MAKING SENSE OF CRUEL AND UNUSUAL PUNISHMENT: A NEW APPROACH TO RECONCILING MILITARY AND CIVILIAN EIGHTH AMENDMENT LAW

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It cannot be helped, it as it should be, that the law is behind the times.[1]

I. Introduction

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[2] The drafters of the amendment did not write these clear prohibitions in a vacuum. Early on, the Founding Fathers recognized the past abuses the Crown inflicted on the English people.[3] Torture and barbaric treatment "were notoriously applied" to the accused and guilty alike, with those receiving a conviction from the many English offenses most likely sentenced to death.[4] From this history lesson, the Founding Fathers borrowed England's prohibition against cruel and unusual punishment found in the English Bill of Rights of 1689.[5] In borrowing the cruel and unusual language, the Framers intended to prohibit

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[1] RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS 192 (Suzy Platt ed., 1993) (citing OLIVER WENDELL HOLMES, SPEECHES BY OLIVER WENDELL HOLMES (1913)).

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

[3] Furman v. Georgia, 408 U.S. 238, 317 (1972) (Marshall, J., concurring) (commenting on the history of the cruel and unusual punishment in English history).

[4] *Id.* at 316.

[5] *Id.* at 318.

objectionable and barbaric modes of punishment.[6] Since the amendment's ratification in 1791, the Supreme Court construes the Cruel and Unusual Punishment Clause to require a *per se* prohibition against modes of punishment that inflict "the unnecessary and wanton infliction of pain."[7] Yet the Supreme Court interprets the Clause to mean much more than dispelling punishments that were barbaric and cruel at the time of the English Bill of Rights' promulgation. The Court's interpretation has led to recognition that punishments that are excessive, or disproportionate to the crime, also violate the Eighth Amendment.[8]

Much of the development of Eighth Amendment law is an extension of the death penalty debate and the death penalty's proper role in a civilized society.[9] The Court, in construing the appropriateness of the death penalty, fashioned a legal doctrine to guide the death penalty's decision making. This doctrine, which the Court refers to as "evolving standards of decency," is an elastic, progressive doctrine that assumes change.[10] This doctrine is essentially a three-pronged analysis.[11] First, the Court surveys the text and legislative history of the Eighth Amendment to ascertain whether a particular mode of punishment was so barbaric at the time of the amendment's ratification that it is inherently unconstitutional today.[12] Second, if the Court is unable to discover the

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[6] *In re* Kemmler, 136 U.S. 436, 446 (1890) (explaining the historical underpinnings of the Cruel and Unusual Punishment Clause and that it extends to the prohibition of manifestly barbaric punishments).

[7] Gregg v. Georgia, 428 U.S. 153, 171-73 (1976) (explaining that the principal purpose of the Cruel and Unusual Punishment Clause is to prohibit punishment that is nothing more than the gratuitous infliction of pain and suffering).

[8] The terms "excessive" and "disproportional" are used interchangeably throughout this article. *See, e.g.*, *Furman*, 408 U.S. at 457 (Powell, J., dissenting) (referring to the punishments handed down in *Weems* as "grossly excessive" and "disproportioinal" for particular crimes).

[9] The phrases "Eighth Amendment law" and "substantive Eighth Amendment law" are used interchangeably with the "Cruel and Unusual Punishment Clause." This clarification is offered to inform the reader that the Eighth Amendment's prohibition against excessive bail or fines is not considered in this article's proposed framework. *See infra* Part IV.

[10] *See* Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 93 (1997) (discussing how the doctrine assumes the possibility of change).

[11] *But cf.* LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 27 (LEXIS 2004) (identifying the evolving standards of decency doctrine as a two-pronged analysis rather than a three-pronged analysis).

[12] Ford v. Wainwright, 477 U.S. 399, 405 (1986) (citing a major premise of the Eighth Amendment that methods and modes of punishment that were cruel and unusual at the time of the Bill of Right's ratification are cruel and unusual today).

Framer's intent on a mode of punishment, the Court considers whether a particular punishment comports with the norms and values of contemporary society.[13] To determine society's mores on the death penalty, the Court considers two crucial indicators: laws enacted by state legislatures and jury decisions.[14] From this survey, the Court attempts to decide whether a "national consensus" exists on the acceptability of the death penalty for the type of crime or for a distinct class of offenders.[15] In addition to the legislative and jury components, the Court relies on public opinion polls, international opinion, and comments by professional associations.[16] Individually and collectively, these societal measurement tools are controversial among some Court members. In particular, the concern of some members rests on whether it is constitutionally appropriate for these components to enter into the Court's cruel and unusual analysis.[17] Third, the Court brings its own judgment to bear on the acceptability of capital punishment.[18] In doing so, the Court looks to whether a particular punishment meets societal goals, like retribution and deterrence.[19] The Court's interest in bringing its own independent judgment to bear ensures the challenged punishment comports with "human dignity."[20] Among some justices critical of the third prong, it merely represents a convenient method for invalidating death penalty legislation.[21] Nevertheless, the doctrine as a whole is well received by the Court and contributes extensively to the development of Eighth Amendment jurisprudence.

An intellectually rich doctrine, shortcomings do still exist. The doctrine's exposure to civilian courts is apparent through more than one hundred years of history. In military jurisprudence, the doctrine's application is scant. With a few exceptions, the doctrine's applicability occurs only in military cases discussing conditions of confinement.[22] The result is a murky, doctrinal gap that fails to address the full range of constitutional protections against cruel and unusual punishment that must apply in some way within the military. It is unsettling that a framework

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[13] *See* CARTER & KREITZBERG, *supra* note 11, at 27.
[14] *See* discussion *infra* pt. II.B.1-2.
[15] *See id.*
[16] *See infra* notes 211-38 and accompanying text.
[17] *See infra* notes 215, 217-18, 224, 226, 231, 233, 236-37 and accompanying text.
[18] *See* discussion *infra* pt. II.B.3.
[19] *See id.*
[20] *See* CARTER & KREITZBERG, *supra* note 11, at 27.
[21] *See* Atkins v. Virginia, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (criticizing the Court for assuming too much power in invalidating state death penalty laws).
[22] *See* discussion *infra* pt. III.B.

does not exist to reconcile the divergent interests of military and civilian Eighth Amendment law.

There is a new approach. The intent is to harmonize the competing interests of civilian and military Eighth Amendment law, yet still maintain a criminal justice system responsive to the military's needs. In this light, this article advocates a two-track system that seeks to bridge the doctrinal gap between civilian and military courts in applying evolving standards of decency. Track one applies civilian Eighth Amendment substantive law. This track recognizes that various crimes and punishments within the civilian criminal justice system are similar to offenses and punishments found within the military's criminal justice system.[23] Like offenses and punishments should follow one coherent legal regime that maintains consistency and fairness to the accused. Track two recognizes that the military contains offenses and punishments which share no civilian counterpart and, therefore, a different standard should govern.[24] That is, because the evolving standards of decency doctrine relies on an index of state legislatures to determine the appropriateness of punishment—indeed, the state legislative index is the doctrine's primary component—its application to the military is doctrinally unworkable.[25] State legislatures do not share the military's laws for unique crimes and punishments, especially in times of war, and therefore, it is inappropriate—if not impossible—to fairly gauge the sentiments of society against a method or form of punishment. For that reason, this article advocates for a rational basis application when the offense or punishment is unique to the military.

Part II of this article provides the historical backdrop for the doctrine's creation, development, and further refinement. This section examines the doctrinal components, primarily considering death penalty cases challenged on excessiveness grounds, and also addresses methods of punishment perceived as barbaric. In addition, this section examines the doctrine's relevancy to noncapital disproportionality challenges and conditions of confinement. Part III considers the Eighth Amendment's application to the military, reviewing its history and the drafting of Article 55 of the Uniform Code of Military Justice (UCMJ). Part IV addresses the problems with applying a pure evolving standards of decency analysis to the military. This section offers a framework to

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[23] *See* discussion *infra* pt. IV.A.
[24] *See* discussion *infra* pt. IV.B.1-2.
[25] *See infra* notes 312-13 and accompanying text.

harmonize the military's interest in assuring that it can effectively punish Soldiers who commit the vilest of crimes, with the civilian court's interest in ensuring that the protections of the Cruel and Unusual Punishment Clause are available to all. In particular, Part IV explores the feasibility of applying a two-track framework that is flexible and doctrinally logical in incorporating evolving standards of decency to both civilian and military life. Part V concludes by emphasizing that military and civilian courts need an Eighth Amendment framework that is flexible enough to meet the military's needs during war and peace.

II. Evolving Standards of Decency: A Brief History

In Supreme Court jurisprudence, evolving standards of decency began its doctrinal development in *Weems v. United States.*[26] Before *Weems*, the Court interpreted the Cruel and Unusual Punishment Clause only to prohibit modes of punishment that were barbaric and cruel.[27] *Weems* changed this; in *Weems* the Court addressed whether fifteen years imprisonment at hard labor constituted excessive punishment for petty theft.[28] The defendant maintained a position as a disbursing officer with the Bureau of Coast Guard and Transportation located in the Philippine Islands.[29] While in this position, the defendant falsified a "public and official document,"[30] which led to the unlawful conversion of 612 pesos.[31] Upon conviction by a Philippine court, the defendant received a sentence of *cadena temporal*.[32] The defendant received fifteen years

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[26] 217 U.S. 349 (1910).

[27] *See, e.g.*, *In re* Kemmler, 136 U.S. 436, 447 (1890) (holding that the Eighth Amendment's protection against cruel and unusual punishment is implicated when punishment amounts to torture or furthers a lingering death); Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (holding that a sentence of public execution by firing squad did not violate the Eighth Amendment). In *Wilkerson*, the Court further mentioned that there is "[d]ifficulty . . . attend[ing] the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Wilkerson*, 99 U.S. at 135-36.

[28] *Weems*, 217 U.S. at 358.

[29] *Id.* at 357.

[30] *Id.*

[31] *Id.* at 358.

[32] *Id.* At a minimum, *cadena temporal* imposed imprisonment for twelve years and one day. BLACK'S LAW DICTIONARY 195 (7th ed. 2000). Derived from Spanish law, *cadena* is defined as "[a] period of imprisonment; formerly, confinement at hard labor while

imprisonment, hard labor, confinement to chains at the ankles, lifetime surveillance, and a fine of 4,000 pesetas.[33] In reaching its decision, the Supreme Court searched for the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause, considering whether it applied, if at all, to punishments that may be excessive, but were not "inhuman and barbarous, and something more than the mere extinguishment of life."[34] In its inquiry, the Court found that the protection from cruel and unusual punishment did indeed go beyond simply the method of punishment, but the excessiveness of punishment as well.[35] Justice Joseph McKenna, for the Court majority, identified the progressive nature of the Eighth Amendment, stating "[t]he clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as the public opinion becomes enlightened by a humane justice."[36] This interpretation permitted this and successor Courts to consider cruel and unusual punishment challenges that are not fixed to an Eighteenth Century definition of punishment—like whipping, burning at the stake, disemboweling, or breaking on the wheel—but that are simply excessive.[37] In other words, *Weems* broke new ground in establishing an Eighth Amendment jurisprudence that did not concern itself with simply the method of punishment (the Clause's traditional interpretation), but whether the Clause should reflect society's changing values and norms toward punishment (or the standard today toward an evolving definition of punishment). Not until *Trop v. Dulles*,[38] almost fifty years after

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chained from waist to ankle." *Id. Cadena temporal* is defined as "[i]mprisonment for a term less than life." *Id. Temporal* is a Spanish term for incarceration. *Id.*

[33] *Id.* at 364-66.

[34] *Weems*, 217 U.S. at 370 (citing *In re* Kemmler, 136 U.S. 436, 447 (1890)); *see also* Furman v. Georgia, 408 U.S. 238, 376 (1972) (Burger, C.J., dissenting) (explaining the difficulty in interpreting a constitutional provision "that is less than self-defining" and "the most difficult to translate into judicially manageable terms").

[35] *Weems*, 217 U.S. at 378. The Court reviewed the history of the protection against cruel and unusual punishment going back to the reign of the Stuarts, where cruel and barbaric punishments were levied against the accused. *Id.* at 371-72. From this, the Court gleaned that the Eighth Amendment, if nothing else, checked overzealous power of the state. *Id.* at 373. On this point, the Court commented that, "[t]his [checking state power] was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history." *Id.*

[36] *Id.* (citing *Ex parte* Wilson, 114 U.S. 417, 427 (1885)) (commenting that "punishments . . . considered as infamous may be affected by the changes of public opinion from one age to another").

[37] *Id.* at 377.

[38] 356 U.S. 86 (1958).

Weems, however, did the Court crystallize how changing societal attitudes can influence the meaning of cruel and unusual punishment.

In *Trop*, the Court considered whether denationalization of a native-born American citizen violated the Eighth Amendment.[39] At issue was Section 401(g) of the Nationality Act of 1940, which said that U.S. citizens shall lose their citizenship by "[d]eserting the military or naval forces of the United States in time of war . . . ."[40] The defendant did just that while serving with the U.S. Army in French Morocco.[41] The defendant, confined to a stockade in Casablanca for prior misconduct, escaped, and an Army truck picked him up less than a day later.[42] "A general court-martial convicted [Mr. Trop] of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge."[43] This court-martial conviction, combined with the penal nature of Section 401(g) of the Nationality Act, resulted in the defendant becoming stateless.[44] It is this limbo status that the Court found untenable. Writing for a plurality of the Court, Chief Justice Earl Warren stated that "[becoming stateless] is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."[45] Yet, the Court did not stop at merely articulating its disdain for the harshness of the punishment; instead, Chief Justice Warren began to craft the legal argument for why such punishment violated basic Eighth Amendment protections. It is here that the Court fashioned the language that it believed captured the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[46] Recognizing the language's infinite meanings, the Court began to define at length what the doctrine meant. For this inquiry, the Court needed something to measure the maturity of a society. Taking a comparative perspective, the Court looked to a United Nations survey of eighty-four nations.[47] In this survey, the Court found

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[39] *Id.* at 88.
[40] *Id.* at 87 n.1.
[41] *Id.* at 87.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 88.
[45] *Id.* at 101.
[46] *Id.* The Court implicitly took the position that it was writing from a blank slate, as the terms "cruel" and "unusual" are imprecise, and because of this, the Court felt free to expound on what the Clause meant at that time. *Id.* at 100 n.32, 103.
[47] *Id.* at 102-03.

only two countries which imposed the penalty of denationalization for desertion, the Philippines and Turkey.[48] From this data, the Court found that denationalization for wartime desertion did not comport with civilized standards.[49] This finding, coupled with the Court's pronouncement that the Eighth Amendment is progressive rather than static, gave the Court the basis to find Section 401(g) of the Nationality Act unconstitutional.[50] It is this rationale, which provided the Court its intellectual footing to challenge excessive punishment, both for capital and noncapital offenses, on Eighth Amendment grounds.[51]

The Court reaffirmed its willingness to examine excessive punishment in *Robinson v. California*.[52] In *Robinson*, California criminalized addiction to narcotics, and consequently, the defendant, a narcotics user, was convicted and sentenced to ninety days imprisonment.[53] Justice Potter Stewart, writing the opinion for the Court, relied on the excessive punishment rationale to hold that "in the light of contemporary human knowledge," such a penalty amounts to cruel and unusual punishment.[54] With *Trop* and *Robinson*'s legal rationale soundly established, relying on the progressive character of the Eighth Amendment, the Court next turned to the constitutionality of the death penalty.

A. Challenging the Death Penalty: The Early Cases

The earliest capital case invoking evolving standards of decency to challenge the legitimacy of the death penalty is *Rudolph v. Alabama*.[55]

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[48] *Id.* at 103.

[49] *Id.* at 102. Civilized standards to the Court could be drawn from the Eighth Amendment, where "[t]he basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100.

[50] *Id.* at 103-04.

[51] *See id*. at 102-03. The Court further left open the possibility that the punishment of death itself could be questioned, "in a day when it is still widely accepted, [the death penalty] cannot be said to violate the constitutional concept of cruelty." *Id.* at 99.

[52] 370 U.S. 660 (1962).

[53] *Id.* at 660 n.1.

[54] *Id.* at 666. *Robinson* is significant because a majority of the Court agreed with an excessiveness rationale, unlike *Trop* where only a plurality was garnered; yet it should be noted that the *Robinson* Court did not specifically cite to *Trop*. *Id*.

[55] 375 U.S. 889-90 (1963) (Goldberg, J., dissenting from a denial of writ of certiorari) (arguing that world-wide trends support at least a discussion of whether it is appropriate to punish a convicted rapist with the death penalty).

In *Rudolph*, the Court denied a writ of certiorari for review of a death penalty conviction for rape.[56] Dissenting from the denial, Justice Joseph Goldberg argued that punishing convicted rapists with the penalty of death was contrary to trends within the states[57] and the world,[58] and therefore, merited consideration.[59] Five years after *Rudolph*, the Court again considered evolving standards of decency in *Witherspoon v. Illinois*, but only tangentially.[60] Nevertheless, even though the Eighth Amendment was not squarely at issue, the Court articulated the critical value of juries, stating that "one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"[61] Soundly relying on evolving standards of decency, the Court suggested that the jury is the body that encapsulates those changing, evolving societal norms that reflect the conscience of the community.[62]

Jury sentencing resurfaced three years later in *McGautha v. California*.[63] Unlike *Witherspoon*, which concerned the disqualification of jurors who were morally opposed to the death penalty, *McGautha* dealt with whether juries could award the death penalty in an absence of standards to guide their decision.[64] Referring to *Witherspoon* and *Trop*, the Court recognized the important link that juries serve in representing society's collective conscience, but failed to provide an in-depth discussion on how this should determine the role of juries in the future.[65] Nevertheless, the impact of *Witherspoon* and *McGautha* is the emphasis

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[56] *Id.* at 889; *see also* Martin, *supra* note 10, at 93.

