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Articles

Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-is-Different" Jurisprudence

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Introduction

"Pay no attention to that man behind the curtain."
- The Wizard of Oz

"Today's opinion adds one more to the long list of substantive and procedural requirements impeding imposition of the death penalty imposed under this Court's assumed power to invent a death-is-different jurisprudence." *Atkins v. Virginia*, 536 U.S. 304, 352 (2002) (Scalia, J., dissenting).

In *Atkins v. Virginia*, Justice Scalia continued his scathing attack on the Supreme Court's "death-is-different" jurisprudence, arguing that it finds "no support in the text or history of the Eighth Amendment"[1] to the Constitution and rests "upon nothing but the personal views" of the Justices.[2] Specifically, Justice Scalia directs his outrage at the Court's applications of the cruel and unusual punishment clause of the Eighth Amendment to derive certain procedural and substantive requirements in capital punishment cases.[3] While the Court has

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1. The Eighth Amendment to the Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

2. 536 U.S. at 337-38.

3. *Id.*

broadly justified the need for such protections based on the notion that death as a punishment is unique because of its severity and irrevocability,[4] hence the "death-is-different" moniker, the constitutional basis upon which these protections have been accorded is largely the doctrine of "evolving standards of decency."

As demonstrated below, in adopting the concept of "evolving standards of decency," the Supreme Court has eschewed traditional methods of constitutional interpretation in favor of a methodology that, at best, eviscerates any independent normative principle inherent in the Eighth Amendment, and, at worst, reduces the Court's capital punishment jurisprudence to an expression of "the *feelings* and *intuition* of a majority of the Justices . . . - 'the perceptions of decency, or of penology, or of mercy, entertained . . . by a majority of the small and unrepresentative segment of our society that sits on th[e] Court.'"[5]

This article first explains, in section one, how the adoption of a purposive approach to the Eighth Amendment, consistent with traditional methods of constitutional interpretation, may have resulted in the abolition of the death penalty in the aftermath of *Furman v. Georgia*, and nonetheless, would presently serve as a legitimate method for applying the Eighth Amendment to capital cases.[6] In section two, this article exposes the inherent flaws in the evolving standards of decency approach, the tool by which the Court has "assumed power" and "invented" standards unique to death penalty jurisprudence. In section three, this article argues that following the "wizards" on the Court down the "yellow brick road" of the evolving standards of decency has ironic jurisprudential and sociological outcomes, including crippling the ability of the Eighth Amendment

4. Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004). *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (death differs from life imprisonment because of its "finality"); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("the death sentence is unique in its severity and in its irrevocability . . ."); Ring v. Arizona, 536 U.S. 584, 616-17 (2002) (Breyer, J., concurring) (as "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming).

5. *Atkins,* 536 U.S. at 348-49 (quoting Thompson v. Oklahoma, 487 U.S. 815, 873 (1988) (Scalia, J., dissenting)).

6. 408 U.S. 238 (1972) (per curiam).

to serve as a non-majoritarian constitutional basis for the abolition of capital punishment.

I. The Purposive Theory of Constitutional Interpretation

The Bill of Rights of the U.S. Constitution, as incorporated to apply to the states, serves to "prevent misconstruction or abuse of . . . powers" through its use of "declaratory and restrictive clauses," which place certain limitations on the legislative power of those states.[7] Accordingly, the laws passed by state legislatures receive little constitutional scrutiny, generally speaking, unless they concern "fundamental" matters identified in the Bill of Rights.[8] When this is the case, however, state laws lose their presumption of constitutionality and instead are given stricter scrutiny, with the burden shifting to the state to demonstrate a compelling reason why the law is necessary in light of the language in the Bill of Rights, and to establish why the end that the law seeks to accomplish could not be achieved by some less invasive method. This method of interpretation has been applied in First Amendment free speech and free exercise of religion cases, as well as in Fifth Amendment and Fourteenth Amendment due process cases.[9]

A. *The Purposive Test*

In 1970, former Supreme Court Justice Arthur Goldberg and Harvard Law Professor Alan Dershowitz advocated applying this traditional method of interpretation to the Eighth Amendment, terming it a "purposive test of constitutionality."[10] The purposive test seeks to protect "[t]he basic concept underlying the Eighth Amendment," which "is nothing less than the dignity of man," by condemning excessively severe punish-

7. U.S. CONST. pmbl. In *Furman*, the Court explained that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Furman*, 408 U.S. at 268-69 (Brennan, J., concurring).

