Out of Sight, Out of Mind: Is Solitary Confinement Offensive to the Evolving Standards of the US Constitution's Eighth Amendment?

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Elements of Chapter II were published in Charlie Eastaugh, ‘Capital Punishment: An Institution Vanishing Through the Evolution of the Eighth Amendment’ (2014) 3 Westminster Law Review 23. This is acknowledged where relevant.

This thesis represents the law as it stood on 1st September 2015.
ABSTRACT

The United States (US) Constitution’s Eighth Amendment includes a restriction on cruel and unusual punishments. Over the past fifty years the punishments clause has been developed by the US Supreme Court through its ‘evolving standards of decency’ (ESD) jurisprudence, restricting the range and application of lawful capital and non-capital penalties. Although the punishments clause has been evolved in the capital sphere such that the American death penalty is reaching a vanishing point, the Court has neglected to apply similar scrutiny in the non-capital setting, especially with respect to conditions of imprisonment. By undertaking an examination of the Eighth Amendment, a theoretical framework is developed in order to understand how the ESD principle has been applied, and to examine how a future constitutional challenge to disproportionate confinement conditions might materialise.

This thesis contends that modern solitary confinement represents a recession of constitutional protection. It is argued that principles of morality underlying the Eighth Amendment create a bar to this severely disproportionate, under-reviewed, and often under-reported punishment. In reaching such a conclusion, Dworkin’s theory of interpretivism is applied to solitary confinement in a novel way. An interpretivist understands morality to have been an undercurrent in the drafting, adoption, application and, therefore, future interpretation of the Constitution. Moral principles trump majoritarian policies, and such an approach compels a curtailment of extreme solitary confinement under the Eighth Amendment’s ESD principle.

Sources of morality relied on to reach such a conclusion are derived from the community and include traditional consensus, which is state counting, in addition to other elements selected for analysis due to their regular citation in Eighth Amendment decisions: public opinion, penological principles, transnational perspectives, and professional consensus. As a result, an original contribution is also made to the medico-legal literature, which has traditionally fixated on the psychiatric implications of confinement. Wider implications will extend to other areas of academic commentary, including professional consensus literature, and transnational law.
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CHAPTER I

INTRODUCTION

In 2015, roughly 81,000 prisoners are held in some form of solitary confinement in the United States (US). While there is no universal definition of such confinement, Riveland’s is the most widely-accepted, defining it as: ‘a highly restrictive, high-custody housing unit…that isolates inmates from the general prison population and from each other’. Riveland’s definition also requires a period of at least 22 hours per day in which prisoners are not allowed to leave their cells, a process known as ‘lockdown’. It will be demonstrated that, while every single US jurisdiction permits some form of solitary confinement, transparent reporting on its use - including population, conditions, duration of stays, and review processes - is information yet to be forthcoming. That lack of transparency will be addressed to demonstrate the pervasiveness of solitary confinement, and to understand an otherwise fractured picture of the country’s use of this extreme form of punishment.

President Obama’s comments in July 2015 that solitary confinement was ‘not smart’, and ‘an environment…that is often more likely to make inmates more alienated, more hostile, potentially more violent’ followed recent high-profile exposés of solitary confinement published by the New Yorker and New York Times. In addition, 2014 saw the most legislative reforms to this form of punishment in recent decades. In spite of this unprecedented focus on solitary confinement, US Board of Prisons director Charles Samuels

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1 John Gibbons and Nicholas Katzenbach, Confronting Confinement (Commission on Safety and Abuse in America’s Prisons 2006) 52-53, 56. Figures vary since classification of “solitary” is not uniformly accepted across the fifty-two jurisdictions.
2 Chase Riveland, Supermax Prisons (US Department of Justice 1999) 6, emphasis removed.
3 ibid.
Chapter I: Introduction

stated before a Senate Committee in August 2015 that the federal system ‘do[es] not practice solitary confinement’. Whether this statement was an oversight by the director, or a real attempt to deny the full extent of punishment in both the federal and state prison systems, is a question that has yet to be answered. The opportunity will be taken to demonstrate that solitary confinement is a reality, and it will be argued that the chance is ripe for a constitutional review of this often hidden corner of punishment.

Additionally, despite significant reforms to capital sentencing by the executive and legislature, the American criminal justice system as a whole has been described as having ‘gone astray, lost in a dark wood of its own making,’ evidenced by Samuels and Obama’s locking horns in 2015. Redress will be demonstrated by constitutional interpretation of a corner of the prison hidden from scrutiny: solitary confinement. This will enrich the discussion surrounding improvement of the criminal justice system, a debate more commonly fixated on capital punishment and mass incarceration. It will be argued that principles of morality underlying the Eighth Amendment compel a bar to this severely disproportionate, under-reviewed, and often under-reported punishment. The contribution provided by such an argument will contain a theoretically-justified blueprint for the constitutional curtailment of solitary confinement, something lacking in the Court’s precedents.

In the final week of the Supreme Court (SCOTUS) 2014-15 term, the Justices handed down a decision where solitary confinement was denounced, albeit in a sole concurrence, for the first time since 1890. In *Davis v Alaya*, the Court held that a judge’s decision to exclude the defendant from a meeting about juror-exclusion was harmless error, an issue unrelated to the punishments clause. Concurring in the Court’s opinion but writing alone on the topic of solitary confinement – not pertinent to the challenge – Justice Kennedy noted that the defendant had been held in solitary for 25 years, and that ‘the condition in which

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9 *In Re Medley* 134 US 160 (1890).
prisoners are kept simply has not been a matter of sufficient public inquiry or interest.’ The gap identified in Kennedy’s concurrence, confinement conditions, will be examined to develop the argument that such conditions are not only a matter of public interest, but require constitutional scrutiny. Kennedy might have opened the door to a challenge to solitary in the nation’s highest tribunal for the first time in recent memory, and it can be expected that at least two others Justices might follow him through that door, but a central question was left open, namely “is solitary confinement, as practiced in the US today, constitutionally offensive under the Eighth Amendment?”

In The Federalist 48, James Madison warned that clauses of the Constitution could become mere ‘parchment barriers against the encroaching spirit of power’. The Eighth Amendment, ratified in 1791, purports to protect citizens from ‘cruel and unusual punishments’ but until the mid-20th Century that clause could be described more accurately in Madison’s cautionary terms. For the first 170 years of the Union federal prisoners were treated as ‘the functional equivalent of non-citizens’, without access to the constitutional rights of those at liberty. The picture was no better at state-level, where local courts left matters of sentencing to the legislature, and the imposition of punishment to the executive.