[57] *Rudolph*, 375 U.S. at 890 (noting the trend in the states is to no longer permit the penalty of death for rape).

[58] *Id.* at 890 n.1 (relying on a United Nations survey where only five countries continued the use of the death penalty for convicted rapists: Nationalist China, Northern Rhodesia (now Zambia), Nyasaland (now Malawi), Republic of South Africa, and the United States).

[59] *Id.* at 889.

[60] 391 U.S. 510, 518-19 (1968) (holding that the state of Illinois infringed on the defendant's right to an impartial jury when those jurors who opposed capital punishment on moral grounds were systematically excluded for cause).

[61] *Id.* at 520 n.15 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[62] *Id.* at 519-20.

[63] 402 U.S. 183 (1971).

[64] *Id.* at 196.

[65] *Id.* at 202. The Court held that the absence of standards to guide the jury's discretion as to whether to award a life sentence or the death penalty was constitutional. *Id.* at 221-22.

on the jury as an important, objective component in defining societal norms that shape the meaning of evolving standards of decency.[66]

The 1970's marked a period of reflection for Eighth Amendment jurisprudence. The Court, troubled with the death penalty's selective application on society's most vulnerable, handed down the landmark, and controversial, decision of *Furman v. Georgia*.[67] *Furman*, in its differing legal rationales, questioned whether states could craft a capital sentencing scheme that would be free of jury arbitrariness.[68] *Furman* also represents a Court struggling to discern how evolving standards of decency should enter into its Eighth Amendment jurisprudence. This is apparent, as the Court failed to find a unifying legal rationale to guide it; however, the plurality did reach one conclusion: arbitrary imposition of capital punishment violates the Cruel and Unusual Punishment Clause.[69] This conclusion resulted in nullifying the District of Columbia and thirty-nine states' capital punishment schemes.[70] *Furman*'s effects are significant, but more elusive are the controlling legal theories. For this inquiry, Justice William Brennan's concurring opinion is insightful. Justice Brennan relied on four principles: (1) the punishment cannot be so severe as to deprive one of human dignity;[71] (2) the state cannot arbitrarily inflict a severe punishment;[72] (3) severe punishment must comport with societal norms;[73] and (4) "severe punishment must not be excessive."[74] Of the four principles, the third provides the most insight on how evolving standards of decency are determined. It is here that Justice Brennan examined objective societal indicators to determine the acceptability of severe punishment.[75] The evidence that Justice Brennan offered to show that contemporary attitudes toward the death penalty

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[66] *See* Martin, *supra* note 10, at 94.

[67] 408 U.S. 238 (1972) (per curiam) (holding that Georgia's capital sentencing scheme violated the Eighth Amendment).

[68] *See generally id.* at 294 (Brennan, J., concurring) (commenting that "when a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied").

[69] *Id.* at 256-57.

[70] *Id.* at 417 (Powell, J., dissenting) (rejecting the plurality's encroachment of the legislature's ability to fashion its own laws).

[71] *Id.* at 271 (Brennan, J., concurring).

[72] *Id.* at 274.

[73] *Id.* at 277.

[74] *Id.* at 279.

[75] *Id.* Justice Brennan went on to say that capital punishment is only tolerated because of its disuse. *Id.* at 300.

changed is that society chose not to use the punishment.[76] In other words, in 1972, the United States' population increased, the number of crimes committed that would make one eligible for the death sentence increased, yet the number of death verdicts decreased to a very small number.[77] The conclusion Justice Brennan drew is that contemporary society (at least in 1972) disagreed with the death penalty as a form of punishment, thus supporting the conclusion that this punishment violated the Cruel and Unusual Punishment Clause.

Justice Thurgood Marshall agreed with much of Justice Brennan's analysis, but Justice Marshall took a slightly different track to conclude that Georgia's death penalty violated the Eighth Amendment. Justice Marshall relied on four factors to find the death penalty cruel and unusual: (1) the punishment involves so much physical pain that society rejects it; (2) the punishment is unusual because of its disuse; (3) the punishment is excessive and serves no valid legislative purpose;[78] and (4) society abhors the type of punishment even though it may not be excessive.[79] The fourth factor offers a glimmer of Justice Marshall's approach to evolving standards of decency.[80] Justice Marshall attempted to determine objective standards that may reflect the norms of a civilized state, considering opinion polls and whether a certain punishment may shock the conscience. In the end, Justice Marshall took a leap of faith and asserted that if Americans knew that the application of the death penalty fell disproportionately on minorities and men, society would reject it.[81]

Chief Justice Warren Burger, writing for the dissent, offered a different perspective on how to assess evolving standards of decency. First, Chief Justice Burger argued that little evidence existed suggesting society disfavored the imposition of capital punishment. As mentioned by the Chief Justice, quite the opposite is true in that over two-thirds of

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[76] *Id.*
[77] *Id.* (Brennan, J., concurring).
[78] *Id.* at 330 (Marshall, J., concurring) (articulating why a legislature may craft capital punishment laws). Justice Marshall's justifications for why legislatures may craft capital punishment laws are: (1) retribution, (2) deterrence, (3) recidivism, (4) encouragement of guilty pleas and confessions, (5) eugenics, and (6) economy. *Id.* at 342. Justice Marshall concluded that these reasons individually and collectively could not support the imposition of death. *Id.* at 359.
[79] *Id.*
[80] *Id.* at 360.
[81] *Id.* at 369.

the states in 1972 still approved of the death penalty.[82] Less reliable, but still relevant, were public opinion polls that supported the death penalty.[83] Chief Justice Burger went on to refute claims that society disdained the death penalty because its imposition is "freakishly rare."[84] In the end, the real impact in the dissent's analysis is that it illustrates the doctrine's amorphous nature. Since it relies on statistics and trends, the ease in which a particular result is reached is largely based upon how the data is interpreted.[85]

Four years later, the Court decided *Gregg v. Georgia*, ending *Furman*'s four-year moratorium on capital punishment.[86] Justice Potter Stewart, writing for a plurality, narrowed the Court's excessiveness inquiry into two distinct aspects: (1) "the punishment must not involve the unnecessary and wanton infliction of pain[;]"[87] and (2) "the punishment must not be grossly out of proportion to the severity of the crime."[88] As to the first aspect, Justice Stewart reviewed the propriety of the death penalty, considering "objective indicia that reflect the public attitude toward [this] sanction."[89] The legislative response after *Furman* swayed Justice Stewart. After *Furman*, thirty-five states and the District of Columbia enacted laws authorizing capital punishment.[90] In addition, the jury, also a significant and reliable index of societal norms, had over the decades handed down less death verdicts, illustrating the humanity in the process.[91] This suggested to the Court that the jury, as a reflection of

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[82] *Id.* at 385.
[83] *Id.*
[84] *Furman*, 408 U.S. at 386 (Burger, J., dissenting) (arguing that the number of cases in which the death penalty is imposed, as compared with the number of case in which it is available, does not indicate a general revulsion toward the death penalty that would lead to its repeal).
[85] *Id.* at 384-86. The Court has relied on public opinion polls to support their position that societal sentiments have changed. *Id.* This author refers to them only to demonstrate that the Court is continually looking to objective measures to gauge society's attitudes, but the Court has indicated that its influence on the Court's judgment is marginal. *Id.* As such, this article does not elevate this objective criterion to a status that is equal in weight to the legislature and jury determinations.
[86] 428 U.S. 153, 207 (1976) (holding that Georgia's statutory capital sentencing scheme did not violate the Eighth Amendment).
[87] *Id.* at 173.
[88] *Id.* Justice Stewart writes that this two-part test to determine excessive punishment "is intertwined with an assessment of contemporary [societal] standards," and but one critical factor to consider is the legislative judgment. *Id.* at 175.
[89] *Id.* at 173.
[90] *Id.* at 179-80.
[91] *Id.* at 182.

the collective conscience, would reserve death for only the most appropriate cases.[92] For these reasons, the Court held that the death penalty did not result in the unnecessary and wanton infliction of pain that the Eighth Amendments finds offensive.[93]

As to the second aspect, the Court reviewed Georgia's comprehensive capital sentencing scheme. This scheme bifurcated the trial proceeding into a guilt and sentencing stage, provided standards to the jury to guide them in deliberating the appropriateness of death (referred to as aggravating and mitigating circumstances), and provided special avenues of appeal to ensure the reliability of a death verdict.[94] These measures safeguarded against jury arbitrariness and caprice, channeling its discretion toward a just result that would not result in a "freakish" death verdict.[95] These checks ensured that when capital punishment was an appropriate response, its infliction would be proportional to the severity of the crime.

The use of objective indicia in *Furman* and *Gregg* to assess societal sentiments on the death penalty marked a new era for the Court. It is clear from these cases that the evolving standards of decency analysis under the Cruel and Unusual Punishment Clause had the opportunity to develop even further as society's moral sentiments changed.[96]

B. The Doctrinal Components

Post-*Gregg* Supreme Court decisions provided further development of the doctrine's components. Of these doctrinal components, the legislature, jury verdicts, and the Court's independent judgment became permanent fixtures in the Court's jurisprudence. Apart from this framework, the Court relied upon additional societal indicators in its Eighth Amendment jurisprudence. This section deals primarily with death penalty and noncapital excessive punishment cases, but due

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92 *Id.*
93 *Id.* at 187.
94 *Id.* at 196-99.
95 *Id.* at 206-07.
96 *See* Thompson v. Oklahoma, 487 U.S. 822, 823 n.7 (1988) (Stevens, J., plurality) (explaining that the rationale for using this index of constitutional values, as reflected by the actions of legislatures and juries, is to construe what "unusual" means, and this understanding depends "upon the frequency of its occurrence [the punishment] or the magnitude of its acceptance").

consideration is given to a distinct class of cases, conditions of confinement, as they relate to the doctrine.[97]

1. The Legislative Role in Evolving Standards of Decency

In cruel and unusual punishment cases, the Court consistently looks to the enactments of state legislatures to determine whether a challenged punishment conforms with the Eighth Amendment. This section examines the legislative component, separating it into two subcategories: capital and noncapital offenses.

a. Capital Punishment and the Legislative Role in Evolving Standards of Decency

The legislative role in staking out the contours of what is cruel and unusual is fixed prominently in the Supreme Court's psyche. Time and time again, the Court emphasizes its important role, stating that "legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency."[98] The utility of looking to the legislature continued, and immediately following *Gregg*, the Court handed down two controversial decisions: *Woodson v. North Carolina*[99] and *Coker v. Georgia*.[100] In *Woodson*, the Court struck down North Carolina's mandatory death penalty statute for first degree murder, finding it to "depart[ ] markedly from contemporary standards respecting the imposition of the punishment of death . . . ."[101] In reaching its decision, the Court found that legislatures were rejecting mandatory death sentences.[102] In rejecting automatic death sentences, the legislatures instead began empowering the jury to make those critical life or death choices.[103] The next year, the *Coker* Court struck down a

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[97] *See* discussion *infra* pt. II.C.

[98] Woodson v. North Carolina, 428 U.S. 280, 294-95 (1976) (affirming that the state legislatures are an important index for determining societal sentiments on the appropriateness of the capital punishment).

[99] *Id.* at 280.

[100] 433 U.S. 584 (1977).

[101] *Woodson*, 428 U.S. at 301.

[102] *Id.* at 298-99.

[103] *Id.* at 293. The Court traced mandatory death sentences from its common law heritage to as late as 1963, where only eight states at that time permitted such a sanction. *Id.* at 289, 293. After *Furman*, a handful of states reenacted their mandatory death penalty statute. *Id.* at 292-93.

Georgia statute that permitted a death sentence for the rape of an adult woman.[104] Like *Woodson*, the Court sought guidance from the country's state legislatures to determine whether rape of an adult woman justified the death sentence.[105] Referring to state legislative records, where the nation's judgment on punishment could be measured, the Court noted that state legislatures clearly rejected the death penalty for rape.[106] Through a series of Court decisions and the passage of time, only one state—Georgia—still retained legislation for capital rape.[107] The Court concluded that the country no longer sanctioned the death penalty for the rape of an adult woman, as it failed to comport with the dignity of man, and as such, found it unconstitutional.[108]

The Court's legislative focus in assessing whether society rejects a punishment that is so excessive that it fails to meet a semblance of proportionality continued in *Enmund v. Florida*.[109] There, the Court considered whether a convicted felony-murderer who "neither took life, attempted to take life, nor intended to take life"[110] could face the death penalty. The Court's survey of the thirty-six jurisdictions that authorized the death penalty in this circumstance revealed that only eight states permitted the death penalty when another robber takes life.[111] The other twenty-eight jurisdictions required a higher degree of culpability before imposing the death penalty.[112] The Court's examination of state felony-murder laws revealed that "only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed."[113] This fact weighed considerably in the Court's ruling. An accomplice to murder must have the requisite level of moral culpability (or something greater than one who neither took life, attempted to take life, nor intended to take life) to become eligible for the

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[104] *Coker*, 433 U.S. at 592.
[105] *Id.* at 593-94.
[106] *Id.* at 595-96.
[107] *Id.* at 593-94. The Court sought to demonstrate that the public consensus on the death penalty for the rape of an adult woman had markedly changed against the sanction. *Id.* In fact, before *Furman*, only sixteen states authorized such a punishment, and after *Furman* and *Woodson*, only the state of Georgia still retained this punishment. *Id.*
[108] *Id.* at 597-98.
[109] 458 U.S. 782, 801 (1982) (holding unconstitutional Florida's felony-murder statute because it permitted the death penalty for one who neither killed nor attempted to kill).
[110] *Id.* at 787.
[111] *Id.* at 789-90.
[112] *Id.*
[113] *Id.* at 792.

death penalty.[114] The Court's ruling, however, left open the degree of moral culpability required. Not until *Tison v. Arizona* did this issue again receive the Court's attention.[115] In *Tison*, Justice Sandra Day O'Connor, writing for the majority, placed the moral culpability requirements within the felony-murder regime on a continuum.[116] At one end of the continuum is felony-murder *simpliciter*,[117] which requires minimum participation in the capital felony (at issue in *Enmund*), and at the other end is the intent to kill or "major participation"[118] in the capital felony, where one's moral culpability is quite high.[119] In the middle rests a hodge-podge of culpability standards, which were at issue in *Tison*.[120] The Court concluded, after surveying state laws, that a consensus was reached in "that substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'"[121] As such, Arizona's felony murder statute, which the Court believed properly fell within the midrange of culpability standards, did not result in a disproportional punishment, and therefore, did not violate the Eighth Amendment.[122]

Woodson, *Coker*, *Enmund*, and *Tison* challenged state laws that authorized the death penalty. Since then, a different, yet effective approach has been used by those on death row to further restrict the sovereign's ability to exact a death sentence. Rather than challenging the constitutionality of capital punishment for the offense itself, this new approach challenges the capital offender's eligibility for the death penalty based on some defining characteristic of that person. The effect of this tactic is to limit the reach of the death penalty by narrowing the

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[114] *Id.* at 801. It is because of this weight of legislative evidence that the Court found the death penalty in this circumstance disproportional to the crime of robbery-felony murder. *Id.* at 788.

[115] 481 U.S. 137 (1987).

[116] *Id.* at 147.

[117] *See* BLACK'S LAW DICTIONARY 1389 (7th ed. 2000). *Simpliciter* is defined as "[i]n a simple or summary manner; simply." *Id.*

[118] *Tison*, 481 U.S. at 158 (explaining that "major participation" in a felony where a murder results is enough to satisfy a state's claim for the death penalty).

[119] *Id.* at 157-58.

[120] *Id.* at 147 (identifying the various middle-range culpability standards for felony murder found in some states as: (1) "recklessness or extreme indifference to human life," (2) "minimal participation in a capital felony," and (3) participation that is not "relatively minor").

[121] *Id.* at 154 (citations omitted).

[122] *Id.* at 158.

class of people eligible for capital sentencing. That is, by disqualifying certain groups, the Court is essentially granting a constitutional exemption from the death penalty. Central to whether a group deserves an exemption, the Court identifies the trends of state legislatures.[123] This approach permits the Court to determine whether the sanction of death comports, as applied to a particularized group, with contemporary standards. This exemption movement began in *Ford v. Wainwright*.[124] There, the Court "[took] into account objective evidence of contemporary values" to find that executing the insane offended the "human dignity" protected by the Eighth Amendment.[125] In particular, the Court traced the common law rule that abhorred execution of the insane, finding that every state legislature prohibited the practice.[126] This historical fact represented a national consensus against the practice.[127]

In *Atkins v. Virginia*, the Court held that executing the mentally retarded is cruel and unusual under the Eighth Amendment.[128] Finding significant change since the Court decided *Penry v. Lynaugh*,[129] the Court concluded that "the American public, legislators, scholars, and judges" reached a consensus that executing the mentally retarded is cruel and unusual.[130] Justice John Paul Stevens, writing for the majority, did not look to mere numbers of state legislatures that prohibited the practice. Rather, Justice Stevens looked at the trend and consistency of some states that rejected executing the mentally retarded, and from this, concluded "[t]he practice . . . has become truly unusual, and it is fair to

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[123] *See* Atkins v. United States, 536 U.S. 304, 315-16 (2002).