8. *See, e.g.*, Harper v. Virginia, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Skinner v. Oklahoma, 316 U.S. 535 (1942).

9. Arthur Goldberg & Alan Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

10. *Id.* at 1784.

ments.[11] In order to protect these values, the Court had (prior to 1970) interpreted the cruel and unusual punishment clause to prohibit punishments that were "degrading in their severity" and "wantonly imposed."[12] Thus, under the purposive test, when a punishment is demonstrated to be degrading in severity (cruel) and wantonly imposed (unusual), the state has the burden to demonstrate that the punishment is not excessively severe. As suggested by Justice Goldberg in his dissent in *Rudolph v. Alabama*,[13] a state's punishment should be declared excessively severe and thus unconstitutional if "(a) it produces hardship disproportionately greater than the harm it seeks to prevent, or (b) a less severe punishment could as effectively achieve the permissible ends of punishment."[14]

B. *The Purposive Test as Applied to Capital Punishment*

As applied to capital punishment, then, the purposive test first asks whether the death penalty is "'degrading in [its] severity,' and 'wantonly imposed.'"[15] In determining what punishments are degrading in severity, the Court initially interpreted the cruel and unusual punishment clause to "reach only those methods of punishment similar to the tortures practiced during the Stuart reign in England, which the framers of the Eighth Amendment clearly intended to forbid."[16] Later, however, in *Weems v. United States,* the Court expanded its view of degradation, stating that "[n]o circumstance of degradation is omitted [from Eighth Amendment scrutiny] . . . [i]t may be that even the cruelty of pain is not omitted."[17] The Court's opinion in *Trop v. Dulles* went even further, holding that the punishment of expatriation was unconstitutional because of its degrading severity, causing "the total destruction of the individ-

11. *Id.* (citing Trop v. Dulles, 356 U.S. 86, 100 (1958)).

12. *Id.*

13. 375 U.S. 889 (1963) (dissenting to denial of certiorari).

14. Goldberg & Dershowitz, *supra* note 9, at 1794.

15. *Id.*

16. *Id.* at 1785 (citing Anthony F. Granacci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969)).

17. 217 U.S. 349, 366 (1910) (holding unconstitutional a sentence of fifteen years of "hard and painful labor" in ankle chains for the falsification of a public record in the Philippines Territory); *see* Goldberg & Dershowitz, *supra* note 9, at 1786.

ual's status in organized society," as "the expatriate has lost the right to have rights."[18] Under the standards articulated in *Weems* and *Trop*, it does not stretch the bounds of credulity to conclude that the death penalty is a punishment degrading in severity.[19] The pain involved in execution, both physical and psychological, coupled with the sheer enormity of the punishment itself and resulting loss of one's existence leaves little doubt that capital punishment is degrading in its severity under the purposive test.[20]

The requirement that the punishment at issue not be wantonly imposed, or "unusual," took two forms in the Court's jurisprudence prior to 1970. First, unusual meant what it does in the modern vernacular: rare. This was the case in both *Weems* and *Trop*, where the punishments at issue were not authorized in other jurisdictions.[21] The second concept of unusualness derives its meaning from an understanding at the time of the adoption of the English Bill of Rights of 1688, the language of which the Eighth Amendment adopted verbatim.[22] Unusualness here referred to the "arbitrary and discriminatory" imposition of punishment.[23] Capital punishment arguably satisfies both of these interpretations: its imposition is rare, and its administration is often arbitrary and discriminatory.[24]

If capital punishment is both degrading in severity and wantonly imposed, the states would then have the burden to demonstrate that a less severe punishment could not achieve the same penological goal. In practice, states would be hard-pressed to satisfy this standard under any of the four common rationales for imposing punishment: rehabilitation, isolation,

18. 356 U.S. at 101-02; *see* Goldberg & Dershowitz, *supra* note 9, at 1786-87.