For the federal punishments clause to have purpose, its incorporation and a more active approach by the courts was required. Throughout it will be argued that, although the punishments clause has been evolved in the capital sphere, since that provision’s

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11 ibid 2-3 Kennedy, J (concurring).
13 It is widely understood that Justices Ginsburg and Breyer favour individual rights in criminal justice cases, exemplified by Glossip v Gross 576 US ___ (2015) 41 Kennedy, J (dissenting, joined by Ginsburg, J): ‘it [is] highly likely that the death penalty violates the Eighth Amendment.’
14 The partisan tract published in favour of the US Constitution.
16 US Const, Amendment VIII. ‘Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’
18 John Fliter, Prisoners' Rights (Greenwood 2000) 45.
incorporation to the states,\textsuperscript{19} and after a renewed approach to prison issues,\textsuperscript{20} SCOTUS has neglected to apply similar scrutiny in the non-capital setting, especially to solitary confinement. The claim will be developed that modern solitary confinement, ‘a species of meta-prison’,\textsuperscript{21} represents a recession of constitutional protection where inmates are punished in a way which contravenes the Eighth Amendment.

By undertaking an examination of the Eighth, a theoretical framework will be developed to understand how the punishments clause has been interpreted since its incorporation, and to analyse how it should apply to solitary confinement. Dworkin’s theory of ‘interpretivism’\textsuperscript{22} encourages a review of history and precedent, with the added filter of a moral lens. An interpretivist understands morality to have been an undercurrent in the drafting, adoption, application, and therefore the future interpretation of the Constitution. Fidelity to the Constitution is thereby upheld in addition to principles of morality, which are not fixed in time. It will be shown that such an approach provides the momentum for future adjudication under the Eighth Amendment. It will be argued that the Eighth Amendment’s decency principle compels a curtailment of extreme solitary confinement. Sources of morality relied on to reach this conclusion are derived from the community and include traditional consensus, which is state counting, in addition to other elements of political morality selected for analysis due to their regular citation in the Court’s Eighth Amendment decisions: public opinion, penological principles, transnational perspectives, and professional consensus. To reach the conclusion that solitary confinement, as practiced, is abhorrent under the punishments clause, a roadmap for the progression of this thesis is provided below.

Chapter II will provide an historical and contextual background to the evolution of the punishments clause, including an analysis of the various factors which led to its revival from

\textsuperscript{19} Robinson v California 370 US 660 (1962).

\textsuperscript{20} Cruz v Beto 405 US 319 (1972) 321: ‘Federal courts sit not to supervise prisons, but to enforce the constitutional rights of all “persons,” including prisoners.’

\textsuperscript{21} Loïc Waquant, ‘Foreword: Probing the Meta-Prison’ in Jeffrey Ross (ed) The Globalization of Supermax Prisons (Rutgers UP 2013) xiii (original emphasis).

\textsuperscript{22} Ronald Dworkin, Law’s Empire (LE) (Hart 1986) 45–47.
something of a ‘parchment barrier’\textsuperscript{23} to a fundamental guarantee. The impact of the Fourteenth Amendment, which sought to afford the ‘inalienable rights’\textsuperscript{24} spoken of in the Declaration of Independence to all citizens,\textsuperscript{25} will also be examined in Chapter II. It will be shown that Congress’s creation of a ‘new liberty’\textsuperscript{26} paved the way for a departure from traditional federalism, eventually leading to incorporation of the various clauses of the Bill of Rights. That line of incorporation cases in the 1960s will be examined,\textsuperscript{27} as will \textit{Weems v US,}\textsuperscript{28} where SCOTUS acknowledged that it was ‘a precept of justice that punishment for crime should be graduated and proportioned to offense’,\textsuperscript{29} and \textit{Trop v Dulles,}\textsuperscript{30} which contains the first acknowledgment of ‘the evolving standards of decency that mark the progress of a maturing society’\textsuperscript{31} underlying the Eighth Amendment. Chapter II will also examine the impact of the Court’s attacks on capital punishment, where it will be argued that it has narrowed capital punishment to a near vanishing point. Such an argument is important to understanding the judiciary’s treatment of punishment, where the death penalty is regarded as creating a ‘different’\textsuperscript{32} level of suffering, yet civic and social death, followed by slow, isolating, painful, biological death, is not regarded at all. It is of fundamental importance that this thesis sheds light on solitary confinement, in which thousands of prisoners are being left to die in a manner arguably far worse than execution.

Chapter III will develop the theoretical framework for the analysis of a constitutional challenge to solitary confinement and for the purposes of mounting a challenge, demonstrating that the most coherent and consistent explanation of the Court’s attitude towards the Eighth Amendment is one of interpretivism, as laid out by Dworkin. Under this

\textsuperscript{23} Madison, in Ball (ed) (n 15) 241.
\textsuperscript{24} Merrill Peterson, \textit{Thomas Jefferson and the New Nation} (OUP 1970) 124.
\textsuperscript{25} US Const, Amend XIV (‘No State shall make or enforce any law which shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws’).
\textsuperscript{26} Charles Warren, ‘The New “Liberty” under the Fourteenth Amendment’ (1926) 39 HLR 431.
\textsuperscript{27} William Brennan, ‘State Constitutions and the Protection of Individual Rights’ (1977) 90 HLR 489, 493-495.
\textsuperscript{28} 217 US 349 (1910).
\textsuperscript{29} ibid 367.
\textsuperscript{30} 356 US 86 (1958).
\textsuperscript{31} ibid 100-101.
\textsuperscript{32} \textit{Gregg v Georgia} 428 US 153 (1976) 188: ‘death is different in kind from any other punishment’.
tenet of interpretation morality is relevant to the background and the framework of law, not
distinct from it, as argued in traditional legal positivism. Chapter III will argue that the
Court’s interpretation of the Eighth Amendment is best explained by Dworkin’s opposition to
traditional post-Enlightenment conceptions of law such as those endorsed by positivism,
instead focusing on the interpreter’s recourse to moral principles. This chapter addresses the
contention that the Eighth’s constraint on governmental power to punish has been understood
to be defined by a set of developing collective values, and that consequently the
punishments clause has been expanded by SCOTUS in an ‘activist’ manner.