[124] 477 U.S. 399, 417-18 (1986) (holding that execution of the insane violates the Eighth Amendment).

[125] *Id.* at 406.

[126] *Id.* at 406-07.

[127] *Id.* at 408-09 n.2. Even though the Court found it constitutionally defective to execute the insane, the Court still had to rule on whether an evidentiary hearing was required to resolve whether the defendant was sane. *Id.* at 410. The Court held that a fact-finding procedure is required to assess a defendant's sanity before imposing execution. *Id.* at 417-18. *But cf.* Sell v. United States, 539 U.S. 166, 169 (2003) (holding that the Fifth Amendment's Due Process Clause does not prohibit, in certain circumstances, the involuntary medication of a mentally ill criminal defendant, who committed serious but non-violent felonies, for the purposes of rendering the defendant competent to stand trial).

[128] 536 U.S. 304, 321 (2002) (holding that executing the mentally retarded violated the Eighth Amendment).

[129] 492 U.S. 302, 340 (1989) (permitting the execution of the mentally retarded), *overruled by* Atkins v. Virginia, 536 U.S. 304 (2002).

[130] *Atkins*, 536 U.S. at 307.

say that a national consensus has developed against it."[131] State trends disfavoring a class of offenders from being subject to capital punishment signaled to the Court that the nation had moved beyond the reasoning reached decades ago, finding in this case that a national consensus exists against executing the mentally retarded.[132] *Atkins'* relevance to the legislative component is that the Court continued to strive to find a national consensus before rejecting or affirming the propriety of the death penalty.[133] The primary component for discovering this national consensus exists with an index of state legislatures.

In *Thompson v. Oklahoma*, the Court relied on legislative trends to exempt minors under the age of sixteen years from the death penalty's reach.[134] In *Thompson*, the Court articulated as an important societal indicator the manner in which state legislatures treated minors under the age of sixteen years of age.[135] In this exercise, the Court surveyed legislative enactments in two respects: (1) the Court identified how legislatures treated minors differently than adults, finding it to be quite disparate;[136] and (2) the Court considered the age at which legislatures authorized the death penalty.[137] As to the latter point, the Court identified thirty-one jurisdictions that prohibited the death penalty for minors under the age of sixteen.[138] To the Court, this evidence suggested

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[131] *Id.* at 315-16 (looking at both trends and total numbers to identify a significant shift in state attitudes toward executing the mentally retarded, and concluding that a national consensus clearly prohibits the practice). *Cf. id.* at 342 (Scalia, J., dissenting) (rejecting the Court's holding that a national consensus exists against executing the mentally retarded).

[132] *Id.*

[133] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815 (1989) (O'Connor, J., concurring in judgment) (explaining that before the Court can find a national consensus that would result in restricting the state from imposing the death penalty on defendants under the age of sixteen, the evidence supporting it must be clear).

[134] Thompson v. Oklahoma, 487 U.S. 815, 823-24 (1988) (declaring that execution of minors below the age of sixteen violates the Eighth Amendment).

[135] *Id.* at 823-24 (Stevens, J., plurality).

[136] *Id.* (Stevens, J., plurality) (finding that minors are "not eligible to vote, . . . to marry without parental consent, or to purchase alcohol or cigarettes") (internal footnotes omitted).

[137] *Id.* at 824-28.

[138] *Id.* at 826-28. Justice Stevens, writing for the Court plurality, noted that fourteen states did not authorize capital punishment under any circumstances for any offense. *Id.* at 826. Then, Justice Stevens found nineteen states that had "no minimum age expressly . . . stated in the death penalty statutes." *Id.* at 827. Because it is inconceivable that a state would execute a ten-year old, as these nineteen state statutes would logically permit, Justice Stevens felt free to brush these nineteen state death penalty statutes aside because they were of no assistance in determining where the appropriate age should rest. *Id.* at

the practice offended "civilized standards of decency" and, therefore, violated the Eighth Amendment.[139]

The result in *Thompson* led to the Court's ruling in *Stanford v. Kentucky*.[140] In *Stanford*, the Court considered whether sixteen and seventeen-year-old capital offenders should receive the death penalty.[141] In finding no Eighth Amendment violation, the Court relied on legislative enactments as the relevant societal indicator. This societal indicator revealed that a consensus remained on the appropriateness of sanctioning the death penalty for sixteen and seventeen-year-old capital offenders.[142] More than a decade later, however, in the landmark case of *Roper v. Simmons*,[143] the Court revisited the appropriateness of executing sixteen and seventeen-year old capital offenders. Writing for the Court, Justice Anthony Kennedy searched for a national consensus against a juvenile death penalty, finding that thirty states prohibited the practice altogether.[144] Of the remaining twenty states, the frequency of executing juveniles was so rare that the Court could confidently conclude that a national consensus existed against the juvenile death penalty.[145] Even though not much had changed since *Stanford*,[146] the trend among the

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828-29. Finally, eighteen states remained, and of those, all required capital offenders to be at least sixteen for death penalty eligibility (for purposes of Justice Stevens' simple math, the federal government is included as a state, which brings the total number of jurisdictions to fifty-one). *Id.* at 829.

[139] *Id.* at 830.

[140] 492 U.S. 361, 380 (1989) (holding that the Eighth Amendment does not prohibit sixteen and seventeen-year old capital offenders from receiving the death penalty), *overruled by* Roper v. Simmons, 125 S. Ct. 1183 (2005).

[141] *Id.*

[142] *Id.* at 371-72. To find a semblance of a national consensus on this issue, Justice Scalia only looked to states that permitted capital punishment. Of those states, Justice Scalia considered not only the states that specifically provided sixteen and seventeen-year old defendants were eligible for the death penalty, but those nineteen states that had no minimum age set at all. *Id.* at 371 n.3. *Cf. id.* at 384 (Brennan, J., dissenting) (rejecting the plurality's exclusion of those fifteen states and the District of Columbia that do not permit the death penalty, claiming that these states inclusion should enter into the calculus of a national consensus).

[143] 125 S. Ct. 1183 (2005) (holding that the Eighth Amendment prohibits the execution of sixteen and seventeen-year old capital offenders).

[144] *Id.* at 1192. *But cf. id.* at 1219 (Scalia, J., dissenting) (arguing that counting states that prohibit capital punishment altogether is like "including old-order Amishmen in a consumer-preference poll on the electric car").

[145] *Id.* at 1192-93 (citing that since *Stanford*, only six states had executed prisoners for crimes committed as juveniles).

[146] *See id.* at 1217 (Scalia, J., dissenting) (criticizing the Court's reversal of *Stanford* just fifteen years after it was decided).

states toward abolition suggested to the Court majority that the time had come to reverse *Stanford* and recognize the juvenile death penalty's incompatibility with a civilized society.[147]

Thus far, the legislative component is considered in light of excessive or disproportional death penalty challenges. However, a limited number of cases concerning the method of punishment have reached the Court. First, the controversial practice of death by electrocution visited the Court. Challenged as a method of punishment in *In re Kemmler*[148] almost a century ago, the issue of using an electric chair to execute capital offenders surfaced again in *Glass v. Louisiana*.[149] In *Glass*, Justice Brennan, in his dissent from a denial of writ of certiorari, failed to mention the trends of state legislatures, and instead made his argument against electrocution by its sheer barbarism.[150] In this regard, Justice Brennan emphasized how the Court's judgment may be brought to bear in striking down death by electrocution.[151] In light of recent changes in state laws turning to lethal injection rather than electrocution; however, Justice Brennan's argument for abolishing the electric chair would certainly be more persuasive.[152] States have questioned whether the electric chair is a humane method of execution, and given this fact, Justice Brennan's argument against the electric chair carries more weight today than in 1986.[153] Second, in *Gomez v. United States*,[154] Justice Stevens challenged the use of lethal gas to execute death

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147 *Id.* at 1198.

148 136 U.S. 436, 447 (1890) (holding that the death by electrocution does not violate the Eighth Amendment); *see also* Louisiana *ex rel*. Francis v. Resweber, 329 U.S. 459 (1947) (holding that death by electrocution after an interrupted first attempt did not violate the Eighth Amendment).

149 471 U.S. 1080 (1987) (Brennan, J., dissenting from a denial of writ of certiorari).

150 *Id.* at 1086-87 (explaining in great detail that death by electrocution results in severe pain and disfigurement that ends in a prolonged and cruel death).

151 *Id.* at 1083-84.

152 *See* Death Penalty Information Center, *Facts About the Death Penalty* (Apr. 22, 2005), *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf [hereinafter DPIC]. Thirty-seven of the thirty-eight states that authorize the death penalty use lethal injection as the primary method. *Id.* at 4; *see also Methods of Execution*, *available at* http://www.deathpenaltyinfo.org/article.php?scid=8&did=245#News (last visited May 16, 2005) (noting that ten states that offer the electric chair as a means of execution, only one state—Nebraska—offers it as the sole means).

153 *See* DPIC, *supra* note 152, at *News and Information*, (noting that Alabama, Georgia, Tennessee, Kentucky, and Florida have recently changed their laws to permit death row inmates to choose whether they are executed by electrocution or lethal injection).

154 503 U.S. 653 (1992) (Stevens, J., dissenting from a denial of a petition for certiorari).

row inmates.[155] Such a practice, Justice Stevens argued, is contrary to the trends of the states.[156] While both decisions are denials of petitions for *certiorari*, their significance to the legislative component is still worthy of consideration.

b. Non-capital Punishment and the Legislative Role in Evolving Standards of Decency

In challenging capital punishment, whether by looking at the capital offense or the group that may be subject to the death penalty, the legislative determination, as a component of the evolving standards of decency doctrine, is a convenient tool to assess the sentiments of society. But one striking fact is that the doctrine did not originate with death penalty challenges. Rather, the doctrine originally was used to challenge noncapital, excessive, and disproportionate punishment.[157] This fact leads to a natural transition in assessing the Court's reliance on the legislative will in shaping the Court's Eighth Amendment jurisprudence. It is in this light that this article's focus shifts from capital to noncapital cases. In making this shift, it is important to recognize that the Court relies on the evolving standards of decency doctrine, but applies different criteria to inform its judgment. One component of the Court's analysis remains a survey of state legislatures. It is from this posture that this article examines noncapital cases.

The Court decided three important cases that tested the limits of what is deemed grossly excessive punishment. In *Rummel v. Estelle*,[158] the defendant, in his unremarkable criminal past, received three minor, non-violent felony convictions, and pursuant to Texas' recidivist statute,

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[155] *Id.* at 657-58 (explaining that death by lethal gas is barbaric and cruel and runs counter to the norms of a civilized state); *see also* Louisiana *ex rel*. Francis v. Resweber, 329 U.S. 459, 463 (1947) (holding that death by electrocution after an interrupted first attempt does not violate the Eighth Amendment).

[156] *Gomez*, 503 U.S. 653 (1992).

[157] *See* Weems v. United States, 217 U.S. 349, 378 (1910); *supra* notes 26-51 and accompanying text; *see also* Trop v. Dulles, 356 U.S. 86, 100 (1958). The Eighth Amendment's excessive punishment rationale had its genesis in *Weems* and was further clarified in *Trop*. Ironically, both cases' ground-breaking pronouncement of a progressive, evolving Eighth Amendment, which led to a doctrine positioned to challenge the death penalty, did not crossover in perfect form to noncapital cases. However, one of the chief components of the Court's noncapital jurisprudence is a survey of state legislatures.

[158] 445 U.S. 263 (1980).

received life imprisonment with the possibility of parole.[159] Chief Justice William Rehnquist, writing for a plurality Court, found it difficult to compare state recidivist statutes with the intent that judges could discover whether Texas' statute was grossly excessive. Instead, Chief Justice Rehnquist deferred to Texas' legislative scheme, stating that, "[the Court] would like to think that we are 'moving down the road toward human decency' . . . however, we have no way of knowing in which direction that road lies."[160] In other words, a survey of state recidivist statutes provided no guidance as to whether Texas' scheme was grossly disproportional, and because the evidence remained inconclusive, the defendant's life sentence did not offend the Eighth Amendment.[161]

The Court revisited recidivist statutes just three years later in *Solem v. Helm*.[162] In an outcome quite different than *Rummel*, the Court held that South Dakota's recidivist statute, as applied, did indeed amount to cruel and unusual punishment because the punishment was grossly disproportionate to the offense. As in *Rummel*, the state convicted the defendant of a number of minor, non-violent felonies;[163] however, unlike *Rummel*, South Dakota's recidivist statute automatically imposed life imprisonment without the possibility of parole.[164] It was this severe punishment that the Court found untenable. Writing for the majority, Justice Lewis Powell fashioned a new framework to determine whether a sentence was excessive in a noncapital case. The Court used this framework to guide its proportionality analysis: (1) "the gravity of the offense and the harshness of the penalty[;]" (2) "the sentences imposed on other criminals in the same jurisdiction[;]" and (3) "the sentences imposed for commission of the same crime in other jurisdictions."[165] Of the three factors, the third is the most relevant to this discussion, as it seeks to gauge how different legislatures would treat the defendant if he committed the same crime in those jurisdictions. Justice Powell

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[159] *Id.* at 265-66. The three felony offenses were credit card fraud, passing a forged check, and false pretenses, with the total dollar amount sought to be stolen just $229.11. *Id.*

[160] *Id.* at 283.

[161] *Id.* at 285.

[162] 463 U.S. 277 (1983) (holding that South Dakota's recidivist statute results in a grossly disproportionate punishment, and therefore, violates the Eighth Amendment).

[163] *Id.* at 279-81. The defendant received convictions for: third degree burglary, obtaining money under false pretenses, grand larceny, driving while intoxicated (third offense), and uttering a "no account" check." *Id.*

[164] *Id.* at 281-82.

[165] *Id.* at 292.

concluded that "[Mr.] Helm could not have received such a severe sentence in forty-eight of the fifty states."[166] For this reason, and a consideration of the first two factors, the Court found South Dakota's recidivist statute, as applied, unconstitutional.

Whatever progress the Court achieved in marking out clear, measurable factors to assess grossly disproportional, noncapital sentences became—arguably—eviscerated in *Harmelin v. Michigan*.[167] In this case that represents sharp disagreement among members of the Court on whether a proportionality element even exists in the Eighth Amendment, the Court struggled to provide a clear, controlling legal theory to guide its decision.[168] Nevertheless, Justice Kennedy's concurrence offers some assistance with respect to the legislative component. Commenting on *Solem*'s third factor, the sentences imposed for commission of the same crime in other jurisdictions, Justice Kennedy remarked that: "[I]nterjurisdictional analys[is] [is] appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[169] In other words, Justice Kennedy considered how other states treat like-kind, disproportional sentences, but only when seeking to validate what should already be known through a proper analysis of *Solem*'s first factor, the gravity of the offense and the harshness of the penalty, that a sentence on its face is disproportional to the crime committed.[170] While *Harmelin* certainly raised more questions than it answered, the Court likely will continue to review legislative enactments to determine whether noncapital punishments are grossly excessive.[171]

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[166] *Id.* at 299.

[167] 501 U.S. 957, 961 (1991) (plurality) (holding that a one-time convicted felon sentenced to life without the possibility of parole for possessing 672 grams of cocaine is a proportional sentence that is constitutional within the meaning of the Eighth Amendment).

[168] *Id.* at 955 (commenting that *Solem* was wrongly decided and that the Eighth Amendment contains no proportionality guarantee).

[169] *Id.* at 1005 (Kennedy, J., concurring).

[170] *But cf. id.* at 1018-19 (White, J., dissenting) (rejecting Justice Kennedy's conclusion that *Solem* only requires an analysis of its first factor in order to determine whether a sentence meets the Eighth Amendment's proportionality requirement).

[171] *See id.* at 1005-06. (Kennedy, J., concurring). Justice Kennedy, in his concurring opinion (with Justices O'Connor and Souter joining) agreed that the *Solem* factors are still relevant to a proportionality analysis. Combined with the dissenters (Justices White, Blackmun, and Stevens), who also believe the *Solem* factors are entitled to great deference, a clear Court majority exists to endorse the *Solem* factor's use. *Id.* at 1021.

In summary, of the objective components to measure evolving standards of decency, the legislative component is the most significant. It is a tested and reliable tool to gauge the sentiments of society. Indeed, in all facets, whether capital or noncapital cases, the Court finds itself using the state legislatures as its moral compass to gauge whether justice is served. Only the Court's consideration of the second component, the jury, retains a level of significance approaching the legislative component. It is from this point that this examination continues, considering the role of jury verdicts as they relate to capturing the public's sentiments on capital and noncapital punishments.

2. The Jury

The jury, one of the cornerstones of American democracy, serves an important safeguard in checking a tyrannical government.[172] Enjoying a rich history in American jurisprudence,[173] the jury system is historically, in many different forms, at the center of the death penalty debate.[174] Because it is an integral component of evolving standards of decency, this section explores the jury's importance, considering its reluctance, or willingness, to issue severe punishments, to include the death penalty.

The jury's importance in sensing the conscience of the community is critical to the Court's assessment of societal sentiments. The *Furman* dissent recognized this importance:

> [o]ne of the most important functions any jury can perform in making such a selection [the death penalty or life imprisonment] is to maintain a link between contemporary community values and the penal system—

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[172] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .").