19. Goldberg & Dershowitz, *supra* note 9.

20. *Id.* at 1786-87. The current challenges to the constitutionality of the lethal injection protocol underscore the severity and degradation that accompanies the use of capital punishment.

21. *Id.* at 1789.

22. *Id.* at 1791; Granacci, *supra* note 16.

23. The cruel and unusual punishment provision of the English Bill of Rights of 1688 has been thought by historians to be a reaction to the prosecution and punishment of Titus Oates in 1685 by Lord Jeffrey. Oates' punishment was "unusual" in that he was singled out, despite others being similarly situated, for a punishment not authorized by statute or within the jurisdiction of the Court. Goldberg & Dershowitz, *supra* note 9, at n.74; Granucci, *supra* note 16, at 857-59.

24. Goldberg & Dershowitz, *supra* note 9, at 1791-92.

deterrence or retribution.[25] Rehabilitation can obviously not be accomplished by capital punishment, and isolation can clearly be accomplished by the less severe penalty of life imprisonment. Given the "inconclusive" nature of the evidence of the effect of capital punishment on future crime, the goal of deterrence would be likewise difficult to establish as a compelling state interest.[26] Finally, retribution is problematic, and arguably unattainable, because it is difficult to determine the level of punishment needed to satisfy this "primal community passion" with any number of severe punishments, including ones that the Eighth Amendment clearly prohibits (i.e., torture).[27]

Given the circumstances surrounding *Furman*, the purposive test, if wholly applied, would likely have resulted in a decision that capital punishment is cruel and unusual under the Eighth Amendment. Even if the Court chose not to go that far, the test could still function as an objective standard by which various applications of capital punishment could be assessed. The purposive test would no doubt have achieved many of the same results of the evolving standards jurisprudence (see *infra*), but in a manner that would focus on the interpretation of empirical evidence proffered by states tied to their espoused pe-

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25. *Id.* at 1796.

26. Furman v. Georgia, 408 U.S. 238, 307-08 (1972) (Stewart, J., concurring) (noting the "inconclusive empirical evidence" concerning deterrence). *Compare* Cass Sunstein & Adam Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005), *with* Carol Steiker, *No, Capital Punishment is not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005).

27. Goldberg & Dershowitz, *supra* note 9, at 1796. *See Furman*, 408 U.S. at 344 (Marshall, J., concurring).

> It is plain that . . . punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view . . . if the 'cruel and unusual' language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But, the fact that *some* punishment may be imposed does not mean that *any* punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act. The 'cruel and unusual' language would thus be read out of the Constitution . . . .

Id. See also CESARE BECCARIA, ON CRIMES AND PUNISHMENT (H. Paolucci trans., Prentice Hall 1st ed. 1963) (1764) (arguing for the abolition of the death penalty focusing on the futility, from the point of social welfare, of torture and capital punishment as means to achieve retribution for victims).

nological goals. Importantly, the purposive test would also help ensure that punishments of non-capital defendants (such as those facing life without parole) would receive the same Eighth Amendment protections as capital cases.[28]

II. The Fundamental Flaws of the Evolving Standards of Decency Doctrine

As with the purposive test above, the evolving standards inquiry seeks to determine whether a particular punishment is "excessive" under the Eighth Amendment. The Court explained in *Coker v. Georgia* that a punishment is "'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[29] To determine whether a punishment meets these tests, the Court examines the historical practice with respect to the punishment at the time that the Constitution and Bill of Rights were adopted and whether the punishment is acceptable under society's evolving standards of decency.[30]

A. *The Derivation of the Evolving Standards of Decency*

The evolving standards of decency concept emerged from the Court's dicta in *Trop*: "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[31] To determine what the applicable Eighth Amendment standards of decency are, the Court tells us that "those evolving standards should be informed by 'objective factors to the maximum possible extent,'"[32] but "the Constitution contemplates that in the end [the Justices'] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[33] Ac-

28. *Compare* Solem v. Helm, 463 U.S. 277 (1983), *with* Harmelin v. Michigan, 501 U.S. 957 (1991) (assessing the degree to which the concept of proportionality applies to non-capital cases under the Eighth Amendment).