By contrast, the case will be made for a different understanding of the Court’s
approach, explaining that a theory of law informed by morality need not ask whether judges
should read the Constitution as ‘living’ or ‘dead’, but asks only how they interpret its
existing provisions in light of underlying principles. With respect to legal interpretation,
judges draw on a form of morality known as ‘political morality’, providing them with the
tools to dig ‘deeper into the law to find the strongest moral and political principles that could
justify an authoritative decision’, without engaging in majoritarianism, which Chapter III
will reject as undercutting the moral element of the Constitution. The principal criticisms of
Dworkin’s jurisprudence will then be discussed, before the interpretivist approach is outlined
in the context of the Eighth Amendment. It will be explained that the interpretivist aspires to
‘purify and perfect’ rights, and it will be acknowledged that such aspiration brings

33 HLA Hart, The Concept of Law (3rd edn, OUP 2012) 203 (discussing how law derives only from rules of
social convention: the Conventionality Thesis).
35 Strauss notes that these criticisms typically take ‘the form of condemning “judicial activism of the left or the
right,” with the Warren Court (or “Warrenism”) seen as an example of the former’. David Strauss, The
36 David Strauss, The Living Constitution (OUP 2010) 1. The phrase ‘living Constitution’ was itself coined by
37 One author has identified 72 types of originalism: Mitchell Berman, ‘Originalism is Bunk’ (2009) 84 NYU
LR 1, 14-15.
40 Thomas Simon, Law and Philosophy (McGraw-Hill 2001) 139-140.
challenges due to the abstract and indefinite status of perfection. Like the ‘Rule of Law’,\textsuperscript{42} which gathers virtually unanimous support but brings with it conflicting definitions and components,\textsuperscript{43} Dworkin’s tenet of legal rights and obligations is aspirational. It will be argued that such an aspiration is worth pursuing in the context of protection from ‘cruel and unusual punishments’.\textsuperscript{44}

To develop the morality argument proposed by Chapter III, and to explain how political morality manifests in a real-world setting, such a theoretical framework will be developed in Chapter IV where the principal source of political morality relied on by the Court will be investigated using the tool developed in Chapter III. That source, majoritarian state counting, comprises a nose-count of the fifty state jurisdictions, plus the federal government and the military. It will be shown that the Court has traditionally deferred to state legislatures in matters of evolving standards adjudication, seemingly exercising a form of majoritarian judicial restraint when counting states as the principal indicator of societal decency. Chapter IV will argue that this is far too simplistic a method, however, and that state counting is better explained by Dworkin’s interpretivism than a strictly majoritarian premise. The chapter will then expose the Court’s use of state counting for the restriction of: the pool of capital crimes; the execution of juveniles; and the execution of intellectually disabled offenders.

The principal purpose of Chapter IV is to build on Dworkin’s ‘soaring, confrontational celebrations of individual rights as broad antimajoritarian immunities’,\textsuperscript{45} by demonstrating that data provided by state counting, without the assistance of a rational ‘sieve’,\textsuperscript{46} provides mere statistics of collectivity rather than a rational form of communal

\textsuperscript{42}Paul Craig, ‘Formal and substantive conceptions of the rule of law’ (1997) 21 Public Law 467.
\textsuperscript{43}Brian Tamanaha, ‘The History and Elements of the Rule of Law’ [2012] Singapore Journal of Legal Studies 232: ‘the notion of the rule of law is perhaps the most powerful and often repeated political ideal in contemporary global discourse.’
\textsuperscript{44}US Const, Amend VIII.
\textsuperscript{46}Ronald Dworkin, Taking Rights Seriously (TRS) (Gerald Duckworth 1977) 252.
Chapter I: Introduction

will.\footnote{Ronald Dworkin, ‘Thirty Years On’ (TYO) (2002) 115 HLR 1655, 1677; Dworkin, \textit{LE} (n 22) 189.} The argument will be made that, for the moral background of the Constitution to be respected, the principle of rights overriding utilitarian policy goals or majority preferences must be adopted. Such an approach adheres to a counter-majoritarian basis for interpretation, where judicial review upholds the rights of individuals on a moral rather than a popular basis. To that end, an argument will be made that interpreters must refer to community standards and principles to show the law in its best moral light. It will be noted that majoritarian statistics are not without merit, but that care must be taken if they are to provide a moral basis for Eighth Amendment adjudication. A framework for the use of state counting will be developed in the conclusion to Chapter IV.

The origin of the constitutional principle of evolutive decency, \textit{Weems},\footnote{\textit{Weems} (n 28).} contains direct reference to public opinion: Justice McKenna talked of the Eighth Amendment ‘acquir[ing] meaning as public opinion becomes enlightened by a humane justice.’\footnote{‘The [punishments] 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 public opinion becomes enlightened by a humane justice.’ \textit{ibid} 378.} This notion of collective consciousness can be treated as a straightforward, almost whimsical concept, but is far from uncontroversial when resorted to for constitutional interpretation. Chapter V will draw on earlier rejections of raw majoritarianism, by analysing the remaining sources of political morality underlying the Eighth Amendment. This chapter will provide a way forward for moral constitutional adjudication, treating the remaining sources by the same Dworkinian rational sieving process which Chapter IV applied to majoritarian state counting.

Applied in the context of punishments clause adjudication and the Court’s precedents, further sources of political morality manifest as public opinion polls; penological principles; transnational legal comparisons; and professional consensus. Chapter V will discuss the shortcomings of deriving moral principles from sources which are selected by fallible interpreters. Far from the ‘myth’\footnote{Rorie Solberg and Eric Waltenburg, \textit{The Media, the Court, and the Misrepresentation} (Routledge 2015) Chapter 1 (discussing the objective criteria upon which the Justices rely to bolster their apolitical legitimacy).} of Supreme Court Justices’ fidelity to the Constitution.
above all else, it is accepted that judges operate with an underlying positioning on an ideological spectrum.\textsuperscript{51} It will be shown, however, that ideologies can shift over a judge’s tenure,\textsuperscript{52} and that in any case the impact of an interpreter’s position on any sort of scale is often overstated.\textsuperscript{53} Nonetheless, caution will be urged when striving for the moral reading of the Eighth Amendment. What will result is a refined approach to punishments clause analysis, laying foundations for scrutiny of modern solitary confinement.

For discussion-framing Chapter VI will introduce contextual issues such as the history of solitary confinement, the last Century’s boom in civil rights suits by prisoners, and the onset of mass incarceration. The chapter will pay close attention to the individualised impacts of solitary confinement, and the breadth and depth of its imposition in contemporary US prisons. This will provide the basis for an analysis of solitary confinement’s constitutionality under the Eighth Amendment, which will follow in Chapter VII.