[173] *See* THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

[174] In order to frame the issues properly, it is important to narrow this section to its proper purpose. This section will not address those cases that are essentially procedural, or those cases which concern themselves with how juries reach their verdicts, like weighing aggravating or mitigating circumstances in a death penalty case. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 648 (1990) (holding that "the Sixth Amendment does not require that specific findings authorizing the imposition of the sentence of death be made by a jury"), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002); Lockett v. Ohio, 438 U.S. 586, 609 (1978) (holding that a death penalty statute that precludes consideration of relevant mitigating circumstances violates the Eighth Amendment).

> a link without which the determination of punishment could barely reflect "the evolving standards of decency that mark the progress of a maturing society."[175]

The jury's link with community values permits the Court to infer whether societal values reject a form—or indeed severity—of punishment. The Court finds these societal values in statistical evidence. That is, the Court considers the frequency and type of verdict adjudged for a particular offense using nationwide and historical surveys. If, for example, the Court finds in its statistical survey that juries are unwilling to return a death verdict for the rape of an adult woman, then this suggests to the Court that society rejects the death penalty for the crime of rape.[176] Exemplifying this principle, the *Coker* Court found that less than one out of ten jury verdicts for rape of an adult woman in Georgia resulted in the death penalty.[177] This extremely low percentage suggested to the Court that the jury, as a reflection of society, found the death penalty to be a disproportionate punishment.[178] Jury analysis swayed the *Woodson* Court, where it considered how jurors historically treated mandatory death sentences for capital offenses.[179] Justice Stewart, for the plurality, argued that jurors historically disregarded their oaths and refused to convict defendants in cases resulting in mandatory death sentences for convictions. Consequently, an ensuing legislative backlash occurred nationwide.[180] This movement resulted in changes to most death penalty statutes, from mandatory to permissive capital punishment. These events, all stemming from the jury's reluctance to adjudge mandatory death sentences, suggested to the Court that the

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[175] Furman v. Georgia, 408 U.S. 242, 441 (1972) (Powell, J., dissenting) (relying on language from *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968), to argue that the jury, as a key societal indicator in determining evolving standards of decency, has accepted the morality of the death penalty) (internal citations omitted).

[176] *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 596-97 (1977); *see supra* notes 104-08 and accompanying text (discussing further the *Coker* decision).

[177] *Coker*, 433 U.S. at 597.

[178] *Id.*

[179] Woodson v. North Carolina, 428 U.S. 280, 294 (1976) (finding that American juries refused to convict defendants when the death sentence would be adjudged automatically); *see supra* notes 101-04 and accompanying text (discussing further the *Woodson* decision).

[180] *Woodson*, 428 U.S. at 290-91 (commenting that the harshness of mandatory death sentences led some state legislatures to reform their death penalty statutes by permitting juries discretion to weigh mitigating factors). By the year 1900, "twenty-three States and the Federal government had made death sentences discretionary for first-degree murder and other capital offenses," and over the next two decades, fourteen additional states followed suit. *Id.* at 291-92.

"aversion of jurors to mandatory death penalty statutes is shared by society at large."[181]

The Court confirmed the utility of juries as indicators for contemporary societal values in two subsequent death penalty cases. First, in *Thompson*, the Court referred to the frequency in which minors under the age of sixteen were given the death penalty for committing willful criminal homicide.[182] The evidence revealed that only a scant .03% of minors arrested for this offense received the death penalty.[183] The rarity of the occurrence suggested to the Court that the practice was "cruel and unusual in the same way that being struck by lightening is cruel and unusual."[184] Second, in *Enmund*, the Court surveyed felony murder convictions dating back to 1954.[185] In only six out of 362 cases did a felony murderer, who did not actually kill the victim, receive the death penalty.[186] This statistic implied two things: (1) juries are unwilling to adjudge death verdicts unless the defendant actually pulled the trigger; and (2) that juries find the death penalty too excessive (or disproportionate) for felony-murderers who do not actually kill. *Thompson* and *Enmund*'s significance is the Court's reliance on jury verdicts to assess contemporary social values on the appropriateness of the death penalty.[187]

Court decisions, like *Atkins*, and more recently *Roper*, fail to address the role of the jury in gauging societal attitudes toward executing the mentally retarded and juveniles. It is not that the jury's role is unimportant; rather, the failure to apply the jury component is more likely due to the fact that statistics on this matter are not recorded. Whatever the reason, the jury component remains vital to ascertaining societal sentiments on the death penalty.

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[181] *Id.* at 295.

[182] Thompson v. Oklahoma, 487 U.S. 822, 832-33 (1988).

[183] *Id.* at 833 n.39; *see supra* notes 134-39 and accompanying text (discussing *Thompson* in light of the Court's legislative component).

[184] *Thompson*, 487 U.S. at 833 (Stevens, J., plurality) (quoting the language in *Furman* that imposition of the death penalty is freakishly rare).

[185] Enmund v. Florida, 458 U.S. 782, 794 (1982); *see supra* notes 109-14 and accompanying text (discussing *Enmund* in light of the Court's legislative component).

[186] *Enmund*, 458 U.S. at 794.

[187] *But cf.* Atkins v. Virginia, 536 U.S. 304, 313 (2002) (explaining that the Court considers only legislative enactments and its judgment on the permissibility of sentencing the mentally retarded to death).

3. The Court's Judgment

The role of the legislature and the jury in discovering whether a form of punishment is congruent with society's sense of justice is empirically based. That is, the Court, for each criterion, relies on statistical surveys to support, partially support, or reject capital punishment as antithetical to the norms of a civilized state. This empirically-based, fact-finding methodology is absent in the third prong of the Court's evolving standards of decency capital framework. Instead, the Court exercises its constitutional responsibility in bringing its judgment to bear on the acceptability of the death penalty. In bringing its judgment to bear, the Court merely identifies whether the method or application of the death penalty comports with human dignity.[188] Two important philosophical goals the Court considers in informing its judgment are deterrence and retribution.

In *Coker*, Justice Byron White wrote the Court's plurality opinion, opining that Eighth Amendment judgments "should not be, or appear to be, merely the subjective views of individual Justices; judgments should be informed by the objective factors to the maximum possible extent."[189] Justice White made this statement because he would soon explain the basis for finding Georgia's capital rape statute unconstitutional, and his opinion would have greater precedential value if he based its conclusion on solid empirical evidence. Relying on statistical evidence drawn from legislative enactments and jury verdicts to substantiate his opinion, Justice White claimed that:

> These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, *for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment*.[190]

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[188] *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1192 (2005) (commenting that the Court's own independent judgment will be brought to bear to determine whether the death penalty is a disproportionate punishment for juveniles); Atkins v. Virginia, 536 U.S. 304, 319-21 (2002) (noting that the Court brings its judgment to bear in confirming or rejecting whether a national consensus exists for imposing the death penalty on the mentally retarded).

[189] Coker v. Georgia, 433 U.S. 584, 592 (1977); *see supra* notes 104-08 (discussing the *Coker* decision).

[190] *Coker*, 433 U.S. at 597 (emphasis added).

Justice White's final clause in this statement makes clear that, regardless of what the objective evidence suggests on the appropriateness of the death penalty, ultimately the burden rests on the Court to make those critical constitutional determinations. Nevertheless, Justice White believed that the weight and trends of legislative enactments and jury verdicts simply confirmed the Court's judgment in *Coker* that the death penalty is a disproportionate response to adult rape.[191] Justice White further elaborated on how the Court may bring its judgment to bear in *Enmund v. Florida*.[192] Drawing inspiration from the *Coker* rationale, Justice White identified how the Court would consider a challenge to a felony-murder statute, concluding that, "[a]lthough the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us to judge whether the Eighth Amendment permits imposition of the death penalty . . . ."[193] Justice White explored additional factors that would weigh in the Court's judgment in determining the constitutionality of Florida's felony-murder statute. Drawing from *Gregg*, Justice White identified the social purposes that inform the Court's judgment on the appropriateness of the death penalty: deterrence and retribution.[194] Neither purpose could be satisfied to substantiate a death sentence, and without more, such a penalty would be tantamount to cruel and unusual punishment.[195]

In *Atkins v. Virginia*,[196] Justice Stevens, in searching for a national consensus against executing the mentally retarded, wrote that legislative judgment would lend guidance to this question, but ultimately, the Court would consider reasons to agree or disagree with the legislative judgment.[197] Those reasons again turned to the two principal goals underlying capital punishment: deterrence and retribution. In pointing out these two principals, Justice Stevens staked out the basis for considering them, writing that "[u]nless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless

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191 *Id.*
192 458 U.S. 782, 794 (1982).
193 *Id.* at 797.
194 *Id.* at 799.
195 *Id.* at 799-801 (writing that statistical surveys do not support the conclusion that capital punishment deters individuals from engaging in felonies where murder may result).
196 536 U.S. 304 (2002).
197 *Id.* at 313.

imposition of pain and suffering.'"[198] The Court concluded that the execution of the mentally retarded did not satisfy either societal goal.[199] Consequently, the Court, after independently evaluating the evidence, found no reason to disagree with the legislative consensus, finding that such excessive punishment is unsuitable for this class of offenders.[200] Contrary to the majority opinion, the dissenters were less than enthusiastic with the Court's rationale. In particular, Justice Scalia found the majority's approach extremely arrogant in that the Court's judgment is not "confined . . . by the moral sentiments originally enshrined in the Eighth Amendment . . . *nor even* by the current moral sentiments of the American people."[201] In fact, as Justice Scalia wrote, the majority's opinion is nothing more than "the feelings and intuition of a majority of the Justices . . . "[202] Clearly, the dissenters in *Atkins* disagreed with injecting the Court's own judgment into its death penalty determinations. The practice permits the Court to look outside traditional objective indicia, such as legislative and jury determinations, that have guided the Court in times past, and instead, broadens the range of sources for which the Court can rely on to inform its judgment.

Like *Atkins* and its progeny, the Court's independent judgment entered into the juvenile death penalty debate. In *Thompson*, Justice Stevens, wrote that the Court must first consider whether "the application of the death penalty to this class of offenders [minors under the age of sixteen] 'measurably contributes' to the social purposes that are served by the death penalty."[203] The social goals which the death penalty serves are retribution and deterrence,[204] and for minors under the age of sixteen, as Justice Stevens explained, it satisfied neither goal.[205] This rationale

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[198] *Id.* at 319 (citing Enmund v. Florida, 458 U.S. 782, 798 (1982)).

[199] *Id.* at 319-20. Justice Stevens argued that the goal of retribution would not be served, as it would be inappropriate to give mentally retarded offenders their "just desserts" because only the most deserving should suffer the imposition of the death penalty. *Id.* Furthermore, because of the limited cognitive ability of the mentally retarded offender, the deterrent value that capital punishment may otherwise serve for the general class of offenders is not served in *Atkins*. *Id.*

[200] *Id.* at 321.

[201] *Id.* at 348 (Scalia, J., dissenting).

[202] *Id.*

[203] Thompson v. Oklahoma, 487 U.S. 822, 833 (1988) (citing Enmund v. Florida, 458 U.S. 782, 798 (1982)).

[204] *Id.* at 836.

[205] *Id.* at 836-38. Justice Stevens's analysis concluded that retribution did not serve a social purpose because a juvenile possessed a lesser degree of culpability, maintained a capacity for growth, and in the end, society still maintained fiduciary obligations to its children. *Id.* For deterrence, Justice Stevens remained unconvinced that a child is

did not find its way in *Stanford*. There, Justice Scalia took a more limited approach in bringing the Court's judgment to bear on the constitutionality of the death penalty for sixteen and seventeen year old minors.[206] While the *Stanford* Court declined to bring its judgment to bear, the *Roper* Court did.[207] Justice Kennedy, writing for the *Roper* majority, identified the age of the offender as an important factor to consider in determining whether the societal goals of retribution and deterrence are furthered. Because of the diminished culpability of juvenile capital offenders, Justice Kennedy argued that the "penological justifications for the death penalty apply to [juvenile offenders] with lesser force than to adults."[208] Relying significantly on the same reasoning used in *Atkins*, the Court reasoned that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders . . . ."[209]

4. Additional Sources

The prominent components of the evolving standards of decency doctrine are legislative enactments, jury verdicts, and the Court's independent judgment.[210] While the Court as a whole accepts these components, some individual justices stray from this framework and consider other sources when searching for contemporary attitudes toward the death penalty. These additional sources are international opinion, public opinion polls, and the opinions of professional associations.

The Court's reliance on international opinion for measuring societal values on the appropriateness of punishment is firmly grounded in precedent. First seen in *Trop*, the Court considered a United Nations' survey to determine how other nations treated denationalization for

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deterred from committing a capital crime. *Id.* Justice Stevens's explanation rests on the likelihood that a child would make the cost-benefit calculation in choosing to commit a crime with the possible death penalty a foreseeable result. *Id.* Such a cold calculation by a child, for Justice Stevens, was simply remote. *Id.*

[206] Stanford v. Kentucky, 492 U.S. 361, 377-79 (1989) (declining to bring the Court's own independent judgment into the constitutional mix), *overruled by* Roper v. Simmons, 125 S. Ct. 1183 (2005). Justice Scalia refuted the position that socio-scientific evidence supported the hypothesis that retribution and deterrence are not served with respect to sixteen and seventeen capital offenders. *Id.*

[207] *Roper*, 125 S. Ct. at 1196-97.

[208] *Id.* at 1196.

[209] *Id.* at 1198.

[210] *See* discussion *supra* pt. II.B.1-3.

wartime desertion, finding that only three, including the United States, permitted the practice.[211] This suggested, among other objective factors, that this punishment did not comport with "evolving standards of decency that mark the progress of a maturing society."[212] It also suggested that the Court is poised to look outside the country's borders to determine the maturity level of society. This comparative analysis carried over to *Rudolph v. Alabama*, where, in a denial of a writ of certiorari, the dissent highlighted the fact that only five nations, including the United States, permitted the death penalty for rape.[213] While some justices in early death penalty cases preferred considering international opinion to determine civilized standards, other justices wrote in opposition.[214] In *Furman*, Chief Justice Burger, in dissent, wrote that, "[t]he world-wide trend limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight, hardly points the way to a judicial solution in this country under a written Constitution."[215] Chief Justice Burger's word of caution against borrowing international opinion to gauge the sentiments of a civilized state did not persuade the *Thompson* plurality. In *Thompson*, the Court looked to western Europe, Canada, and even the then-Soviet Union, to support the premise that executing juveniles under the age of sixteen was cruel and unusual.[216] The Court's reliance on international norms for the execution of juveniles over the age of sixteen did not fair as well in *Stanford*. There, Justice Scalia, writing for the plurality, referenced international norms only in the context of rejecting them. Justice Scalia emphasized that it is the "American conceptions of decency that are dispositive,"[217] and that the opinions of other nations "cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people."[218] Justice Brennan, in dissent, however, disagreed, arguing that international opinion is important to frame the norm that civilized nations should aspire to, and in this case, the norm in

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[211] Trop v. Dulles, 356 U.S. 86, 103 (1958); *see supra* notes 39-51 and accompanying text (discussing *Trop*'s significance in forming the evolving standards of decency language).

[212] *Trop*, 356 U.S. at 101.

[213] 375 U.S. 889-90 (1963) (Goldberg, J., dissenting).

[214] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 403 (1972) (Burger, C.J., dissenting).

[215] *Id.* (explaining the incompatibility with using international norms to interpret the parameters of the Cruel and Unusual Punishment Clause).

[216] Thompson v. Oklahoma, 487 U.S. 822, 830 (1988) (plurality).

[217] Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989) (plurality), *overruled by* Roper v. Simmons, 125 S. Ct. 1183 (2005).

[218] *Id.*

other nations was to reject the execution of juvenile capital offenders.[219] Justice Brennan may have lost this battle, but his vision became a reality more than a decade later in *Roper*. Justice Kennedy, writing for the *Roper* majority, found international opinion on the juvenile death penalty as instructive to interpreting the Eighth Amendment.[220] Recognizing international opinion is not controlling, Justice Kennedy was undeterred from citing striking, if not embarrassing, facts: only eight countries, to include the United States, have executed a juvenile since 1990.[221] Of those nations, only the United States failed to publicly disavow the juvenile death penalty.[222] These facts, and the overwhelming weight of international opinion against the juvenile death penalty, confirmed for the *Roper* majority that the practice did not comport with civilized standards.[223] In dissent, Justice Scalia pointed out that the Court majority is selective in its application of international standards.[224] If international opinion is relevant to American constitutionalism, then incorporating other nations' laws on the exclusionary rule, the right to a jury trial, direct endorsement of religion, and abortion—whether they are compatible with the domestic law or not—are worthy of inclusion given the *Roper* majority's reasoning.

The juvenile capital offense cases are reflective of the deep divisions that exist within the Court in using international opinion to measure whether society rejects, or should reject, the death penalty. Such divisions were on display in *Atkins*. In *Atkins*, Justice Stevens argued that the world community rejects imposing the death penalty on the mentally retarded. This fact represented further evidence that this practice did not comport with modern justice.[225] His support for this argument rested on an amicus curiae brief the European Union filed in another case. The utility of borrowing foreign sentiments on the death penalty to gauge whether a national consensus exists against executing the mentally retarded struck a chord with Chief Justice Rehnquist. In his dissenting opinion, Chief Justice Rehnquist clearly declined to inject international values and norms into American constitutionalism, writing that he

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[219] *Id.* at 405 (Brennan, J., dissenting).
[220] Roper v. Simmons, 125 S. Ct. 1183, 1198-99 (2005).
[221] *Id.* at 1199 (identifying Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, China and the United States as the only countries to execute a juvenile since 1990).
[222] *Id.*
[223] *Id.* at 1200.
[224] *Id.* at 1226-27 (Scalia, J., dissenting).
[225] Atkins v. Virginia, 536 U.S. 304, 316 (2002).