29. 433 U.S. 584, 592 (1977).

30. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 312 (2002).

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

32. *Atkins*, 536 U.S. at 312 (quoting *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring)).

33. *Id.* (quoting *Coker*, 433 U.S. at 597).

cording to the Court, the "most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures," although it has also used other objective barometers such as juries, public opinion and international norms.[34] Therefore, to determine what the applicable evolving standard of decency is, the Court looks to state legislatures to determine whether a consensus exists, and then its "own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[35]

B. *The Constitutional Flaws of the Evolving Standards of Decency*

As a constitutional rule, the evolving standards doctrine is problematic in two fundamental respects. First, the standard's objective criteria ensure that the Eighth Amendment is "drained of any independent integrity as a governing normative principle."[36] The objective criteria rely exclusively on public opinion as expressed by the legislative enactments of the state legislatures, and if they are determinative of the meaning of the Eighth Amendment, then the Amendment can do no more than reflect public opinion.[37] Thus, the Eighth Amendment can, at best, serve merely to limit the power of certain states to employ punishments departing from the norms of their fellow states.[38] Further, unless a majority of state legislatures elect to ban capital punishment, the death penalty cannot be interpreted under

34. Penry v. Lynaugh, 492 U.S. 302, 331 (1989).

35. *Atkins*, 536 U.S. at 313 (quoting *Coker*, 433 U.S. at 597).

36. Goldberg & Dershowitz, *supra* note 9, at 1779 (quoting Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication – A Survey and Criticism*, 66 YALE L.J. 319, 345 (1957)).

37. *See* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089 (2006) (identifying the flaws of using state legislation as evidence of the evolving standards of decency).

38. As Justice Marshall wrote in *Lockett v. Ohio*, "[t]hat the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the 'evolving standards of decency,' embodied in the Eighth Amendment, by reference to state 'legislative judgment.'" 438 U.S. 586, 620 (1978) (Marshall, J., concurring) (citations omitted).

the evolving standards test to be a cruel and unusual punishment.[39] As aptly put by Justice Brennan in *Furman*,

> [i]f the judicial conclusion that a punishment is 'cruel and unusual' 'depend[ed] upon virtually unanimous condemnation of the penalty at issue,' then, '[l]ike no other constitutional provision, [the Clause's] only function would be to legitimize advances already made by the other departments and opinions [that are] already the conventional wisdom.' We know that the Framers did not envision 'so narrow a role for this basic guaranty of human rights.'[40]

The second problematic aspect of the evolving standards test is its importation of the Justices' subjective views into the determination of what the current applicable standard of decency is. Although the Court in *Coker* instructed that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent," the Justices have done exactly that by inserting their subjective views into the Eighth Amendment calculus.[41] This is particularly troublesome in cases such as *Atkins v. Virginia* and *Roper*

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39. As a majority of western nations have abolished the death penalty, *see* ROGER HOOD, THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE (3d ed. 2002), commentators have argued for the application of international standards to this test. *See* William Schabas, *International Law and the Death Penalty: Reflecting or Promoting Change? in* CAPITAL PUNISHMENT STRATEGIES FOR ABOLITION (Hodgkinson & Schabas eds., 2004); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS. L. REV. 1085 (2002). While the Court has a long history of citing foreign law, it has only recently used such authority as a basis for striking down state legislation. Stephen Calabresi & Stephanie Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005). However, injecting global norms as the method for interpreting the meaning of the United States Constitution is problematic on many levels. Stephen Calabresi, *Symposium: Equality, Privacy and Lesbian and Gay Right after Lawrence v. Texas*, 65 OHIO ST. L.J. 1097 (2004). *See also* Justice Antonin Scalia, Keynote Address at the American Enterprise Institute: Outsourcing American Law (Feb. 21, 2006) ("What reason is there to believe that other dispositions of a foreign country are so obviously suitable to the morals and manners of our people that they can be judicially imposed through constitutional adjudication?").