In 2011 Justice Kennedy delivered the Court’s opinion in \textit{Brown v Plata},\textsuperscript{54} providing the clearest assurance of the relevance of dignity to the Eighth Amendment in decades. The Court acknowledged that ‘[p]risoners retain the essence of human dignity inherent in all persons’,\textsuperscript{55} and held the entire state prison system in violation of the Eighth Amendment for lacking adequate safeguards for physical and mental safety.\textsuperscript{56} \textit{Plata} followed a series of leaps and bounds in federal policy and jurisprudence regarding sentencing proportionality, including most recently the Fair Sentencing Act of 2010,\textsuperscript{57} the Second Chance Act of 2007,\textsuperscript{58} and \textit{US v Booker},\textsuperscript{59} handed down in 2005. Despite these leaps, which will be discussed in Chapter VII, it has been noted that, ‘[i]n comparison to the immense scope of the public

\textsuperscript{52} ibid.
\textsuperscript{54} 131 S Ct 1910 (2011).
\textsuperscript{55} ibid 1928.
\textsuperscript{56} ibid 1947.
\textsuperscript{57} Pub L No 111-220 §2, 124 Stat 2372 (2010).
\textsuperscript{59} 543 US 220 (2005).
policy disasters that gave us mass incarceration, the positive changes of the last decade are 
small beer’. 60 Furthermore, those reforms dealt only with one issue: proportionality on paper. 
They did not deal with the lived-experiences of prisoners, suffering in worsening conditions 
of imprisonment, most acutely in conditions of solitary confinement. Simon’s hypothesis that 
*Plata* is a mechanism for constitutional revolution, with decency as the driving force, 61 will 
be examined in Chapter VII and expanded to solitary confinement.

To provide the substance of an Eighth Amendment claim, Chapter VII considers the 
constitutionality of solitary confinement in light of the moral assessment refined in previous 
chapters. Through a series of theoretical and practical bases of analysis, including the sources 
of political morality introduced in earlier chapters, it will be argued that the use of solitary 
confinement in the US may be deemed impermissible on the following two constitutional 
grounds. First, the ‘ever-increasing fear and distress’ 62 condemned in *Trop* is perpetuated, to 
an even greater extent, by contemporary solitary confinement. Second, the warning from 
*Robinson v California* that society ‘would forget the teachings of the Eighth Amendment if 
we allowed sickness to be made a crime and permitted sick people to be punished for being 
sick’ 63 is applicable to solitary, due to its flagrant disregard for the psychiatric welfare of the 
inmates on whom it is imposed.

First, pre-interpretive data is investigated by this thesis. Research was carried out into 
local, national, and international government databases, non-governmental bodies (including 
human rights charities or other lobbyists), and most prominently media outlets. As a result, an 
original contribution is made to the literature, which, in the solitary confinement field, has 
traditionally fixated on the psychiatric implications of confinement. This element, 
“professional consensus”, is relevant to the legal assessment, but greater scrutiny into other 
areas of political morality will be encouraged. As a result of Chapter VII’s analysis,

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62 *Trop* (n 30) 101. 
63 370 US 660 (1962) 678.
judgements of political morality (the “rational sieve”, as guided by moral responsibility and political integrity, which is consistency in decision-making) will be applied to the otherwise “pre-interpretive data” first unearthed by the positivistic counting of consensus. Justice Kennedy’s ‘privilege of unknowing’, the blissful ignorance enjoyed by the bulk of society about the rights of prisoners once they are condemned, will be undone by this examination. Ultimately, the claim will be made in Chapter VIII that solitary confinement, as practiced, is unconstitutional under the ‘evolving standards of decency that mark the progress of a maturing society.’

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65 Trop (n 30) 100-101.
Chapter II: The Evolution of the Eighth Amendment

CHAPTER II

THE EVOLUTION OF THE EIGHTH AMENDMENT

2.1 INTRODUCTION

The Eighth Amendment to the United States (US) Constitution prohibits *inter alia* ‘cruel and unusual punishments’.¹ The text of the punishments clause, ratified in 1791, was adopted from the earlier Virginia State Constitution,² which borrowed from the English Bill of Rights a century earlier.³ Interpreting the punishments clause of this provision has proven, for reasons to be discussed, less straightforward than taking the text at face value. In *Trop v Dulles*⁴ Chief Justice Warren held that the punishments clause ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society’.⁵ This application of evolutive interpretation has formed the basis for significant judicial enhancements of Eighth Amendment protection. From the mid-20th Century to today, punishments clause jurisprudence has undergone something of an evolution. This thesis will return to the theoretical underpinnings of constitutional interpretation and assessments of evolving standards of decency (ESD) in Chapter III, where a theoretical framework for the analysis intended by this thesis will be built. The ensuing chapters will assess the objective indicia of these evolving standards available to interpreters. First, in this chapter, a contextual socio-political overview of the Eighth Amendment’s progress over the past half a century will be provided.

¹ US Const, Amendment VIII.
³ ‘[E]xcessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.’ Bill of Rights (1689) 1 Will & Mary Sess 2 c 2.
⁵ ibid 101.
2.2 Weems v US: Benevolent Imperialism?

Before introducing the Eighth Amendment precedent relevant to this chapter, it is vital to have an understanding of another important Amendment to the Constitution. Following the Civil War, Congress sought to afford the ‘inalienable rights’ spoken of in the Declaration of Independence to all citizens, regardless of race.7 By enacting the Fourteenth Amendment, Congress created a ‘new liberty’, marking the beginning of a departure from traditional federalism. In 1833 Chief Justice Marshall had concluded with force that the Bill of Rights ‘contain[s] no expression indicating an intention to apply them to the State governments.’9 In that case, Barron v Baltimore, the Court made clear that the Constitution created only the federal government, so its limitations on state power were not intended to apply to local governments like Baltimore, upholding the primacy of states’ rights. It was not for another six decades that SCOTUS would depart from its continuous refusal to apply the Bill of Rights to the states, a process known as incorporation.10 In the earliest case to depart from the Barron doctrine, Chicago Railroad Co v Chicago,11 the due process clause of the Fourteenth was held to apply an element of the Fifth Amendment to the states:12 the first demonstration of incorporation. Chicago Railroad Co was handed down in 1897, the year following Plessy v Ferguson,13 a case now widely considered ‘anticanon’14 for its judicial sanction of racial segregation. In Plessy, the Supreme Court deferred to local lawmakers in upholding the racist regimes of Jim Crow, another showing of deference to the states from which it would soon depart.