"fail[ed] to see . . . how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."[226] Chief Justice Rehnquist then cited *Stanford* for the proposition that the Court already addressed, and soundly rejected, the issue of applying international values in American sentencing practices.[227]

The Court inconsistently applies international opinion as a measurement of civilized standards on the appropriateness of capital punishment. For the conservative wing of the Court, which supports the death penalty—or at least that its legitimacy is consistent with their ideological views on federalism, originalism, and strict constructionism—international opinion is a doctrinal liability that presupposes judicial activism. Yet one cannot underestimate international opinion's importance, as it indicates an attempt to shift the Court's evolving standards of decency doctrine to emulate, at least in part, the values of western European culture.

Public opinion polls are less significant in measuring societal sentiments than state legislatures and jury verdicts, yet from time-to-time, they enter into the Court's death penalty jurisprudence. For instance, in *Furman*, Justice Marshall referenced public opinion polls as helpful in indicating public acceptance of the death penalty; however, he conceded that its overall utility was marginal.[228] Not until *Atkins* did the Court refer to public opinion polls, and when it did, the Court used polls to support society's rejection of executing the mentally retarded.[229] Public opinion polls, however, have their detractors. Justice Scalia flatly rejects the use of opinion polls to assist the Court in finding a national consensus, stating that "the results of opinion polls are irrelevant."[230] Chief Justice Rehnquist shares Justice Scalia's contempt for public

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[226] *Id.* at 324-25 (Rehnquist, C.J., dissenting).

[227] *Id.* at 325 (Rehnquist, C.J., dissenting) (noting the Court addressed whether international opinion is proper for determining societal sentiments on the death penalty and soundly rejected its inclusion in *Sanford*).

[228] Furman v. Georgia, 408 U.S. 238, 361 (1972) (Marshall, J., concurring); *see also id.* at 386 (Burger, C.J., dissenting) (commenting that even though no judicial reliance should be placed on public opinion polls, a majority of American population still supported capital punishment).

[229] *Atkins*, 536 U.S. at 316 n.21 (citing polling data that Americans reject executing the mentally retarded).

[230] *Id.* at 347 (Scalia, J., dissenting).

opinion polls, commenting that any reliance on them "is seriously mistaken."[231]

Equally divisive as public opinion polling is the reliance on professional associations. In *Thompson*, the Court relied on a Amnesty International report that identified the juvenile death penalty as inconsistent with civilized standards.[232] In dissent, Justice Scalia claimed such reliance "is totally inappropriate as a means of establishing the fundamental beliefs of this Nation."[233] This message carried over to the *Stanford* plurality, where the Court declined to consider the opinions of professional associations in determining whether a national consensus existed against executing juveniles over the age of sixteen.[234] *Atkins*, however, turned again to opinions of professional organizations.[235] While these opinions, in the form of amicus curiae briefs, were relegated to a footnote, their conclusions against the propriety of executing the mentally retarded sparked the ire of Justice Scalia. In Justice Scalia's dissenting opinion, he commented that "the Prize for the Court's most Feeble Effort to fabricate 'national consensus' must go to its appeal . . . to the views of assorted professional and religious organizations . . . ."[236] Justice Scalia's criticism for relying on public opinion polls and the opinions of professional organizations stems from his own judicial philosophy. That is, the Court is to identify the measures that reflect the norms of a civilized state, not to dictate what they should be.[237] Such a position represents the Court's divergent approaches in identifying objective criteria that reflects the norms of a civilized state.[238]

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[231] *Id.* at 328 (Rehnquist, C.J., dissenting).

[232] Thompson v. Oklahoma, 487 U.S. 815, 830-31 n.34 (1988).

[233] *Id.* at 869 n.4 (Scalia, J., dissenting).

[234] Stanford v. Kentucky, 492 U.S. 371, 377 (1989).

[235] *Atkins*, 536 U.S. at 316 n.21 (citing opinions on the death penalty from the American Psychological Association, the United States Catholic Conference, and opinions from Christian, Jewish, Muslim and Buddhist groups).

[236] *Id.* at 347 (Scalia, J., dissenting) (maintaining "that the views of professional and religious organizations and the results of opinion polls are irrelevant").

[237] *Id.* at 378-79 (Scalia, J., plurality) (explaining that federal and state statutes and jury verdicts are proper indicia for making Eighth Amendment determinations).

[238] *See generally Atkins*, 536 U.S. at 304. The "liberal" wing of the Court (composed of Justices Stevens, Ginsburg, Breyer, and Souter) favor an expansive tool chest (public opinion polls and opinions of professional associations) to diagnose whether a challenged sentence violates the Cruel and Unusual Punishment Clause. The "conservative" wing of the Court (composed of Chief Justice Rehnquist, and Justices Thomas and Scalia) favor a limited role for the Court in reaching its death penalty determinations. Somewhere in between, the "moderates" (Justices Kennedy and O'Connor), seek to balance the competing sides. Whatever the approach that is used in subsequent opinions there is little

C. Conditions of Confinement

The Eighth Amendment's drafters were principally concerned with prohibiting punishment that amounted to nothing more than the gratuitous infliction of pain, terror, and torture.[239] Practices such as drawing and quartering, burning alive at the stake, and breaking at the wheel, were firmly established as punishments that amounted to cruel and unusual punishment.[240] Yet, nearly 200 years after ratification, the Court took one step further in identifying methods of punishment that failed to pass constitutional muster. This step placed the Court firmly in U.S. prisons, where aggrieved inmates challenged their treatment as violative of the Eighth Amendment. Such challenges were premised on two underlying Eighth Amendment principles. The first principle was a derivative of the Eighth Amendment's prohibition against unnecessary cruelty in punishment, or punishment that simply was "inhuman and barbarous."[241] The second principle relied on evolving standards of decency to ensure that the punishment, or the condition of confinement, was compatible with contemporary societal standards.[242]

These underlying principles, as applied to conditions of confinement, first appeared in *Estelle v. Gamble*, where a prison inmate challenged the inadequate medical treatment he received after he suffered an injury.[243] The Court, in reflecting on the primary purpose of the Eighth Amendment, held that, at the very least, the Amendment proscribed "the unnecessary and wanton infliction of pain."[244] From this posture, the Court articulated the standard, holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and

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doubt that reliance on additional objective sources, like international opinion, public opinion polls, and opinions of professional associations, will cause controversy.

[239] Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879) (finding that the historical scope of the Eighth Amendment's prohibition against cruel and unusual punishment did not encompass death by firing squad).

[240] *See In re* Kemmler, 136 U.S. 436, 446-47 (1890).

[241] Glass v. Louisiana, 471 U.S. 1080, 1084 (1987) (Brennan, J., dissenting) (citing *In re* Kemmler, 136 U.S. at 447) (identifying punishments that result in "torture or a lingering death" violative of the Eighth Amendment).

[242] Estelle v. Gamble, 429 U.S. 101, 103 (1976) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)) (identifying the Eighth Amendment's repugnance toward punishments that are incompatible with evolving standards of decency).

[243] *Id.* at 101 (challenging that inadequate medical care constituted a deprivation of a constitutional right, namely the prohibition against cruel and unusual punishment, which was actionable under 42 U.S.C. § 1983 (2000)).

[244] *Id.* at 102-03 (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

wanton infliction of pain.'"[245] It is this indifference the Court found to fall properly within the meaning of cruel and unusual punishment.[246] The impact of this decision was three-fold: first, it firmly placed Eighth Amendment protections within the penal system; second, it provided a standard for the Court to ascertain a cognizable Eighth Amendment claim;[247] and third, it established evolving standards of decency as a relevant principle to guide the Court's judgment.[248] Justice Marshall, writing the majority opinion, referenced evolving standards of decency as an important ingredient in crafting the appropriate standard for determining violations of the Cruel and Unusual Punishment Clause.[249] However, Justice Marshall failed to provide an in-depth analysis on the interplay between the doctrine and the creation of the willful disregard standard.

Estelle ushered in further Eighth Amendment challenges. Following the deliberate indifference standard *Estelle* articulated, prison inmates challenged double celling,[250] prison overcrowding, inadequate food service, faulty heating and cooling systems,[251] exposure to second-hand smoke,[252] and failure to safeguard inmates from serious risk of harm.[253] The crux of these decisions is the proof required to satisfy what the Court calls "deliberate indifference."[254] In *Helling v. McKinney*, the Court provided guidance on this matter, holding that to have a cause of action under the Eighth Amendment, a prisoner must demonstrate, both

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[245] *Id.* at 104.

[246] *Id.* at 105-06 (citing *Gregg*, 428 U.S. at 173) (explaining deliberate indifference to mean something more than negligence or inadvertent acts or omissions).

[247] *See id.* at 101.

[248] *Id.* at 103.

[249] *Id.*

[250] Rhodes v. Chapman, 452 U.S. 337, 352 (1981) (holding that double celling inmates did not constitute cruel and unusual punishment).

[251] Wilson v. Seiter, 501 U.S. 294, 303 (1991) (holding that "overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and housing with mentally and physically ill inmates" may constitute cruel and unusual punishment if the complainant can demonstrate that prison officials exhibited deliberate indifference).

[252] Helling v. McKinney, 509 U.S. 25, 35 (1993) (holding that exposure to second hand smoke may rise to a legitimate cause of action under the Eighth Amendment if the prisoner can show, both subjectively and objectively, a deliberate indifference to an unreasonable risk of serious injury to his future health).

[253] Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that in order for a prisoner to satisfy the deliberate indifference standard, prison officials must be subjectively aware of a serious risk of harm and disregard that risk by failing to take measures to prevent it).

[254] *Estelle*, 429 U.S. at 104.

subjectively and objectively, that prison officials exhibited a deliberate indifference to a serious risk of harm.[255] Yet the Court found this standard deficient in addressing a slightly different class of confinement cases—whether deliberate indifference is the appropriate standard when the intentional use of force is applied to quell a prison riot.[256] In determining whether inmates suffered the unnecessary and wanton infliction of pain that the Eighth Amendment prohibits, the Court elevated the standard to malicious and sadistic. In crafting the standard that prison officials may be held accountable for excessive use of force when they inflict pain "maliciously and sadistically for the very purpose of causing harm,"[257] the Court relied in part upon the contemporary standards of decency principle to guide its decision.[258] This rationale carried over to *Hudson v. McMillian*, another excessive use of force case.[259] In *Hudson*, the Court opined that when "prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated."[260] The significance of both *Whitley* and *Hudson* is two-fold: first, they recognized that use of force and conditions of confinement cases were different in kind, and thus required different standards; second, in use of force cases, an underlying principle, like condition of confinement cases, was that evolving standards of decency was a vital component to ascertain whether a legitimate Eighth Amendment claim existed.

In summary, conditions of confinement and use of force cases are derivatives of the Eighth Amendment's prohibition against unnecessary and wanton infliction of pain. In each category, the Court draws a distinct difference in the legal standard that should apply. In pure

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[255] *Helling*, 509 U.S. at 35.

[256] Whitley v. Albers, 475 U.S. 312, 320 (1986) (holding that the appropriate standard to determine a deprivation of an Eighth Amendment right when use of force is applied is whether prison officials unjustifiably inflicted pain maliciously and sadistically for the very purpose of causing harm).

[257] *Id*. at 320-21 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)) (identifying the constitutional threshold for a cognizable claim against a prison officer who struck the defendant several times in the head).

[258] *Id*. at 327 (citing Estelle v. Gamble, 429 U.S. 101, 103 (1976) for the proposition that brutal conduct in the nation's prisons is "inconsistent with contemporary standards of decency" and "repugnant to the conscience of mankind").

[259] 503 U.S. 1, 8-9 (1992) (holding that in use of force cases, injuries received from blows to the body, like bruises, swelling, loosened teeth, and a cracked dental plate, are not minor injuries and may amount to the unnecessary and wanton infliction of pain that the Eighth Amendment proscribes).

[260] *Id.* at 9.

conditions of confinement cases, the legal standard is "deliberate indifference." In use of force cases, the standard is "malicious and sadistic." For both standards, the underlying principle that supports their constitutional legitimacy is evolving standards of decency.[261]

III. The Eighth Amendment in the Military

The American military's authority to decree capital punishment is as old as the military itself. At the inception of the Revolutionary War in 1775, Americans adopted, with little change, the Articles of War from the British military justice system.[262] Within the articles, a spectrum of wartime criminal offenses and punishments were identified.[263] Of these punishments, the articles identified the death penalty as a punishment for abandonment of post, improper use of countersign, mutiny, desertion, and misbehavior before the enemy.[264] The Articles of War of 1776 increased the number of capital offenses to fourteen, but restricted ordinary, common law capital offenses to the jurisdiction of the civil courts.[265] After ratifying the Constitution, the newly formed Congress amended the Articles of War in 1789, and in 1806, revamped them in their entirety.[266] In the 1806 revision, Congress rejected a proposal to remove the death penalty from court-martial jurisdiction,[267] and in 1863, expanded death penalty court-martial jurisdiction to encompass common law capital felonies and the authority to impose the death penalty during wartime.[268] Not until 1916 did the Articles of War receive another rewrite, and at that time, Congress retained for the civilian courts jurisdiction for rape and murder committed in the United States during

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[261] *See supra* notes 243-60 and accompanying text.

[262] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICES AND PROCEDURES § 1-6(A) (5th ed. 1999).

[263] *See generally* AMERICAN ARTICLES OF WAR OF 1775, arts. XXV, XXVI, XXXI, LI, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953 (2d ed. 1920).

[264] *Id.* at 955.

[265] United States v. Loving, 517 U.S. 748, 752 (1996) (citing WINTHROP, *supra* note 263, § 10, art. 1, at 964 (requiring commanders to use utmost endeavors to deliver accused capital offenders to the civil magistrate).

[266] SCHLUETER, *supra* note 262, § 1-6(B).

[267] *Loving*, 517 U.S. at 753 (citing Frederick Bernays Wiener, *Court's Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 20-21 (1958)) (explaining Congressman Campbell's failed attempt to remove the death penalty from court-martial jurisdiction).

[268] *Id.* (citing Act of Mar. 3, 1863, § 30, Rev. Stat. § 1342, art. 58 (1875)).

peacetime.[269] But even this changed in 1950, when Congress approved the UCMJ and lifted the jurisdictional restriction for rape and murder.[270] At present, the UCMJ authorizes the death penalty for fifteen offenses, both in peace and wartime.[271]

Concomitantly with promulgation of the capital offenses, Congress, in an effort to ensure that protections against cruel and unusual punishment existed, enacted Article 55 of the UCMJ.[272] This section examines Article 55 in light of its legislative history and case law to gauge its faithfulness to, and deviations from, civilian Eighth Amendment law. Both military case law and Article 55 provide little guidance in defining the protections from cruel and unusual punishment afforded to service members.

A. Cruel and Unusual Punishment

From the beginning of the Revolutionary War, some punishments were deemed excessive and limited as to their severity. In the 1775 Articles of War, Article 51 prohibited flogging of more than thirty-nine lashes.[273] The number of lashes inflicted upon the convicted varied with each revision of the Articles of War.[274] In the 1874 Articles of War, Article 98 codified an absolute prohibition against the practice and added an additional restriction: "[n]o person in the military service shall be punished by flogging, or *by branding, marking, or tattooing on the body*."[275] Article 98 retained its language in subsequent revisions, and was recodified in 1928 as Article 41.[276] When Congress, in 1950,

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[269] *Id.* (citing Articles of War of 1916, ch. 418, § 3, arts. 9-93, 39 Stat. 664).
[270] *Id.*
[271] UCMJ art. 85 (desertion), art. 90 (assaulting or willfully disobeying superior commissioned officer), art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 101 (improper use of countersign), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106 (spying), art. 106(a) (espionage), art. 110 (improperly hazarding a vessel), art. 113 (misbehavior of sentinel), art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape) (2002).
[272] UCMJ art. 55.
[273] WINTHROP, *supra* note 263, at 438.
[274] *Id.*
[275] *Id.* at 994, *reprinting* Articles of War of 1874 (emphasis added).
[276] Article of War 41, MANUAL FOR COURTS-MARTIAL, U.S. Army, 1928, at 212. It reads, "[c]ruel and unusual punishments of every kind, including flogging, branding, marking, or tattooing on the body, are prohibited. *Compare* 1874 Articles of War, *reprinted in* WINTHROP, *supra* note 263, at 994 (referring to Article 98, it reads, "[n]o

accepted the formidable task of drafting a uniform code for all of the services, it incorporated the Article 41 language (found in the Articles of War of 1928) and recodified much of it into Article 55. It reads:

> Punishment by flogging, or by branding, marking or tattooing on the body, or any other cruel and unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.[277]

From Article 55's plain reading, it certainly proscribes a distinct class of punishments, but it does not elaborate on the phrase "cruel and unusual punishment." The legislative debates on Article 55 provide little enlightenment. In the congressional hearings, Congressman Overton Brooks inquired, "[i]s there any comment or discussion of this article? This is based on the forty-first article of war, is it not?"[278] Mr. Robert Smart, a professional staff member, responded suggesting that the proposed article, "takes us out of the dark ages."[279] The House Report had even less commentary, stating that "[g]enerally speaking, [Article 55] reenacts existing provisions of law."[280] The Senate Hearings offer less than their House counterparts, albeit with one exception. The Senate Hearings reference Article 55's inclusion into the UCMJ as a product of the Eighth Amendment's inapplicability to the military.[281] These legislative accounts suggest that Congress promulgated Article 55 to

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person in the military service shall be punished by flogging, or by branding, marking, or tattooing on the body").