40. Furman v. Georgia, 408 U.S. 238, 268 (1972) (Brennan, J., concurring) (citations omitted).

41. Coker v. Georgia, 433 U.S. 584, 592 (1977). Others have warned of the dangers of non-democratic elites substituting their own values in place of popular ones. *See, e.g.*, John Hart Ely, *The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 51 (1978).

v. Simmons, where the objective evidence of consensus among the state legislatures is not firmly established, because it creates the perception that the Court's interpretation of the objective standards is merely a pretext for the expression of their subjective views.[42] Thus, the meaning of the Eighth Amendment now possesses a certain tenuousness, flipping in the wind of public opinion[43] and anchored only by the subjective views of the Justices currently sitting on the Court.[44]

III. The Application of the Evolving Standards of Decency Doctrine and its Jurisprudential and Sociological Outcomes

A. *The Adoption of Evolving Standards*

In *Furman*, the Court first entertained the question of whether the death penalty, as applied, constituted cruel and unusual punishment. Several of the Justices implicitly en-

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> The notion that the genuine values of the people can most reliably be discerned by a non-democratic elite is sometimes referred to in the literature as 'the Fuhrer principle,' and indeed it was Adolph Hitler who said that '[m]y pride is that I know no statesman in the world who with greater right than I can say he is the representative of his people.' . . . [Similarly,] '[t]he Soviet definition' of democracy . . . also involves the 'ancient error' of assuming that 'the wishes of the people can be ascertained more accurately by some mysterious methods of intuition open to an elite rather than by allowing people to discuss and vote and decide freely.

Id.

42. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

> [T]he Court's conclusion that the meaning of our Constitution has changed over the past 15 years . . . [is attributed] not to the original meaning of the Eighth Amendment, but to 'the evolving standards of decency' of our national society. . . . Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

Id.

43. *See, e.g.*, David Garland, *The Cultural Uses of Capital Punishment*, 4 PUNISHMENT & SOC'Y 459, 479 (2002) ("If 'evolving standards of public decency' had once justified the Court's objections to capital punishment there were now clear signs that public standards in many states had ceased to evolve in that direction.").

44. *Compare* Penry v. Lynaugh, 492 U.S. 302 (1989), *with* Atkins v. Virginia, 536 U.S. 304 (2002); *compare* Stanford v. Kentucky, 492 U.S. 361 (1989), *with Roper*, 543 U.S. 551 (reversing interpretations of the Eighth Amendment based on evolving standards of decency analysis).

dorsed aspects of the purposive test (with Brennan and Douglas both citing Goldberg and Dershowitz) in striking down the death penalty as applied because of its arbitrary and discriminatory ("unusual") character. Several of the *Furman* plurality also implicitly supported the concept that death was a punishment of degrading severity ("cruel") in going to great lengths to explain how death was different.[45]

Four years later in *Gregg v. Georgia*, however, the Court's view of the application of the Eighth Amendment shifted away from "purposive" concepts and toward "evolving standards of decency" concepts as the Court upheld the new death penalty statutes.[46] The Court in *Gregg* explained:

> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
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> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'[47]

Despite all of the Court's rhetoric that "death-is-different" in *Furman*, the Court in *Gregg* assumes that the meaning of

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45. According to Justice Stewart, death is "unique in its total irrevocability." 408 U.S. at 306 (Stewart, J., concurring). Because the "finality of death precludes relief," the executed person has "lost the right to have rights." *Id.* at 290 (Brennan, J., concurring). Justice Brennan also wrote that the "uniqueness of death is its extreme severity," manifested "most clearly in its finality and enormity." *Id.* at 288-89. Thus, "[as] the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

46. 428 U.S. 153 (1976). The Court of course did not repudiate the narrowing concept of *Furman* and its requirement of individualized sentencing; these concepts of avoiding arbitrariness because "death-is-different" are vestiges of the conceptual framework endorsed by the purposive test. *See, e.g.*, *Woodson*, 428 U.S. 280; Eddings v. Oklahoma, 436 U.S. 921 (1978).

