohol playing a significant role. *See* COLUMBIA LEGAL SERVS., *supra* note 6, at 2–3.

304. *See* Estate of Abdollahi v. County of Sacramento, 405 F. Supp. 2d 1194, 1200 (E.D. Cal. 2005) (finding the decedent suffered from opioid withdrawal and committed suicide in his cell after a lapse in observation).

305. *See* Linden et al., *supra* note 2, at 252.

306. *Id.* Inmate deaths due to overdoses and withdrawal from drugs and alcohol are preventable when prisons adopt reforms like providing MAT. *See* COLUMBIA LEGAL SERVS., *supra* note 6, at 2–3.

Experimental statewide MAT programs have not proven overly burdensome or difficult to implement. In 2016, Rhode Island enacted a program that provided MAT and drug abuse counseling throughout its prison system.[307] This program costs Rhode Island $2 million annually and successfully reduced the number of overdose deaths in the state's prison population.[308] Enacting this program helped the state prison system comply with Eighth Amendment standards, at a relatively low cost.

VI. CONCLUSION

C.S. Lewis described pain as a "megaphone to rouse a deaf world" that "shatters the illusion that all is well."[309] The human body's rejection of pain represents a timeless measuring tool for cruelty because it speaks, and often shouts, for itself. Certain practices, from beatings, to forced labor with a back injury, to drug withdrawal, will always create objectively high levels of suffering, regardless of society's contemporary standards. Society's feelings about these high levels of pain may change, condoning it for some groups and rejecting it for others, but pain still speaks for itself, vocally demanding redress like the decedent's cries for help in *Villarreal*.[310] The constitutional implications of this pain should turn on its severity, without the secondary question of whether society condones this severity. The proposed solution eliminates the evolving standards rule and restricts cruel and unusual punishment to practices causing severe pain or the substantial risk of death. The Supreme Court should promptly correct its cruel and unusual analysis and return to a practice consistent with the original spirit behind the Eighth Amendment.

---

307. *See* Linden et al., *supra* note 2, at 261–62. Rhode Island provides immediate assistance to withdrawing detainees and long-term assistance to facilitate reintegration with society. *See* Andrea Hsu & Ari Shapiro, *Rhode Island Prisons Push to Get Inmates the Best Treatment for Opioid Addiction*, NAT'L PUB. RADIO (Nov. 19, 2018, 2:13 PM), https://www.npr.org/sections/health-shots/2018/11/19/668340844/rhode-island-prisons-push-to-get-inmates-the-best-treatment-for-opioid-addiction [https://perma.cc/T3HG-MLPL].

308. *See* Trickey, *supra* note 4. After a spike in drug overdoses statewide, Rhode Island's legislature "easily" passed the bill instituting MAT in state prisons. *See* Linden et al., *supra* note 2, at 261. In 2016, before instituting the reforms, twenty-six inmates died from drug overdoses, while only nine died the following year. *See* Trickey, *supra* note 4.

309. C. S. LEWIS, THE PROBLEM OF PAIN 81, 83 (1944).

310. *See* Villareal v. County of Monterey, 254 F. Supp. 3d 1168, 1174–75 (N.D. Cal. 2017).

–