[277] UCMJ art. 55 (1951).

[278] *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings Before a Subcommittee of the Committee on Armed Service House of Representatives*, 81st Cong. 1087 (1950), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, (U.S. Government Printing Office 1950) [hereinafter House UCMJ Hearings].

[279] *Id.*

[280] H.R. REP. NO. 81-491, at 27, *reprinted in* House UCMJ Hearings, *supra* note 278.

[281] *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings Before a Subcommittee of the Committee on Armed Service House United States Senate*, 81st Cong. 112 (1950), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, (U.S. Government Printing Office, 1950) [hereinafter Senate UCMJ Hearings]. The Senate subcommittee hearings pointed out Article 55's codification was required because "apparently . . . the eighth amendment is inapplicable [to the military] . . . ." *Id.*

ensure legislative restrictions on cruel and unusual punishment existed, modeling its basic protections from previous versions of the Articles of War.

Congress diverted little attention to expounding upon the meaning of Article 55 and the Eighth Amendment's application to the military. Congress's omissions left the military courts some latitude to interpret Article 55 and the Eighth Amendment's role in capital court-martial proceedings. *United States v. Matthews* is indicative.[282] In *Matthews*, the U.S. Court of Military Appeals (COMA) (now the Court of Appeals for the Armed Forces (CAAF)) reacted to the shockwave left by *Furman*. The court ruled that existing capital punishment procedures under the 1969 Manual did not satisfy constitutional requirements.[283] In analyzing Article 55, the court noted that Congress "intended to grant protection covering even wider limits than that afforded by the Eighth Amendment."[284] The court further noted that while service members are entitled to the protections afforded by Article 55 and the Eighth Amendment, under certain circumstances the rules governing capital punishment will differ from civilian courts.[285] In *United States v. Curtis*, the Court of Military Appeals revisited the constitutionality of the military's death penalty.[286] *Curtis* is not a cruel and unusual punishment case; rather, the court considered the delegation doctrine.[287] In so doing, the court held that Congress properly delegated to the President the

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[282] 16 M.J. 354 (C.M.A. 1983).

[283] *Id.* at 380 (finding military sentencing procedure defective because of the failure to require court members to rely on individualized aggravating circumstances when imposing the death penalty); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, 283, R.C.M. 1004 analysis, at A21-73 (2002) [hereinafter MCM] (recognizing that RCM 1004 and its analysis were drafted before *Matthews*; after *Matthews*, the decision encouraged discussion to further revise capital sentencing procedures).

[284] *Id.* at 368 (citing United States v. Wappler, 2 U.S.C.M.A. 393, 396 (1953)). *Wappler* held that Article 55 prohibits the imposition of confinement on bread and water in excess of three days while embarked at sea. *Wappler*, 2 U.S.C.M.A. at 396. In its analysis on the interplay between Article 55 and the Eighth Amendment, the *Wappler* court did not refer to Article 55's legislative history in reaching it conclusion that Congress "intended to grant protection covering even wider limits" than afforded by the Eighth Amendment. *Id.*

[285] *Id.* (alluding to offenses committed during combat conditions).

[286] 32 M.J. 252 (C.M.A. 1991).

[287] *See id.* at 260-61 (considering Mistretta v. United States, 488 U.S. 361 (1989) in discerning the scope of the delegation doctrine. The delegation doctrine's premise is that Congress is vested with the lawmaking function. Congress may, however, pursuant to general broad directives, delegate lawmaking authority to coordinate branches of government so long as an "intelligible principle" exists. *Mistretta*, 488 U.S. 371-72.

authority to promulgate Rule for Court Martial (RCM) 1004 for adjudging the death penalty.[288] *Matthews* and *Curtis* were a direct result of *Furman*, and therefore, offered little insight into the interplay between Article 55 and the Eighth Amendment except that both provisions applied to the military. In fact, military courts refer to Article 55 and the Eighth Amendment case law, but rarely articulate how each apply to the military.[289]

The only Supreme Court case to consider the military death penalty is *Loving v. United States*.[290] Like *Curtis*, the Court held that Congress properly delegated to the President the authority to prescribe aggravating and mitigating factors found in RCM 1004.[291] Such a delegation did not offend the separation of powers or the Eighth Amendment. In reaching its decision, the Court assumed that its death penalty jurisprudence applied to the military.[292] In a striking concurring opinion, Justice Clarence Thomas questioned whether the extensive rules under the Eighth Amendment necessarily applied to capital prosecutions in the military.[293] Justice Thomas cited *Parker v. Levy* as the predicate for providing Congress greater breadth in fashioning rules for the military.[294] This flexibility, Justice Thomas argued, is an extension of the constitutional necessity granted to Congress and the President to fight the nation's wars.[295] Justice Thomas's concurring opinion reflects at least one justice's view that the constitutional protections afforded to civilians and service members are different.

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[288] *Id.* at 269.

[289] *See, e.g.*, United States v. Thomas, 43 M.J. 550, 605 (N-M. Ct. Crim. App. 1995) (citing Trop v. Dulles, 356 U.S. 86 (1958) for the proposition that death by lethal injection does not violate Article 55 or the Eighth Amendment). In so doing, the court dedicated one small paragraph to support this conclusion and offered no analysis on how Article 55 and the Eighth Amendment complement each other. *Id.* at 605-06.

[290] 517 U.S. 748 (1996).

[291] United States v. Loving, 517 U.S. 748, 774-75 (1996); United States v. Curtis, 32 M.J. 252, 255 (C.M.A. 1991).

[292] *Loving*, 517 U.S. at 755. The government did not contest the Eighth Amendment's applicability for murder committed during peacetime. *But cf.* WINTHROP, *supra* note 263, at 398 (stating that while courts-martial are not legally bound by the Eighth Amendment they should observe it as a general rule of practice).

[293] *Loving*, 517 U.S. at 777 (Thomas, J., concurring).

[294] *Id.* (citing Parker v. Levy, 417 U.S. 733, 756 (1974)).

[295] *See id.*

The legislative history and case law regarding capital cruel and unusual punishment challenges in the military is limited. In each decision, no court explains properly how Article 55 and the Eighth Amendment complement each other.[296] Yet in the realm of cruel and unusual punishment, military courts invest much of their time in cases concerning conditions of confinement. The next section explores these cases and their relevance to civilian Eighth Amendment law.

B. Conditions of Confinement

The Supreme Court's Eighth Amendment jurisprudence in conditions of confinement cases is well established.[297] Military courts are faithful to these decisions, applying those legal standards created by the Court to determine if an Eighth Amendment or Article 55 violation exists. Operating a penal system in the military is very similar to operating one in the civilian sector. Consequently, applying standards crafted by the Supreme Court for the civilian penal system is compatible with the military. This is apparent in *United States v. Martinez*.[298] In *Martinez*, the Army Court of Military Review (ACMR) (now the Army Court of Criminal Appeals (ACCA)) held that pre and post-trial segregation did not violate Article 55 or the Eighth Amendment.[299] In its analysis, the court reviewed the congruence between Article 55 and the Eighth Amendment, stating that, "Article 55, UCMJ, encompasses all constitutional safeguards of the eighth amendment, as the former parallels the latter."[300] From this premise, the court turned to federal law, adopting the test articulated in *Trop*: "whether the conditions can be said to be cruel and unusual under contemporary standards of decency."[301] The court then diagnosed the applicable standard from *Rhodes v.*

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[296] This statement is based upon the underlying principle that military courts have had few opportunities to consider the reach of the Eighth Amendment in capital cases, especially cases where capital offenses in "times of war" are at issue. *See* MCM, *supra* note 283, R.C.M. 103(19) (defining "time of war" to mean "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that a 'time of war' exists").

[297] *See* discussion *supra* pt. II.C.

[298] 19 M.J. 744 (A.C.M.R. 1984) (holding that defendant's conditions of confinement did not violate Article 55 or the Eighth Amendment).

[299] *Id.* at 749-50.

[300] *Id.* at 747 (citing United States v. Matthews, 13 M.J. 501, 521 n.10 (A.C.M.R. 1984)).

[301] *Id.* at 748 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).

Chapman and held that no Eighth Amendment violation existed.[302] *Martinez* is representative of the military courts' approach to resolving conditions of confinement challenges. Because the type of challenge is quite similar to the civilian sector, military courts incorporate Eighth Amendment standards without deviation. For instance, military courts apply Supreme Court standards created *in Estelle v. Gamble*,[303] *Wilson v. Seiter*,[304] *Farmer v. Brennan*,[305] and *Hudson v. McMillian*.[306] In only a select few cases did a military court address a unique military punishment and resolve it applying Article 55.[307]

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[302] *Id.*; *see also* Rhodes v. Chapman 452 U.S. 337, 346 (1981). The ACMR relied on *Rhodes* for two important legal propositions. First, when using the evolving standards of decency doctrine, courts "should make informed decisions using objective factors to the maximum extent possible." *Rhodes*, 452 U.S. at 346. Second, "courts should consider the totality of the confinement conditions to determine whether . . . contemporary standards of decency have been violated." *Id.* at 347. Factors that inform the court on inadequate conditions are those that deprive one of their basic human needs. *Id.* (citing Hutto v. Finney, 437 U.S. 678, 687 (1978)).

[303] *See, e.g.*, United States v. Erks, No. 33059, 2000 CCA LEXIS 171 (A.F. Ct. Crim. App. July, 14, 2000) (unpublished) (holding that confinement under stark conditions and segregation from the main population did not, under the totality of the circumstances, constitute cruel and unusual punishment under Article 55 and the Eighth Amendment).

[304] *See, e.g.*, United States v. White, 54 M.J. 469 (2001). In *Wilson*, the Supreme Court distilled its condition of confinement analysis into two prongs: first, the Court considered whether an act or omission resulted in the denial of necessities and is objectively serious (objective component); and second, the Court considered whether prison officials exhibited deliberate indifference to the inmates safety. *Id*. at 474 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)); *see also supra* note 251 (explaining the deliberate indifference standard applied in *Wilson*).

[305] *See, e.g.*, United States v. Sanchez, 53 M.J. 393 (2000). The CAAF relied on *Farmer* to define the two factors necessary for a valid Eighth Amendment claim. The first (the objective component) is whether an act or omission results from the denial of necessities and is sufficiently serious; and second, whether a deliberate indifference (subjective component) to the health and safety toward the inmate exists. Farmer v. Brennan, 511 U.S. 825 (1994) (citing *Wilson*, 501 U.S. at 298); *see also supra* note 253 (clarifying how the deliberate indifference standard is to be applied).

[306] *See, e.g.*, United States v. Kinsch, 54 M.J. 641 (Army Ct. Crim. App. 2000) (holding that a prison guard maliciously and sadistically struck an inmate in his testicles with the intent of unnecessarily and wantonly causing physical and mental pain); *see also supra* note 259 (stating that blows to an inmate resulting in "bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis*" (quoting Hudson v. McMillian, 503 U.S. 1, 10 (1992)).

[307] *See, e.g.*, United States v. Lorance, 35 M.J. 382 (C.M.A. 1992) (holding that confinement to bread and water on a vessel docked in a domestic shipyard violates Article 55 of the UCMJ); United States v. Yatchak, 35 M.J. 379 (C.M.A. 1992) (holding that Article 55 and the Eighth Amendment were violated when the convening authority sentenced a sailor to confinement on bread and water on a ship docked in a domestic shipyard).

As this section demonstrates, military courts closely follow Supreme Court decisions in conditions of confinement cases. This pattern stems from the ease in adapting civilian legal standards to the military and the frequency with which military courts apply the rules. But these types of cases represent a narrow application of the evolving standards of decency doctrine. What is unknown is the effect the doctrine may have in military capital cases where the offense is unique to the military. To address this unknown, a two-track model to harmonize military and civilian Eighth Amendment law is proposed. This model's purpose is to offer consistency and direction for military courts when applying Eighth Amendment law and address the inherent flaw that exists with evolving standards of decency in the military. The flaw rests with the legislative component, which surveys state legislatures to determine whether the offense or the offender's status permits a death penalty sentence. Because some of the offenses and punishments are unique to the military, a survey of the state legislatures is unhelpful in diagnosing whether an Eighth Amendment violation exists. It is this flaw that the following passages explore and remedy.

IV. A New Framework

In the death penalty arena, evolving standards of decency is a vibrant doctrine that relies on objective criteria to form conclusions on the appropriateness of punishment.[308] The prominent factors the Court considers are legislative enactments and jury verdicts.[309] After a thoughtful analysis of the evidence, the Court brings its judgment to bear on the appropriateness of the death penalty.[310] The doctrine's chief components are not as starkly examined in noncapital proportionality and conditions of confinement challenges, but the doctrine is still invoked for the proposition that society accepts or rejects a form of punishment based upon the attitudes of the day.[311] The doctrine's acceptance by civilian courts is well-established, in part because its chief components maintain a civilian character. It is this civilian character that makes the doctrine inadaptable to the military.

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[308] *See* discussion *supra* pt. II.B.1-2.
[309] *See id.*
[310] *See* discussion *supra* pt. II.B.3.
[311] *See* discussion *supra* pt. II.B.1.b & II.C.

The Court's primary criterion is legislative enactments. By surveying state laws and the punishments proscribed, the Court has a versatile tool to measure the sentiments of society. This tool is constitutionally rooted in principles of federalism and seeks to defer to the elected legislative bodies when a national consensus exists.[312] These legislative bodies, however, proscribe the death penalty for heinous common law felonies. The military proscribes the death penalty for fifteen offenses, yet only three of them are rooted in the common law.[313] For the twelve unique military offenses,[314] it is difficult to reach a conclusion that a national consensus exists on the appropriateness of the death penalty when state legislatures may never address the issue. Jury verdicts present the same problem, albeit differently. In comparison to the military's crimes of rape, felony-murder, and premeditated murder, the twelve unique military capital offenses that authorize the death penalty are rarely charged. For the most part, this is a result of the nature of the unique offense, which is not authorized as a permissible charge unless, in most cases, the nation is in a "time of war."[315] Because capital charges rarely occur,[316] and therefore convictions are even rarer, it remains difficult to measure the attitudes of court-martial panels.[317]

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[312] *See, e.g.*, Atkins v. United States, 536 U.S. 304, 312-13 (2002) (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989) for the proposition "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures'").

[313] UCMJ art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape) (2002).

[314] *Id.* art. 85 (desertion), art. 90 (assaulting or willfully disobeying superior commissioned officer), art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 101 (improper use of countersign), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106 (spying), art. 106(a) (espionage), art. 110 (improperly hazarding a vessel), art. 113 (misbehavior of sentinel).

[315] *See supra* note 296 (explaining the Rules for Courts-Martial's definition of "time of war").

[316] *See* MCM, *supra* note 283, R.C.M. 103 analysis A21-4, A21-5 (identifying national conflicts, absent a declaration by war by Congress or a factual determination by the President, that qualify as a "time of war[:]" Korean War and Vietnam War). The inference to be drawn is for purposes of the UCMJ, the military is rarely in "time of war," as both Gulf War I and Gulf War II, and the Global War on Terrorism failed—at least at the time of this writing—to trigger the congressional or Presidential action required to achieve this special status.

[317] *See* DPIC, *supra* note 152, at *The U.S. Military Death Penalty: News and Developments (Prior to 2005)*, *at* http://www.deathpenaltyinfo.org/article.php?did=180&scid=32#facts (last visited May 19, 2005) (identifying PVT Eddie Slovick as the only Soldier to be executed for a time of war offense, desertion, since the Civil War).

Whether a mature society rejects or accepts the death penalty or an offense that proscribes the death penalty in the military is not answered by looking to the evolving standards of decency's chief components. Extending the doctrine's analysis to additional objective sources, like international opinion, public opinion, and the opinions of professional organizations, is equally unhelpful. For instance, the trend in the international community is to ban the death penalty under all circumstances, including offenses committed during times of war.[318] This is antithetical to American tradition, culture, and policy.[319] Military officers and elected officials take an oath to support the Constitution, not to support the integration of European laws that lack America's culture and history.[320] Public opinion polls provide even less guidance on the appropriateness of the death penalty or punishment that appears to be barbaric. Public opinion polls are mere snapshots in time that reflect the passions of the public, who may be informed or uninformed. As the national mood changes, so do public opinion polls. One only need consider presidential exit polling conducted in 2004 to reach the conclusion that polling is an imprecise science.[321]

Noncapital disproportionality challenges present their own set of hurdles for the military justice system. The framework used to guide the Court's analysis is the *Solem* factors: (1) the gravity of the offense and the harshness of the penalty; (2) the sentence imposed on other criminals

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[318] *See* Council of Europe: The Death Penalty Outlawed, *at* http://www.coe.int/T/E/Com/Files/Themes/Death-penalty/default.asp (last visited Apr. 28, 2005). Forty-four of the forty-six members of the Council of Europe have ratified Protocol 6 to the Convention, which prohibits capital punishment in times of peace. *See* Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, as amended by Protocol No. 11 (Apr. 28, 1983), *available at* http://conventions.coe.int/Treaty/en/Treaties/Word/114.doc (last visited Apr. 28, 2005). Protocol 13 prohibits capital punishment in time of war or of imminent threat of war. Twenty-nine of the forty-six members of the Council of Europe have ratified Protocol 14. *See* Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty), *available at* http://conventions.coe.int/Treaty/en/Treaties/Word/187.doc (last visited Apr. 28, 2005).