47. *Gregg*, 428 U.S. at 175 (quoting *Furman*, 408 U.S. at 383 (Berger, C.J., dissenting)).

cruel and unusual punishment rests on public opinion (whether in 1791 or the present) not on constitutional principle (degrading severity and wanton imposition).[48] In sum, the Court places higher scrutiny on certain death penalty cases not because they are degrading in severity and wanton in their imposition, i.e. cruel and unusual punishments, but only when current public opinion (or current Justice opinion) dictates that capital punishment is not appropriate in a particular circumstance.

B. *Jurisprudential and Sociological Outcomes of the Evolving Standards of Decency*

The Court's subsequent Eighth Amendment decisions have essentially flowed from this concept in deciding to add the following substantive and procedural protections: a prohibition of the death penalty for rape of an adult woman,[49] for felony murder absent a showing that the defendant possessed a sufficiently culpable state of mind,[50] for any person under the age of sixteen at the time of the crime,[51] as the mandatory punishment for any crime,[52] for mentally retarded individuals,[53] for individ-

48. *See* Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974) (arguing that the level of public support concerning a mode of punishment does not have any bearing on whether such punishments rest on constitutionally acceptable standards of morality).

49. Coker v. Georgia, 433 U.S. 584, 592 (1977) ("[A]ttention must be given to the public attitudes concerning a particular sentence history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.").

50. Enmund v. Florida, 458 U.S. 782, 797 (1982) ("Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty [in this situation].").

51. Thompson v. Oklahoma, 487 U.S. 815, 821-22 (1988) (Interpretation of the Eighth Amendment is delegated "to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'").

52. Woodson v. North Carolina, 428 U.S. 280, 288 (1976) ("[C]entral to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment.") (citation omitted).

53. Atkins v. Virginia, 536 U.S. 304, 311-12 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958))).

uals who were under age eighteen at the time of the crime[54] and for individuals who have not received a judicial evaluation of a claim of insanity.[55]

Ultimately, however, the death penalty cannot be declared to be a cruel and unusual punishment under the Eighth Amendment unless public opinion (or the subjective opinion of five Justices) warrants that it is so. Thus, the irony in Justice Scalia's statement in *Atkins*, that while "[t]here is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by th[e] Court," is that without public opinion (or pretextual application of subjective Justice opinion), the Court will never be able to abolish the death penalty *per se* under the Eighth Amendment in the world of evolving standards of decency.

And in fact, the added substantive and procedural protections that Scalia bemoans may not be all that effective in protecting capital defendants from arbitrary and discriminatory application of the death penalty.[56] To the contrary, application of the evolving standards doctrine may promote arbitrariness and error by implementing standards that create the appearance of fairness but are not the product of the Court's analysis of relevant empirical evidence.[57] Reflecting on twenty years of participating on the Court in death penalty cases and trying to apply the evolving standards of decency construction, Justice Blackmun wrote,

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54. Roper v. Simmons, 543 U.S. 551, 560-61 (2005) ("To implement this framework we have established the propriety and affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be 'cruel and unusual.'").

55. Ford v. Wainwright, 477 U.S. 399, 406 (1986) ("[T]his Court takes into account objective evidence of contemporary values before determining whether a particular punishment comports with the fundamental human dignity that the Amendment protects.").

56. Carol Steiker & Jordan Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 398, 401 (1995).

57. The outcome in *Atkins*, for instance, prohibits execution of mentally retarded defendants but does not provide a standard of how to determine who is retarded for purposes of the Eighth Amendment, leaving an opaque standard that will in practice not be uniformly applied and instead create another level of unfairness and arbitrariness within the capital system. Michael L. Perlin, *Life in Mirrors, Death Disappears: Giving Life to Atkins*, 33 N.M. L. REV. 183 (2003).