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7 US Const, Amend XIV.
9 Barron v Baltimore 7 Pet US 243 (1833), following Marshall’s declaration that ‘[i]t is emphatically the province and duty of the judicial department to say what the law is’. Marbury v Madison 5 US 137 (1803) 177.
11 Chicago, Burlington and Quincy Railroad Company v Chicago 166 US 226 (1897).
12 The takings clause: US Const, Amendment V: ‘nor shall private property be taken for public use, without just compensation.’
13 163 US 537 (1896).
14 Balkin and Levinson define Plessy as anticanon due to common acceptance that it was wrongly decided. Jack Balkin and Sanford Levinson, ‘Commentary: The Canons of Constitutional Law’ (1998) 111 HLR 963, 1018.
Chapter II: The Evolution of the Eighth Amendment

In *The Strange Career of Jim Crow*, Vann Woodward developed a theory that would upend conventional wisdom surrounding racial segregation. The segregation of post-Civil War slaves and their free descendants did not develop in the US with Reconstruction, Woodward’s thesis claimed, but at the end of the 19th Century and later. Despite correcting various errors in later revisions, *Strange Career* attracted wide-ranging reproaches from critics. Woodward later admitted that he should have emphasised the location of the developments, not the time-scales. Jim Crow was born in the early years of Reconstruction, but foremost a ‘city slicker’ he would not venture to the rural South until some years later. Only when segregation had been enacted in the more distinctively class-divided urban cities would it reach the more rural, underdeveloped areas, accounting for the time-lag Woodward originally described.

At the same time that SCOTUS upheld Jim Crow regimes, McKinley’s government was engaged in war with the Spanish, a conflict that endured throughout 1898. The Philippine Islands, formerly a colony of Spain, were consequentially governed by the US as an ‘insular area’. An account of a prominent Filipino writer in 1899 remarked the hypocrisy of America’s grip on the Philippines, noting that just over a century prior the US had broken free from a similar reign. ‘Give us a chance’, he wrote, ‘treat us exactly as you demanded to be treated at the hands of England’. It would be against this backdrop that the case of *Weems v US* would arrive at the Supreme Court in 1910.

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18 Rabinowitz (ibid) 845 fn 9-10.
22 A Filipino, ‘Aguinaldo’s Case against the United States’ [1899] (September) North American Review 1, 2.
Substantively, the case concerned a sentence of *cadena temporal*, hard and painful labour whilst shackled in chains for a period of at least 12 years. The punishment was applied in the Filipino colony but, given America’s control over the territory, SCOTUS was able to provide review. Writing for the majority, Justice McKenna explained that it was ‘a precept of justice that punishment for crime should be graduated and proportioned to offense’, deeming *cadena temporal* in contravention of the Eighth Amendment. While McKenna clarified that proportionality was fundamental to the Eighth, he fell short of providing the ‘exhaustive definition’ of the punishments clause, absence of which he lamented. Much more significant than the merits questions in *Weems* was the willingness of the Court to engage in such paternalism over foreign territory, and the invocation of evolutive decency, a principle which would one day revolutionise the Eighth Amendment on domestic soil.

Raymond has noted that the Court’s cultural and geographic distance from the Philippine Islands enabled it to view them as part of as ‘a disrespected, foreign system’. Unprepared to answer questions surrounding such an intrusion on sovereignty, the Court was nonetheless willing to condemn the shortcomings of the Filipino system. In effect, American Imperialism was legitimised. The prevalent view in the early-20th Century that native Filipinos were ‘uneducated, unsophisticated, unambitious, and incapable of selfgovernment’ aided such imperialist activism by SCOTUS. Some contemporaneous commentary was even more extreme, with one example from 1901 describing the ‘little brown man’ from the Philippines as ignorant of the ‘great world, a complex sphere of action’. Such views bolstered the Court’s call to ‘remember that [the punishment] has come

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24 As well as hard labour, certain ‘accessory penalties’ were imposed: ‘(1) civil interdiction; (2) perpetual absolute disqualification; (3) and sub- jection to surveillance during life’. Frederick Fisher, ‘Some Peculiarities of Philippine Criminal Law and Procedure’ (1932) 19 Virginia LR 33, 42-43.
25 *Weems* (n 23) 367.
26 ibid 369.
28 ibid 284.
29 Anna Benjamin, ‘Some Filipino Characteristics’ (1901) 68 Outlook 1003.
to us from a government of a different form and genius from ours.\textsuperscript{30} In addition, the US government’s imperial policy of control over the islands was sustained.\textsuperscript{31}

Given its proximity to \textit{Lochner v New York},\textsuperscript{32} the Court was wise in \textit{Weems} to take the opportunity to display deference to local state jurisdictions. \textit{Lochner} concerned a dispute surrounding New York’s regulation of the free market. SCOTUS took a \textit{laissez-faire} approach and struck down the state limitation on maximum working hours for bakers,\textsuperscript{33} handing down a decision ‘infused with reactionary hatred of emerging social movements that sought to aid workers and the poor’.\textsuperscript{34} \textit{Lochner} is reviled for encroaching on state rights,\textsuperscript{35} and for perpetuating class-bias and disregard for individual citizens.\textsuperscript{36} \textit{Weems} gave the Court an early opportunity to react to these criticisms, whereby the Justices affirmed their conviction that states were to be considered sovereign,\textsuperscript{37} renewing the \textit{Barron} assumption that the Bill of Rights did not apply to the states.\textsuperscript{38} The Court in \textit{Weems} set no limits on existing American punishments. Despite the enactment of the Fourteenth Amendment, and \textit{Lochner}’s encroachment, the Eighth Amendment was still reserved for scrutiny of federal government activity and, by extension, American colonies. Incorporation of the punishments clause was not a consideration the Justices even vocalised during oral argument or in dicta.

The \textit{Weems} majority’s willingness to listen to the will of the People, as displayed by state legislatures and by recourse to social and economic statistics, was something expressly