[319] The author recognizes that objections against using international opinion in Eighth Amendment cases apply equally to military and civilian courts. Those objections have been deferred until this section.

[320] *See* U.S. CONST. art. VI. The relevant portion reads: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound, by Oath or Affirmation, to support this Constitution. . . ." *Id.*

[321] Richard Morin & Claudia Dean, *Report Acknowledges Inaccuracies in 2004 Exit Polls*, WASH. POST, Jan. 20, 2005, at A6 (reporting that the 2004 exit polls were the most inaccurate of any of the last five presidential elections).

in the same jurisdiction; and (3) the sentence imposed for commission of the same crime in other jurisdictions.[322] Criteria one and two are self-explanatory and cause no concern to the military in its ability to apply the rules. Criterion three is troubling. The criterion directs a court to consider sentences imposed for the commission of a crime in other jurisdictions.[323] The military does not have a comparable jurisdiction in which to measure the harshness of a penalty that is unique to the military. For example, the crime of desertion in time of war may carry death or other punishment as a court-martial may direct.[324] Setting aside the possible death verdict, another punishment that may result from a conviction for desertion is life without the possibility of parole.[325] The third *Solem* factor provides no guidance on the appropriateness of this punishment. Consequently, the *Solem* factors' applicability to the military's noncapital proportionality analysis is limited.

The framework advocated in this article reconciles the doctrine's inadaptability in its capital and noncapital jurisprudence. This framework, however, is not limited to the death penalty; it extends to capture other dimensions of substantive Eighth Amendment law—like noncapital disproportionality and conditions of confinement challenges—into a holistic, logical framework.[326] Not only is the framework holistic in its application, but it remains faithful to American tradition and law.[327] A central piece to this framework is recognition that Congress is constitutionally responsible for the regulation of the armed forces.[328] Congress promulgates laws to ensure the military is prepared to fight the nation's wars. Such laws are presumed lawful and rational.[329] It is from this premise that the framework begins. The framework first considers whether an offense or punishment is unique to the military. If the offense or punishment is common to the states, the applicable

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[322] Solem v. Helm, 463 U.S. 277, 292 (1983); *see also supra* note 171 for the proposition that *Solem*'s noncapital proportionality factors remain good law despite Justice Scalia's plurality opinion in *Harmelin*.

[323] *See id.* at 291-92.

[324] UCMJ art. 85.

[325] *See id.*

[326] *See* Appendix A for graphical representation.

[327] *See* United States v. Loving, 517 U.S. 748, 752 (1996) (citing 1776 Articles of War, *reprinted in* WINTHROP, *supra* note 263 at 976 (following the British example, Congress reauthorized the Articles of War with a provision that the civil courts would maintain jurisdiction over common law capital offenses).

[328] *See* U.S. CONST. art. I, § 8, cls. 11-14.

[329] *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993) (explaining that congressional statutes bear a strong presumption of validity).

approach remains civilian Eighth Amendment law. If the offense or punishment, however, is unique to the military, whether in peace or war, the applicable standard is rational basis. To elaborate further, this article examines each track of the framework. First, track one is examined, addressing common offenses or punishments that civilian and military societies share. Second, track two is examined, identifying the unique military offenses and applying to them a rational basis standard.

A. Track One: The Civilian Standard

Track one applies civilian, substantive Eighth Amendment law without deviation. The underlying principle of track one is the recognition that many aspects of military criminal law parallel civilian criminal law. For those aspects that bear an instinctively civilian character, no rational policy basis exists to prevent the application of civilian standards. This parallelism allows military courts to confidently follow civilian Eighth Amendment law. In conjunction with the Eighth Amendment's application, military courts also have interpreted Article 55 to not only mirror Eighth Amendment protections, but to beyond them as well.[330] This comprehensive umbrella of Eighth Amendment protections affords service members protections that are at least as generous as their civilian counterparts. In this comprehensive umbrella, the overall scope of substantive Eighth Amendment law in the military is considered. Of particular importance to the scope of the Eighth Amendment law is the recognition that track one analysis permits full doctrinal application of that law to the military. That is, evolving standards of decency and its objective components are applicable because they assess the legal standards for civilian offenses and punishments. Since track one analysis requires that the offense or punishment maintains a civilian character, it necessarily follows that the doctrine is applicable.

A track one examination identifies particular military offenses, punishments, conditions of confinement, and possible future cruel and unusual punishment challenges that may reach the Court. What follows after identifying these categories is a matching process, where each distinct group is compared to its civilian counterpart. This process

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[330] United States v. Martinez, 19 M.J. 744, 748 (A.C.M.R. 1984) (citing United States v. Wappler, 2 U.S.C.M.A. 393, 396 (1953)); *see also supra* notes 298-302 and accompanying text.

permits an opportunity to analyze the applicability of a category and determine whether the civilian and military legal standards are congruent.

The UCMJ maintains three common law capital felonies: rape, felony-murder, and premeditated murder.[331] Of the three offenses, the crime of rape's maximum punishment bears the greatest likelihood of violating federal Eighth Amendment law. This punitive article's punishment is arguably incongruent with *Coker*,[332] yet it maintains a civilian character. This is apparent by examining the language of Article 120. Article 120 is absent of language offered to limit the death penalty to those occasions where the offense is committed in times of war. Moreover, the history of the crime of rape in the military indicates that at one time, civilian courts maintained jurisdiction over the offense.[333] Not until the Civil War did Congress extend to courts-martial jurisdiction for the crime of rape.[334] In 1916, Congress granted the military jurisdiction over common law felonies, but maintained civilian jurisdiction over the crimes of rape and murder.[335] This evidence suggests that the crime of rape, even as enacted in Article 120, is traditionally a civilian offense. Therefore, civilian and military courts should remain faithful to the

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[331] UCMJ art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape) (2002).

[332] *See* Coker v. Georgia, 433 U.S. 584, 600 (1977) (holding that the imposition of the death penalty for the rape of an adult woman violates the Eighth Amendment). The *Coker* plurality's rejection of capital rape stems from a "death is different" rationale. That is, the rape of an adult woman does not involve the unjustified taking of human life. Consequently, imposing the death sentence for capital rape where no loss of life results is a disproportionate punishment. *Id.* at 598-99. *But see* MCM, *supra* note 283, R.C.M. 1004(c)(9) (identifying two conditions before a capital rape offender can become eligible for the death penalty: (1) the victim must be under the age twelve; or (2) the accused maimed or attempted to kill the victim). The *Coker* rationale casts doubt as to whether either condition satisfies the Eighth Amendment.

[333] *See supra* note 328 (Congress reauthorized the Articles of War with a provision that the civil courts would maintain jurisdiction over the common law offense of rape. Congress changed this in 1863 when it expanded courts-martial jurisdiction to include the common law felony of rape).

[334] *See* Coleman v. Tennessee, 97 U.S. 509, 514 (1879) (citing Act of Mar. 3, 1863 § 30, 12 Stat. 736, Rev. Stat. § 1342, Art. 58 (1875)) (finding that Congress authorized subject matter jurisdiction over murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny during times of war or rebellion).

[335] Articles of War of 1916, ch. 418, § 3, Arts. 92, 93, 39 Stat. 664.

Eighth Amendment and its prohibition against the death penalty for this offense.[336]

Article 118(4), felony-murder, properly falls within a track one analysis. Again, felony-murder is a common law offense that carries the death penalty. Like the crime of rape, because felony murder bears a civilian character, it should properly be construed in light of federal law. The Supreme Court is not remiss in this area, having decided two capital felony-murder challenges, *Enmund* and *Tison*, to guide lower courts.[337] Both decisions provide guidance on the requisite level of moral culpability warranted for the death penalty. Military courts and the drafters of the RCM are cognizant of *Enmund* and *Tison*'s significance in sentencing. For instance, in *Loving v. United States*,[338] the CAAF construed RCM 1004(c)(8) to comply with *Enmund* and *Tison* "provided that it is . . . limited to a person who kills intentionally or acts with reckless indifference to human life."[339] In its opinion, the court considered the drafter's intent in writing RCM 1004(c)(8), finding that the language was written with *Enmund* and *Tison* in mind.[340] Under a track one construction, consistent with present practice, military courts would adhere to both *Enmund* and *Tison* when evaluating whether to sentence a felony-murderer to death.

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[336] *See* MCM, *supra* note 283, art. 120 analysis, at A23-13. *Coker* is interpreted as prohibiting the death penalty for the rape of an adult woman. *Id.* R.C.M. 1004 analysis, at A21-77. This interpretation lends itself to permitting capital punishment for those who rape a child. The Court has yet to address this issue, but nevertheless, the military still permits the death penalty for rape in two instances. *See supra* note 333 (identifying the two conditions necessary for capital rap conviction). *See* MCM, *supra* note 283, R.C.M. 1004(c)(9).

[337] *See* Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding that Arizona's felony murder rule authorizing the death penalty maintained an appropriate moral culpability standard to satisfy Eighth Amendment requirements). *But see* Enmund v. Florida, 458 U.S. 782, 798 (1982) (holding that Florida's felony murder rule failed to satisfy the requisite level of moral culpability to warrant the death penalty).

[338] 47 M.J. 438, 443-44 (1998) (holding that felony murder under Article 118(4) and the aggravating factor in RCM 1004(c)(8)—the "actual perpetrator of the killing"—is constitutional as long as the aggravating factor is limited to those who intend to kill or those who act with reckless indifference to human life).

[339] *Id.* at 444.

[340] *See* MCM, *supra* note 283, R.C.M. 1004(c)(8) analysis, at A21-77 (2002) (citing Enmund v. Florida, 458 U.S. 782 (1989) and Tison v. Arizona, 481 U.S. 137 (1989) as the basis for writing RCM 1004(c)(8)'s aggravating factor).

A challenge involving the method in which a death row inmate is executed also maintains a civilian character. To date, the method of execution in the military is lethal injection.[341] Whatever standards civilian courts impose in administering lethal injection (to include whether the method even comports with civilized standards), military courts should faithfully observe. This statement is premised on the observation that no distinction exists between the military and the civilian sectors imposing lethal injection. The method of execution may, however, properly fall into a track two analysis if Congress seeks to revive a historic method for reasons of military necessity. For instance, if Congress revived death by firing squad, and believed it to be an appropriate punishment for those committing a capital offense while deployed overseas and during wartime, then the method would be presumed legitimate.[342]

The Court's construction of the *Solem* factors for noncapital disproportionality cases requires a track one analysis, yet this is limited.[343] Application of the *Solem* factors is only appropriate when the offense maintains a civilian character. For instance, in *Harmelin*, a majority of the justices supported the use of the *Solem* factors to determine whether a sole conviction for possessing 672 grams of cocaine warranted life imprisonment without the possibility of parole.[344] While a harsh punishment, the decision is relevant to a track one analysis because the UCMJ also criminalizes drug possession.[345] Since no qualitative distinction exists between the military and civilian drug possession laws, a court-martial that imposes a sentence of life without the possibility of parole for drug possessions, in a quantity similar to that in *Harmelin*, would not offend the Eighth Amendment.[346] This analysis is applicable to other civilian-like offenses found in the UCMJ.

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[341] *See* DPIC, *supra* note 152 (identifying lethal injection as the sole method of execution in the military).

[342] *See* Wilkerson v. Utah, 99 U.S. 130, 135 (1878) (identifying death by firing squad as a permissible form of punishment in the military).

[343] *See* Solem v. Helm, 463 U.S. 277, 292 (1983).

[344] *See* Harmelin v. Michigan, 501 U.S. 957, 997-98 (1991) (Kennedy, J., concurring) (explaining that the *Solem* factors remain relevant in noncapital proportionality challenges).

[345] UCMJ art. 112(a) (2002).

[346] *See id.* (wrongful use or possession of cocaine provides a maximum punishment of a dishonorable discharge, forfeiture of all pay and allowances, and five years confinement). This assumes that Congress changed the existing maximum penalty from five years to life without the possibility of parole.

Conditions of confinement challenges offer a reservoir of cases to demonstrate the military's faithfulness to Eighth Amendment law when the management of a penal system is commonly shared by the two sectors. That is, both the military and civilian sectors maintain facilities to incarcerate convicted felons. There is little distinction between the manner in which civilian and military facilities are managed.[347] Because the Eighth Amendment applies to persons incarcerated, both the military and civilian penal systems adhere to constitutional prohibitions against "the unnecessary and wanton infliction of pain."[348] The military's commitment to this standard is illustrated in a host of conditions of confinement challenges decided by military appellate courts. These military appellate decisions follow the standards articulated in *Estelle* (treatment of medical needs), and *Whitely* (use of force cases), with successor decisions clarifying the culpability standards for both.[349] This is significant because it demonstrates that military courts follow Eighth Amendment standards when the application is clear and unambiguous.[350] This line of cases also supports the track one analysis: punishments maintaining a civilian character should follow the applicable civilian Eighth Amendment standard.

Thus far, track one analysis concerns itself with traditional Eighth Amendment challenges that the Court has addressed. Yet track one's applicability also extends to other issues that have not been clearly decided or encountered by military courts. That is, there are a number of death penalty challenges that the Court has either addressed, or may address in the coming years that may become relevant to the military. For instance, the Court trend exempting groups from the reach of the

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[347] U.S. DEP'T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 1-5 (5 Apr. 2004) [hereinafter AR 190-47] (stating that the Army Corrections System "will strive to be accredited by the American Corrections Association").

[348] Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

[349] *See, e.g.*, United States v. Kinsch, 54 M.J. 641 (Army Ct. Crim. App. 2000) (holding that prison officials acted maliciously and sadistically when they used excessive force in a patdown); United States v. White, 54 M.J. 469 (2000) (holding that prison officials did not exhibit a deliberate indifference to an inmate's medical needs when basic psychiatric care was provided); United States v. Sanchez, 53 M.J. 393 (2000) (holding that prison officials did not inflict unnecessary cruel treatment when an inmate became subject to verbal sexual abuse).

[350] *But cf.* United States v. Yatchak, 35 M.J. 379 (C.M.A. 1992) (failing to address the deliberate indifference standard advanced in *Estelle* when the Sailor was confined to bread and water on a vessel docked in a domestic port.); *see also* United States v. Lorance, 35 M.J. 382 (C.M.A. 1992) (failing to address the *Estelle* deliberate indifference standard).

death penalty follows a track one analysis. To date, the mentally insane,[351] mentally retarded,[352] and minors below age eighteen are exempt from receiving a death sentence.[353] It is plausible that a court-martial could encounter an exempt group when deciding the punishment for a capital offense. Since enlistment into the services begins at age seventeen,[354] this decision bears some importance. For instance, Congress could change the military's minimum age to receive the death penalty to seventeen (it is presently set at eighteen).[355] If Congress so acted, and a court-martial sentenced a seventeen-year-old service member to death, this action would constitute a constitutional violation under a track one analysis. Second, in another nuance to the Eighth Amendment, Justice Breyer in a denial of a writ of certiorari raised the possibility that an inmate on death row for too long may constitute cruel and unusual punishment.[356] Justice Thomas criticized this proposition as absurd considering the death row inmate is largely responsible for the extended delay in execution.[357] Nevertheless, both types—death penalty exempt status categories and excessive length on death row cases—may properly receive a track one analysis.

In summary, track one's underlying principle is the recognition that civilian and military similarities in the offense and punishment deserve to be treated in accord with Eighth Amendment requirements. Thus, deviation from this rule is not permissible unless the offense or punishment is uniquely military.

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[351] Ford v. Wainwright, 477 U.S. 399 (1986).

[352] Atkins v. Virginia, 536 U.S. 304 (2002).

[353] Roper v. Simmons, 125 S. Ct. 1183 (2005); *see supra* notes 143-47 and accompanying text (discussing *Roper*'s significance to the legislative component).

[354] 10 U.S.C. § 505 (2000) (identifying the age of enlistment into the services as a person "not less than seventeen years of age . . . [;][h]owever, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control").

[355] *See* DPIC, *supra* note 152 (identifying eighteen as the minimum age a service member can receive the death penalty).

[356] Foster v. Florida, 537 U.S. 990, 993 (Breyer, J., dissenting from denial of writ of certiorari) (explaining that twenty-seven years on death row may be unusual for purposes of the Eighth Amendment).

[357] *Id.* at 990 (Thomas, J., concurring from denial of writ of certiorari).

B. Track Two: The Military Standard

Track two analysis applies a rational basis standard to determine the appropriateness of punishment for unique military offenses. Track two is the crux of the thesis advocated in this article and the most controversial. Track two's policy rationale stems from three positions: (1) the objective components embedded in the evolving standards of decency doctrine fail to address the unique aspects of military Eighth Amendment law; (2) Congress is better suited to craft laws that regulate the armed forces in times of war; and (3) civilian courts should grant great deference to crimes and offenses that are unique to the military and share no civilian comparison. As addressed in the legal research, no court decision properly fixes the appropriate Eighth Amendment standard when the capital crime or punishment is uniquely military. For that reason, this article advocates a rational basis standard. Borrowed from equal protection, due process and First Amendment jurisprudence,[358] the rational basis test is customarily recognized as a standard that presumes the validity of a statute unless it fails to achieve a rational relationship to a legitimate state interest.[359] With a rational basis standard applied in the Eighth Amendment and Article 55 military context, the burden of proof rests with the challenger in contesting the propriety of a capital offense or punishment.[360] Moreover, the challenged law does not fail because Congress neglected to make a record identifying the policy basis for creating the law.[361] Overall, a rational basis application, whether in the First Amendment, equal protection, or due process regimes, is presumed legitimate and constitutional.[362] The burden for the challenger is to demonstrate that the challenged law does not rationally relate to a legitimate state interest, or in the alternative, the law itself serves no legitimate state interest.[363] For these reasons, it is difficult, if not rare, for a challenger to overcome this heavy burden of demonstrating the irrationality, or indeed, illegitimacy, of a challenged law under a rational basis standard. Indeed, the standard supports, for the most part, the

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[358] *See* FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).