> [f]rom this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.[58]

Blackmun's perspective is particularly significant in that he voted in favor of maintaining the death penalty in *Furman* and *Gregg*, with the apparent belief that a fair and workable application of capital punishment could be achieved.[59]

The Court's application of the evolving standards doctrine also has the important consequence of undermining the legitimacy of the Supreme Court by politicizing it as an institution.[60] By tying the application of the evolving standards doctrine to the composition of a majority of the Supreme Court and their personal (as opposed to jurisprudential) views, the determination of whether any punishment is cruel and unusual under the Eighth Amendment becomes merely a political choice. Likewise, if the Supreme Court, as a purportedly countermajoritarian institution bootstraps its interpretation of the Constitution to majoritarian public opinion, it undermines its role of neutral arbiter of the Constitution and protector of the rights of the minority. Thus, if the Court's imposition of restrictions on the use of the death penalty is tied to current public opinion or the subjective views of its members, then its decisions are merely written in pencil, waiting to be rewritten.

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58. Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). *See* Governor George Ryan, I Must Act, Address at Northwestern University School of Law (Jan. 11, 2003) *reprinted in* AUSTIN SARAT, MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION (2003) ("[O]ur three year study has found only more questions about the fairness of [the Illinois capital system].").

59. *See* Furman v. Georgia, 408 U.S. 238 (1972) (Blackmun, J., dissenting); Gregg v. Georgia, 428 U.S. 153 (1976) (Blackmun, J., concurring).

60. The Supreme Court gains little by entering the political fray surrounding the death penalty. *See, e.g.*, Marshall Frady, *Death in Arkansas*, THE NEW YORKER, Feb. 22, 1993, at 105; Jeff Woods, *Public Outrage Nails a Judge*, THE NASHVILLE BANNER, Aug. 2, 1996.

IV. An Opportunity to Move Away from Evolving Standards?

On September 25, 2007, the Supreme Court granted certiorari in the case of *Baze v. Rees*, to address the question of whether the lethal injection protocol used in Kentucky violates the Eighth Amendment prohibition against cruel and unusual punishment.[61] This protocol[62] has been challenged on the

61. No. 07-5439, 2007 U.S. LEXIS 9066 (U.S. Sept. 25, 2007) (granting certiorari), *amended by* No. 07-5439, 2007 U.S. LEXIS 11115 (U.S. Oct. 3, 2007). Kentucky's lethal injection protocol is not the first to be called into question. California, Missouri and Tennessee have all had their respective protocols declared unconstitutional under the Eighth Amendment since 2006. *See* Morales v. Hickman, 415 F. Supp. 2d 1037 (N.D. Cal. 2006), *aff'd per curiam*, 438 F.3d 926 (9th Cir. 2006), *cert. denied*, 546 U.S. 1163 (2006) (requiring California to provide medical personnel to ensure that the inmate was unconscious during the procedure or alter its lethal injection protocol); Taylor v. Crawford, No. 05-4173, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006) ("determin[ing] that Missouri's current method of administering lethal injections subjects condemned inmates to an unacceptable risk of suffering unconstitutional pain and suffering"), *rev'd*, 487 F.3d 1072, 1085 (8th Cir. 2007) (reversing the district court's holding that the state's revised protocol violated the Eighth Amendment); Harbison v. Little, No. 3:06-01206, slip op. at 55–56 (M.D. Tenn. Sept. 19, 2007) ("[T]he court finds that the plaintiff's pending execution under Tennessee's new lethal injection protocol violates the Eighth Amendment . . . . The new protocol presents a substantial risk of unnecessary pain . . . .").

62. The Kentucky Supreme Court explained the protocol in its entirety in determining that the protocol did not violate the Eighth Amendment or the Kentucky Constitution:

> The protocol for lethal injection execution begins with the availability of a therapeutic dose of diazepam if it is requested. Diazepam, commonly referred to as Valium, is an anti-anxiety agent used primarily for the relief of anxiety and associated nervousness and tension. Certified phlebotomists and emergency medical technicians are allowed up to an hour to then insert the appropriate needles into the arm, hand, leg or foot of the inmate.
>
> Three grams of sodium thiopental, commonly referred to as Sodium Pentathol, are then injected. This drug is a fast acting barbiturate that renders the inmate unconscious. At this level of ingestion the person is rendered unconscious for hours. The line is then flushed with 25 milligrams of a saline solution to prevent adverse interaction between the drugs.
>
> Fifty milligrams of pancuronium bromide, commonly referred to as Pavulon, follows. This drug causes paralysis. The purpose is to suspend muscular movement and to stop respiration or breathing. The line is again flushed with 25 milligrams of a saline solution to again prevent any adverse interaction between the drugs.
>
> Finally, 240 milligrams of potassium chloride is injected. This chemical disrupts the electrical signals required for regular heart beat and results in cardiac arrest. An electrocardiogram verifies the cessation of heart activity. A doctor and a coroner then verify the cause of death.