\textsuperscript{30} \textit{Weems} (n 23) 377.
\textsuperscript{31} See Peter Stanley, \textit{A Nation in the Making} (HUP 1974) 64-65: ‘Taft, president of the Philippine Commission, wrote in 1900: “The great mass of them are superstitious and ignorant...The idea that these people can govern themselves is...illfounded”’.
\textsuperscript{32} 198 US 45 (1905). Striking down a state regulation of working hours, SCOTUS regarded it as having no valid purpose. Balkin and Levinson (n 14) 1017 also describe \textit{Lochner} as anticanon.
\textsuperscript{34} ibid 1470.
\textsuperscript{35} Shaman references numerous authors for the claim that handing down a “\textit{Lochner}-like decision” is the highest judicial insult. Jeffrey Shaman, ‘On the 100th Anniversary of \textit{Lochner v. New York}’ (2005) 72 Tennessee LR 455, 456 fn2.
\textsuperscript{36} James Ely, ‘Economic Due Process Revisited’ (1991) 44 Vanderbilt LR 213: “[\textit{Lochnerism}] resembles a Victorian melodrama. A dastardly Supreme Court is pictured as frustrating noble reformers who sought to impose beneficent regulations on giant business enterprises.”
\textsuperscript{37} Christine Hightower, ‘Recidivist Offenses - Can the Whole Be Greater Than the Sum of Its Parts?’ (1980) 26 Loyola LR 698, 700 (noting the Court’s subordination to state legislatures).
\textsuperscript{38} \textit{Barron} (n 9).
ignored in *Lochner* and called for by Holmes’s dissent in that case.\(^{39}\) The *Lochner* Court was ‘[u]nder the sway of categorical thinking [and] dismissed empirical evidence that belied the Court’s precious preconceived notions.’\(^{40}\) Where *Weems* differed was by the Court’s deference to public opinion, at least in dicta. Noting that ‘time works changes’\(^{41}\) within the Eighth, Justice McKenna emphasised the importance that ‘a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions’.\(^{42}\) As this section has shown, the foundations for Eighth Amendment evolution had been prepared with *Weems*, though the decision was well before its time. Much further incorporation was required before real activism in the Court’s punishments clause jurisprudence would begin.

**2.3 THE EIGHTH AMENDMENT, INCORPORATED**

Between 1911 and 1917, seven states abolished capital punishment for all crimes, and Tennessee for all but rape. Capital abolition seemed to be accelerating, but in the wake of the Russian Revolution of 1917, progress slowed. The US entered World War I and, following its end, the Red Scare persisted,\(^{43}\) leading to ‘national hysteria’.\(^{44}\) In this era sociologists would describe the death penalty as a ‘preventative and necessary social measure’,\(^{45}\) and the utility model of punishment prevailed.\(^{46}\) Mounting tension in the 1930s,\(^{47}\) combined with the Great Depression, culminated in that decade providing the most lethal statistics of any decade in the history of the US: 1,667 legal executions were carried out.\(^{48}\) At the same time, the end of the *Lochner* era was signalled in 1938,\(^{49}\) when a newly composed Court decided in *Carolene Products* that legislation such as that at issue in *Lochner* was to be subjected only to very

\(^{39}\) *Lochner* (n 32) 75 (Holmes, J, dissenting).

\(^{40}\) Shaman (n 35) 488.

\(^{41}\) *Weems* (n 23) 373.

\(^{42}\) ibid.


\(^{44}\) ibid.


\(^{46}\) Punishment philosophy is examined in Chapter V.


\(^{49}\) Bernstein (n 33) 1510-1511.
minor judicial scrutiny. The post-Lochner Court, under Chief Justices Hughes (1930-1941) and Stone (1941-1946) took a much more active role during World War II, emerging as a ‘progressive agent’ in the protection of citizens against state control. Later, the Court began to incorporate many guarantees contained in the Bill of Rights. It was from 1962 that constitutional law would begin to change in the US, starting in earnest with the incorporation of the Eighth Amendment.

The 1950s had seen extensive civic reprisals surrounding social inequality and a lack of civil rights for black Americans. Finally, overdue judicial condemnation of racial segregation arrived in 1954; in the form of the Court’s unanimous pronouncement in *Brown v Board of Education* that the ‘separate but equal’ doctrine upheld in *Plessy* half a century prior was unlawful under the Fourteenth Amendment. *Brown*, which will be revisited in the next chapter when sources for constitutional interpretation are discussed, is noteworthy not just for its social context, but its role in the enhancement of progressive moral values such as ESD, the principle of interpretation central to this thesis. Loveland has noted that *Brown* was an example of SCOTUS leading the way, in the face of popular consensus. A similar issue might face the Court regarding the death penalty, namely: ‘is it for the Court to lead or to follow the views of America’s citizens?’ This question is vital to the Eighth Amendment’s ESD, a principle honed shortly after *Brown*, in 1958, and one to which this thesis will eventually return when focus is placed on solitary confinement in Chapters VI and VII.

In the case which woke the *Weems* principle of ESD from its half-century slumber, *Trop v Dulles*, the Court concluded that the military had infringed the Eighth Amendment’s...
cruel and unusual punishments proscription by stripping a deserter of his citizenship.\textsuperscript{57} In a ‘bizarre[ly]\textsuperscript{58} grounded judgment, the Court condemned the treatment as worse than death, the majority concluded:

‘[t]he provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation...The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’\textsuperscript{59}

While the ESD principle had been pronounced in earnest, it would take Eighth Amendment incorporation before real progress could be made. Following the Warren Court’s\textsuperscript{60} departure from \textit{Lochner} and in the wake of numerous civil rights advancements at the congressional level,\textsuperscript{61} the Eighth was finally applied to the states.\textsuperscript{62} Chief Justice Warren, known for his progressive civil liberties jurisprudence and opposition to the death penalty as governor of California,\textsuperscript{63} noted at the outset of his judgment in \textit{Trop}: ‘let us put to one side the death penalty’.\textsuperscript{64} This dictum, deposited as a tactic to bring on board death penalty retentionist Justice Black,\textsuperscript{65} which was successful, indicated that the extension of \textit{Trop} to the death penalty was likely to require a new bench-composition, with at least five Justices willing to challenge the historic penalty.

Incorporating the punishments clause in 1962 and thereby applying it to state sentencers, Justice Stewart’s majority relied on ‘contemporary human knowledge’\textsuperscript{66} to condemn the Californian criminalisation of narcotics addiction. By referring to modern

\begin{itemize}
  \item \textsuperscript{57} ibid 103.
  \item \textsuperscript{58} Loveland (2009) (n 54) 454 fn9 (explaining that the ground – worse than death – was bizarre).
  \item \textsuperscript{59} \textit{Trop} (n 4) 100-101.
  \item \textsuperscript{60} As is convention, the “Warren Court” denotes the era when SCOTUS was led by Chief Justice Warren. Similarly, the “Roberts Court” is the present compositon.
  \item \textsuperscript{61} See the Civil Rights Act of 1960 (74 Stat 89, Pub L 86 –449); the Civil Rights Act of 1964 (78 Stat 241e); the Voting Rights Act of 1964 (79 Stat 437, Pub L 89-110).
  \item \textsuperscript{62} Throughout this thesis, mention of the Eighth Amendment is in reference to the punishments clause only.
  \item \textsuperscript{63} Mandery (n 51) 12.
  \item \textsuperscript{64} \textit{Trop} (n 4) 99.
  \item \textsuperscript{65} Mandery (n 51) 12 (who derived this data from interviews with law clerks sitting at the time).
  \item \textsuperscript{66} Robinson (n 117) 666.
\end{itemize}
knowledge, Stewart invoked the *Weems-Trop* principle of interpretation without verbatim reference to ESD, demonstrating the providence of this tenet of interpretation from the outset of the Eighth’s incorporation. While *Robinson* was confined to non-capital punishment, it is that area of law, governing the boundaries of the death penalty, which has provided the richest example of Eighth Amendment evolution over the past fifty years. As such, it is the treatment by the Court of capital punishment to which this chapter will now turn.