[359] Romer v. Evans, 517 U.S. 620, 632 (1996) (holding that an amendment to a State Constitution that prohibits all legislative, executive, or judicial action designed to protect homosexual persons from discrimination lacked a rational basis).

[360] *See FCC*, 508 U.S. at 315.

[361] *Id.*

[362] *But cf.* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that Texas's law prohibiting homosexual sodomy does not serve a legitimate state interest).

[363] *See FCC*, 508 U.S. at 315.

validity of a law, and entrusts the responsibility for its fairness with the legislature and not the courts.

This track two analysis identifies capital offenses and punishments that implicate the Eighth Amendment but deserve a rational basis application. The nature of each capital offense or punishment examined is firmly rooted to the military, whether through tradition, culture, or custom. A starting point to determine whether an offense or punishment is unique to the military is whether its roots can be traced to the Articles of War. Thereafter, a rational basis standard is applied to determine whether these unique offenses withstand constitutional scrutiny. Finally, the analysis is divided into two sections, unique military capital offenses and unique noncapital punishments.

1. Unique Military Capital Offenses

Uniform Code of Military Justice capital offenses are a product of Congress's intent to ensure the military possesses the means to effectively punish service members who, by their conduct, harm the safety and integrity of the unit or the interests of national security.[364] A conviction on any offense could possibly result in the death penalty.[365] For a challenger to make a successful excessiveness or proportionality challenge, he or she must show that the punitive article and its prescribed punishment are irrational.[366] That is, the challenged article and its complement punishment (whether unique military punishment, life in

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[364] *See* MCM, *supra* note 283, R.C.M. 1004(c)(2) (stating an aggravating factor that the death penalty can be adjudged if the accused "knowingly created a grave risk of substantial damage to the national security of the United States;" or "[k]nowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected").

[365] *See* UCMJ art. 85 (desertion), art. 90 (assaulting or willfully disobeying superior commissioned officer), art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 101 (improper use of countersign), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106 (spying), art. 106(a) (espionage), art. 110 (improperly hazarding a vessel), art. 113 (misbehavior of sentinel), art. 118(1) (premeditated murder), art. 118(4) (felony murder), art. 120 (rape) (2002). Each punitive offense maintains the death penalty as a possible punishment.

[366] *See FCC*, 508 U.S. at 315 (commenting that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it . . . .'") (citing Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

prison, or death) fail to further the legitimate interests of the government. As long as Congress reasonably believes that the punishment deters or redresses misconduct that is detrimental to the unit or national security, it remains constitutionally valid. For those who disagree with Congress's conclusion on the appropriateness of the punishment, the remedy remains with Congress, which serves at the will of the people.

The UCMJ provides twelve capital offenses that are unique to the military.[367] Of these offenses, five authorize the death penalty only in times of war.[368] Seven offenses permit the death penalty whether the nation is at war or not.[369] Of the twelve, only two military capital offenses, article 106 (spying)[370] and article 106a (espionage)[371] have

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[367] *See supra* note 314 (identifying the military's twelve unique capital offenses).

[368] *See* UCMJ art. 85 (desertion), art. 90 (assaulting or willfully disobeying superior commissioned officer), art. 101(improper use of countersign), art. 106 (spying), art. 113 (misbehavior of sentinel).

[369] *See id.* art. 94 (mutiny or sedition), art. 99 (misbehavior before the enemy), art. 100 (subordinate compelling surrender), art. 102 (forcing a safeguard), art. 104 (aiding the enemy), art. 106(a) (espionage), art. 110 (improperly hazarding a vessel).

[370] 18 U.S.C. § 794(a) (2000). The relevant section reads:

> Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

Id.

[371] *Id.* § 794(b). The relevant section reads:

> Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy,

comparable civilian counterparts. Even though the UCMJ crimes of spying and espionage are federally-based, they still maintain a military character because the offenses are not recognized by state legislatures, the key component the evolving standards of decency doctrine relies upon to assess whether society accepts or rejects a capital offense.[372] For both, whether in war or peace time, Congress's legitimate state interest is to ensure that the nation's security remains intact. The means by which Congress has chosen to attain this objective is to prescribe severe punishments—up to and including the death penalty—for these serious infractions. Congress through history recognizes that the unlawful release of sensitive information to foreign nations directly threatens the national security of the United States, and consequently, prescribes the most severe punishment.[373] Given the low standard that rational basis requires and Congress's intent to protect the national security of the United States, espionage and spying survive a rational basis application.

The crimes of desertion, assaulting or willfully disobeying a superior commissioned officer, improper use of a countersign, and misbehavior of a sentinel during wartime are rooted in the Articles of War.[374] The legitimate state interest in prescribing death for these offenses,

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> shall be punished by death or by imprisonment for any term of years or for life.

Id.

[372] House UCMJ Hearings, *see supra* note 278, at 1229 (referencing spying as an Article of War); *see also* MCM, *supra* note 283, pt. IV, ¶ 106a analysis, at A23-9 (identifying peace time espionage as a recent amendment to the UCMJ). Even though Congress included the crime of espionage within the UCMJ in 1986, its derivate is spying—a traditional offense under the Articles of War, committed only in times of war. House UCMJ Hearings, *see supra* note 278, at 1229; *see also* WINTHROP, *supra* note 263, at 756-66 (commenting that the American Articles of War did not have an offense of spying until 1806, in which the offense of spying carried a death penalty sentence).

[373] *See* MCM, *supra* note 283, R.C.M. 1004(d) (stating that the "military judge shall announce that by operation of law a sentence of death has been adjudged [for the crime of spying]"); *see also id.* R.C.M. 1104 analysis, at A21-77 (distinguishing *Woodson* as only prohibiting the mandatory death sentences for the crime of murder. This statement presumes that *Woodson*'s holding does not apply to the crime of spying).

[374] House UCMJ Hearings, *supra* note 278, at 1225 (referring to desertion as an Articles of War offense and commenting that Article 85 is meant to consolidate various provisions relating to the crime of desertion; referring to Article of War 86, and importing its exact language into UCMJ art. 113, to permit the death penalty for misbehavior of a sentinel), 1226 (identifying article 90 as a derivative of Article of War 64 and further commenting that the death penalty may be imposed only in times of war), 1228 (referring to improper use of a countersign as an Article of War offense that carries the death penalty).

individually and collectively, is to ensure that during times of war, the armed forces maintains a ready force to meet foreign threats.[375] Congress has chosen the death penalty as one punitive means to further this legitimate interest. As long as a nexus, or rational relationship, exists between the state's legitimate interests to maintain a responsive military and the means to achieve the objective (the death penalty for serious wartime offenses), the questioned law overcomes a constitutional challenge.[376] As such, the death penalty, as one of the many punishments Congress provides to court-martial panels, is selected only for those crimes that, if committed, bear a substantial risk of harming the unit, the war effort, or even national security. A service member who commits a "time of war" capital offense, maintains the burden of proof to challenge its propriety. Yet, as mentioned, the standard is pro-government. In writing legislation, Congress is not required to justify the policy rationale for permitting such harsh punishment.[377] Rather, the statute's mere promulgation affords it a presumption that it is constitutionally valid. Only in the rarest cases has the Court applied a rational basis standard and found for the challenger.[378] Whether these cases are indicative of new Court trends in applying a rational basis standard is difficult to assess, but these decisions are anomalous and arguably represent more politics than legal reasoning.[379]

During peace time, seven unique military offenses permit the death penalty. Of those capital offenses, five—mutiny or sedition, misbehavior before the enemy, subordinate compelling surrender, forcing a safeguard, and aiding the enemy—are for the most part, like the war time capital

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[375] *See* Parker v. Levy, 417 U.S. 733, 743 (1974) (citing United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955) for the proposition that "the difference[ ] the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise'").

[376] *See supra* notes 359-64 and accompanying text (explaining the great deference given to Congress's legislative enactments when a rational basis standard is applied).

[377] FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993); *see supra* note 362 and accompanying text (discussing the rational basis test's presumption toward the legitimacy of a statute even if Congress has failed to provide a policy basis for the statute's enactment).

[378] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (applying a rational basis standard and finding Texas's anti-sodomy law as serving no legitimate state interest); Romer v. Evans, 517 U.S. 620, 635-36 (1995) (striking down as unconstitutional a Colorado constitutional amendment, which implicitly supported discrimination against homosexuals, as serving no legitimate state interest).

[379] *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (arguing the Court majority misapplied the Due Process Clause's rational basis standard).

offenses, rooted in the Articles of War.[380] Espionage, as identified earlier, is a derivative of spying, and therefore, maintains a unique military character.[381] The only unique military capital offense not originating in the Articles of War is improperly hazarding a vessel.[382] Nevertheless, this offense is not one shared by the states, and therefore, is properly characterized as unique to the military. The seven peace time capital offenses are, like the war time capital offenses, designed to further the nation's interest in safeguarding the armed forces, and ultimately the nation, from internal and external threats. These are serious peace time offenses, which is why Congress reserved the death penalty only for this select group. In applying a rational basis standard, one must address whether safeguarding the armed forces from internal and external threats is a legitimate state interest. The obvious answer to this question is yes. More attenuated, but nonetheless relevant, is whether the death penalty furthers this national interest. Again, a rational basis standard presumes the statute's legitimacy, and the burden of proof to demonstrate a statute's irrationality, or that no plausible nexus exists between the means and ends, rests with the challenger. Each unique capital offense, individually and collectively, satisfies a rational basis standard.[383]

The twelve unique military capital offenses are justified, but some are a throwback to archaic reasoning that has carried over to the present time.[384] Nevertheless, a rational basis standard in this legal regime affords the responsibility to Congress to correct perceived injustices, not the courts.

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[380] House UCMJ Hearings, *supra* note 278, at 1227 (commenting that UCMJ art. 94, mutiny or sedition, consolidates Articles of War 66 and 67), 1228 (commenting that UCMJ art. 99, misbehavior before the enemy, consolidates Articles of War 75), 1228 (referring to UCMJ art. 100, subordinate compelling surrender, as originating from Articles of War 76), 1229 (commenting that UCMJ art. 102, forcing a safeguard, derives from Articles of War 78 but with "time of war" language omitted), 1229 (commenting that UCMJ art. 104, aiding the enemy, derives from Articles of War 81).

[381] *See supra* note 373 and accompanying text.

[382] *See* House UCMJ Hearings, *supra* note 278, at 1230 (identifying UCMJ art. 110, improperly hazarding a vessel, as originating from the proposed Articles for the Government of the Navy).

[383] Applying a different standard, such as intermediate or strict scrutiny, would certainly reveal a different result, but such is not the standard advocated in this article.

[384] Permitting the death penalty for UCMJ art. 85 (desertion) and art. 90 (assaulting or willfully disobeying a superior commissioned officer) (2002) appear, even given the extreme case, unduly severe. Yet, a rational basis standard presumes the legitimacy of a statute and defers, with limited exceptions, to Congress for its rationality.

2. Unique Noncapital Military Punishments

Track two is not concerned solely with capital offenses. It may extend to noncapital disproportionality challenges as well. For instance, Article 15 authorizes punishment of confinement to bread and water on a disembarked vessel.[385] This practice is found primarily within the U.S. Navy, and military courts, in reviewing the practice, find it consistent with Article 55 and congressional intent as long as the confinement lasts no longer than three consecutive days and is implemented at sea.[386] Applying a track two analysis, this practice is in accord with the theme presented throughout this article. Confinement to bread and water is a unique punishment that is historically rooted.[387] Commanders find its application necessary because it is one of the few effective punishments at their disposal.[388] Even though Congress debated bitterly whether this punishment is simply a throw-back to barbarism, the debates' eventual outcome resulted in the punishment's promulgation.[389] Since those debates, this punishment moved from courts-martial proceedings to non-judicial punishment found in Article 15.[390] Whether confinement to bread and water as a punishment is found in courts-martial proceedings or non-judicial punishment, applying a rational basis standard would

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[385] UCMJ art. 15(b)(2)(A). Bread and water confinement is permissible "if imposed upon a person attached to or embarked in vessel . . . for not more than three consecutive days." *Id.*

[386] *See* United States v. Yatchak, 35 M.J. 379 (C.M.A. 1992) (holding that Article 55 of the UCMJ and the Eighth Amendment were violated when the convening authority sentenced a Sailor to confinement on bread and water on a ship docked in a domestic shipyard); *see also* United States v. Lorance, 35 M.J. 382 (C.M.A. 1992) (holding that confinement to bread and water on a vessel docked in a domestic shipyard violated Article 55, UCMJ).

[387] S. REP. NO. 81-486, at 11 (1949), *reprinted in* INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE, (U.S. Government Printing Office 1950) (commenting that Article 15's inclusion of confinement to bread and water on an embarked vessel is a "combination and revision of Article of War 104 and article 14 of the proposed amendments to the Articles for the Government of Navy").

[388] United States v. Wappler, 2 C.M.A. 393, 395 (1953) (referring to the legislative history that Navy commanders lobbied for confinement to bread and water to ensure they had an effective punishment at their disposal).

[389] *See* House UCMJ Hearings, *supra* note 278, at 643 (referring to bread and water confinement as cruel and barbaric punishment that "fit[s] in the same category as the floggings, brandings, and tattooings which are specifically prohibited by article 55"). Congress debated Article 15's authorization of confinement to bread and water in the context of Article 55's prohibition against cruel and unusual punishment.

[390] UCMJ art. 15(b)(2)(A) (2002). The relevant portion of Article 15 reads: "if imposed upon a person attached to or embarked in a vessel, confinement on bread and water or diminished rations for not more than three consecutive days . . . ." *Id.*

reach the same result: the punishment is constitutional. This is significant and underlies one of the premises for track two analyses—Congress is the proper forum to debate the merits of a unique military offense or punishment.

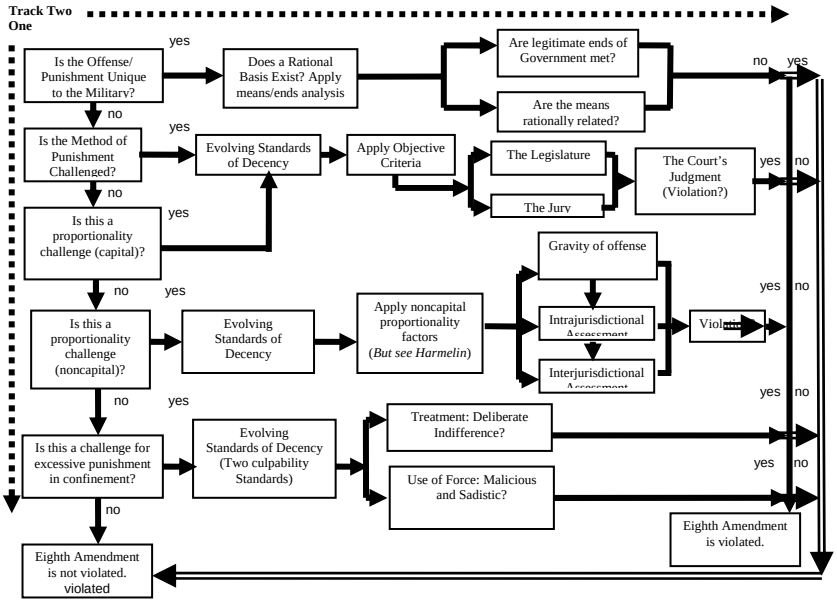
Track two analysis is controversial in that it provides great deference to Congress in legislating offenses and punishments that are unique to the military. Again, the rationale for this proposition is the inability of the evolving standards of decency doctrine to address the appropriateness of punishment. Therefore, the recommended standard is one that is deferential to the will of Congress, which is ultimately accountable to the people.

V. Conclusion

This article examined the components of the evolving standards of decency doctrine and demonstrated its shortcomings with the military justice system. A primary shortcoming is the inability to apply the doctrine's primary component—the sense of the nation's legislatures as expressed in their statutory pronouncements—to determine whether a military offense or punishment conflicts with the Eighth Amendment. Given this shortcoming, the competing interests of civilian and military Eighth Amendment law must be harmonized while still maintaining a criminal justice system responsive to the military's needs. The framework advocated is comprehensive in that a clear standard is identified for any offense or punishment. The framework is also progressive in that it follows Supreme Court pronouncements on the death penalty when the offense or punishment maintains a civilian character. For those offenses or punishments that are unique to the military, a rational basis standard—or track two application—is advocated. Track two's most attractive feature is the simplicity of application. With simplicity may come occasional injustice, but the forum for addressing the "bad facts" cases in a track two application resides with Congress and not the courts. For both track one and two, the result is a framework that ultimately achieves a methodology that provides clear answers on the appropriate Eighth Amendment standards for the military criminal justice system.

Appendix A

Eighth Amendment Framework



This flowchart represents the Eighth Amendment framework proposed in this article. The critical question is whether the offense or punishment is uniquely military. If the offense possesses a civilian character, apply Track One analysis (vertical dotted arrow). If the offense is uniquely military, apply Track Two analysis (horizontal dotted arrow).