Baze v. Rees, 217 S.W.3d 207, 212 (2007).

grounds that it causes an unconstitutional risk of unnecessary pain and suffering.[63]

Rather than look to a majority of jurisdictions to determine what the prevailing standard of decency is, the Court should apply the purposive test advocated here in determining whether the lethal injection protocol at issue is "degrading in severity" and "wantonly imposed," i.e., cruel and unusual. As explained above, the death penalty as applied will likely meet both of those standards, so the test should be whether the state of Kentucky could demonstrate that the lethal injection protocol is the least severe procedure by which it could achieve its desired penological goal.[64]

At a minimum, the Court should strike down the Kentucky protocol because there is evidence that the same end (death) could be achieved in a manner that results in substantially less risk of pain and suffering, regardless of whether the sentence imposed achieves the state's penological goal.[65] By finding that the protocol creates an unnecessary risk of pain and suffering in violation of the Eighth Amendment, the Court can move its jurisprudence back in the direction of the purposive test and away from the concept of evolving standards of decency, even if it does not entertain the broader question of whether Kentucky can demonstrate a compelling need for the death penalty in the cases of Petitioners Baze and Bowling.[66]

V. Repudiation of the Evolving Standards of Decency: A Road Map out of Oz?

For abolitionists, a close examination of the evolving standards jurisprudence suggests doing the unthinkable: agree (to

63. Indeed, the Kentucky protocol is similar to most other states, almost all of which use lethal injection as the method of execution. *See*, e.g., Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 50 (2007).

64. *See* Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting) (dissenting to denial of certiorari).

65. *See generally* Baze Petition for a Writ of Certiorari (July 11, 2007).

66. While it is important to note that *Baze* is brought as a civil action challenging the death penalty procedure and not an appeal of a criminal sentence as in the other cases discussed herein, this case could nonetheless serve as the basis for shifting the doctrine back in the direction implicitly adopted in *Furman*, and away from the "evolving standards" concept adopted in *Gregg*. *See Baze*, 217 S.W.3d 207.

some extent) with Scalia. In order to abolish the death penalty in a manner not subject to the whim of public opinion, the Court needs to repudiate its evolving standards construct and return to first principles to apply the purposive test. As indicated above, there is still consensus on the Court that "death-is-different" (cruel) and that the death penalty continues to be applied in an arbitrary manner (unusual). Assuming this is true, the Court can place the burden back on the states to demonstrate, in a compelling manner, how capital punishment achieves any proper penological goal that a lesser punishment could not.

For those who believe that the death penalty should be used, the purposive test also has appeal in that it provides a better framework for defining the instances where the death penalty should be used. Rather than subjecting Eighth Amendment analysis to the willy-nilly views of Supreme Court Justices, the purposive test ties the use of the death penalty to the penological goals of the states and in that way, promotes consistency. As noted, the evolving standards of decency doctrine promotes unnecessary arbitrariness that impedes the fair application of capital punishment.

Without a doctrinal shift and a return to traditional principles, the Supreme Court will remain "behind the curtain in Oz" in the awkward role of a super-majoritarian legislature striving to maintain legitimacy by circumscribing its power to its interpretation of the will of the people. This is certainly not the role of independent interpreter of the Constitution that the founding fathers envisioned, where "[t]he judiciary . . . ha[s] neither FORCE nor WILL but merely judgment."[67] With the Supreme Court having led us down the "yellow brick road" of evolving standards of decency doctrine, only to find a jurisprudential sham without a curtain big enough for our judicial "wizards" to hide behind, the best hope for getting out of Oz is a return to traditional methods of constitutional interpretation.

67. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).