### 2.4 Capital Punishment

Whilst the vast majority of Western democratic nations have departed from the practice of punishing their citizens by death, a majority of US jurisdictions maintain capital punishment statutes. Available to sentencers in 31 states, the death penalty is also sanctioned by the federal government and the military, though in the latter cases its imposition is rare. Currently, the most prevalent method of capital punishment is the lethal injection, used in 87.5% of executions since 1976. Since the introduction of this method in 1977, a three-drug cocktail, known as a “protocol”, was originally used to carry out such executions. Seen to prevent unnecessary pain or suffering, this protocol combined the use of the barbiturate sodium thiopental, followed by the muscle relaxant pancuronium bromide and finally the cardiac-arrest-inducing electrolyte potassium chloride. The Court sanctioned such a concoction in 2008, insofar as it did not present a ‘substantial’ or ‘objectively intolerable’ risk of serious harm. The Court in *Baze* clearly did not see death as a form of serious harm, a

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70 1,236 out of 1,413. DPIC, (Updated 12 August 2015) ‘Executions by Year Since 1976’ <http://www.deathpenaltyinfo.org/executions-year> accessed 12th August 2015.
72 ibid.
74 ibid 50-51.
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bizarre form of backwards logic,\textsuperscript{75} and noted that lawful capital punishment must have a means of being carried out.\textsuperscript{76} The Court was satisfied that three-drug protocol provided such means, and the issue was seemingly put to rest.

In 2015, however, lethal injection controversy has reignited and the post-\textit{Baze} capital picture is already quite different. Following a nationwide shortage of the three-drug protocol’s first two ingredients, sodium thiopental and pancuronium bromide,\textsuperscript{77} the states most active in implementing the death penalty have altered their lethal drug protocols. Seven have used a single drug in all of their post-\textit{Baze} executions.\textsuperscript{78} Moreover, of the 16 carried out in the first half of 2015, 14 executions used a single drug: pentobarbital,\textsuperscript{79} heavily criticised as creating an extreme risk of serious harm.\textsuperscript{80} Numerous media reports documented botched, seemingly torturous executions in 2014 and,\textsuperscript{81} in June 2015, the Court revisited the \textit{Baze} question, this time regarding the new single-drug protocol.

In that case, \textit{Glossip v Gross},\textsuperscript{82} the petitioner alleged that the Oklahoma authorities would offend the Constitution’s proscription of cruel and unusual punishments if they neglected to provide ‘a protocol substantially similar to the one that [the] Court considered in \textit{Baze}’.\textsuperscript{83} While the case had the potential to provide wide-ranging consequences to the abundance of \textit{Baze}-deficient capital statutes across the US, Justice Alito took the opportunity to block any such argument. In the face of an abundance of scientific professional consensus

\textsuperscript{76} \textit{Baze} (n 73) 47. Sawicki (ibid) generally.
\textsuperscript{78} Ohio, Arizona, Indiana, Texas, South Dakota, Georgia, and Missouri.
\textsuperscript{82} 576 US ___ (2015).
\textsuperscript{83} Brief for Petitioners, \textit{Glossip v Gross}, No 14-7955, (i).
proffered by amicus briefs,\(^84\) Alito condemned their ‘outlandish rhetoric’,\(^85\) dismissing the claim. Justices Ginsburg and Breyer abhorred the death penalty in general, dissenting: ‘[t]he circumstances and the evidence of the death penalty’s application have changed radically’.\(^86\)

While the lethal injection has remained the principal and, since 2013, sole method of execution in the US, other methods were more frequently used throughout the last century. Death by hanging was the method of choice of capital sentencers from the foundation of the Union to the early-20\(^{\text{th}}\) Century, when a more publicly appeasing mode was sought. Change was introduced after numerous botched hangings in the late-19\(^{\text{th}}\) Century,\(^87\) giving rise to the observation that it was the public’s perception of decency that drove this change, an early form of evolving standards based policy.\(^88\) Electrocution, first introduced to the US in 1886,\(^89\) became the primary method as hangings declined and after SCOTUS sanctioned its use in \textit{re Kemmler}.\(^90\) The Constitutional test for “cruel”, noted the majority, ‘implies there is something inhuman and barbarous, something more than the mere extinguishment of life’.\(^91\) \textit{Kemmler} was handed down towards the end of the long line of post-Fourteenth Amendment cases where the Court refused to incorporate the Bill of Rights. While not in itself an Eighth Amendment case, it was the Court’s silence in \textit{Kemmler} on the punishments clause that provided an incentive for nationwide enactment of electric-chair statutes.

Throughout the Court’s involvement with the constitutionality of execution methods, similar deference has been displayed towards the role of state legislatures in determining appropriate approaches to types of punishment. While very seldom used, a small number of states still provides for hanging,\(^92\) firing squad,\(^93\) and the gas chamber\(^94\) as forms of capital

\(^84\) Professional consensus and the use of briefs are discussed in Chapter V.
\(^85\) \textit{Glossip} (n 82) 29 (Alito, J).
\(^86\) ibid 2 (Breyer, J, dissenting, joined by Ginsburg, J).
\(^87\) Edward Schriver, ‘Reluctant Hangman’ (1990) 63 NEQ 271.
\(^88\) Though it could be argued that clinical decency, the search for a publicly-appealing method was the driver here, rather than moral decency, which is the driver of this thesis.
\(^89\) Chapters 352 & 489 of the Laws of New York of 1888.
\(^90\) 136 US 436 (1890).
\(^91\) ibid 447.
punishment. These provisions generally reside in dormant statutes, which have not been invoked for a number of years. Nonetheless, recent hysteria surrounding the lethal injection has reinvigorated efforts to renew, or in some cases introduce, methods of execution. The Supreme Court has rarely had occasion to review specific methods, but on those occasions it has invariably deferred to the states, expressly permitting both the firing squad and electric chair, with the latter remaining on the books of seven states in 2015.

Judicial review of the nation’s ultimate penalty is now so commonplace it would be easy to view such scrutiny as an historical tradition. Quite to the contrary, the picture just over fifty years ago was very different. In the early 1960s, following the incorporation of the Eighth, few SCOTUS Justices considered that capital punishment would ever fail constitutional muster. It was accepted that the framers brought capital punishment with them from the English, though contemporaneous popular sentiment seemed to support its abolition. A line of litigation led by the Legal Defense Fund (LDF), the same civil liberties organisation which helped secure victory in Brown, would challenge the age-old assumption that the death penalty was immune from Eighth Amendment scrutiny. That challenge began in 1968.

95 See (nn 91-93).
98 Wilkerson v Utah 99 US 130 (1879), permitting execution by firing squad; Louisiana ex rel Francis v Resweber 329 US 459 (1947), allowing multiple attempts at electrocution.
99 Alabama, Arkansas, Florida, Kentucky, South Carolina, Tennessee, and Virginia.
100 Robert Bohm, DeathQuest (Routledge 2011) 43-44 (discussing that abolition was a product of the 1970s).
101 Mandery (n 51) 16 notes that ‘nothing less than a paradigm shift’ was required to upend this conventional wisdom.
102 In 1966 Gallup provided the lowest death penalty support figures in its history, and remains a record low, with 42% of Americans polling in favour. Gallup, ‘Death Penalty’ <www.gallup.com/poll/1606/death-penalty.aspx> accessed 14th August 2015.
2.4.1 The Precursors to Furman

In 1968 the Supreme Court decided a case, which would provide vital support to the LDF in its struggle against the death penalty. The importance of the case to this thesis rests with its role as the origin of the first Supreme Court condemnation of a capital system, demonstrating a lurch forward in Eighth Amendment adjudication for the first time since its framing. Arriving just six years after punishments clause incorporation was provided by Robinson, Witherspoon v Illinois concerned a state scheme where broad discretion had been available to the prosecution when composing juries in capital trials.\textsuperscript{103} At an earlier stage in Witherspoon half of the venire of potential jurors had been deemed unsuitable, giving rise to the claim.\textsuperscript{104} The Court ruled that such a legislative scheme, permitting juror-exclusion on the basis that they felt unable to impose death or had some principled opposition against capital punishment, was insufficiently impartial by due process standards.\textsuperscript{105} While the decision involved other areas of law besides the Eighth Amendment, the majority judgment positively cited Trop, noting the importance of ‘the conscience of the community on the ultimate question of life or death.’\textsuperscript{106}

Witherspoon had set the pace and arrived during a period when around 20 states were seriously considering limiting their death penalty statutes, and seven already had.\textsuperscript{107} In addition, recorded public support for capital punishment had plummeted to an historic low, and the rate of executions slowed. Just one man was executed in 1966, and two in 1967,\textsuperscript{108} during a de facto abolition which would last for ten years while the states fine-tuned their capital statutes and the Court faced various challenges to those regimes for the first time. Any motion promised by Witherspoon’s condemnation of Illinois looked to be short-lived,

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\textsuperscript{103} 391 US 510 (1968).
\textsuperscript{104} ibid 513.
\textsuperscript{105} ibid 519.
\textsuperscript{106} ibid; ibid fn15: ‘a link without which the determination of punishment could hardly reflect “the evolving standards of decency that mark the progress of a maturing society.”’ (Quoting Trop (n 4) 101).
\textsuperscript{107} Bohm (n 100) 12-13.
\end{flushright}
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however, and progress was on the verge of failure just one year later, when Warren stepped down as Chief Justice. Further compounding the LDF’s struggle against capital punishment, both Justices Black and Harlan died within three months of one another in 1971.109 It was left to Justice Brennan, described by some as ‘the most influential justice of the twentieth century’,110 and its ‘liberal champion’,111 to secure an extension of Witherspoon.

2.4.2 FURMAN V GEORGIA REACHES THE COURT

The Justices nominated to replace Black and Harlan were far from moderate. Justice Powell was noted as having criticised Martin Luther King,112 sacrilege to civil rights proponents, and Justice Rehnquist was on the record defending Plessy,113 the case upholding segregation overruled by Brown two decades prior. It would clearly take more than conventional appeals against the death penalty in and of itself to challenge the nation’s ultimate penalty, and the LDF had the ideal candidate to do so.

At oral argument in Furman v Georgia,114 the LDF’s lawyer Anthony Amsterdam posed an objective element for his argument, an approach never before faced by the Court. If a punishment would ‘be unacceptable to general contemporary conscience and standards of decency,’115 he argued, it would offend the Constitution’s proscription of cruel and unusual punishments as informed by the Weems-Trop standard.116 In effect, the decision of which of these ‘standards’117 to follow rested with the Justices’ views about the death penalty itself, something they had already faced in Witherspoon but not so explicitly. Where Amsterdam’s

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109 Mandery (n 51) 123-126.
110 ibid 71.
112 Lewis Powell, ‘A Lawyer Looks at Civil Disobedience’ (1966) 23 Washington and Lee LR 205, 214 (criticising King for civil disobedience, and describing Brown as ‘an unwelcome and disturbing precedent’).
113 Rehnquist noted at oral argument in Brown: ‘I realize that it is an unpopular and unhumanitarian position…but I think Plessy v. Ferguson was right and should be re-affirmed’. Bernard Schwartz, ‘Chief Justice Rehnquist, Justice Jackson, and the “Brown” Case’ [1988] Supreme Court Review 245, 246. During Furman the Chief Justice was Burger, while Rehnquist himself would succeed him in 1986.
116 First proposed by Gerald Gottlieb, ‘Testing the Death Penalty’ (1961) 34 Southern California LR 268, though it took Amsterdam’s innovation to upend conventional wisdom.
117 Furman Oral Argument (n 115).
argument differed to those the Court had faced previously, however, was with his reference to ‘objective indications’. This required the Justices to interpret value into the Eighth Amendment, through “objectivity” rather than through subjective facts. Amsterdam’s line of attack permitted them to do so without the risk of perceived personal value judgements.

Ultimately, Amsterdam won the day and the Court held in favour of Furman (and a co-defendant, Jackson), and in the case of a cross-appeal from a Texan death row inmate sentenced in similar circumstances. Abruptly striking down capital statutes in Georgia and Texas, SCOTUS held in a one-page per curiam decision that the level of discretion those states provided to judges was unacceptable and violated the punishments clause. Such schemes, a plurality held, lead to ‘wanton’ and ‘freakish’ imposition of the death penalty. Whilst the judgment was notoriously fractured – nine separate decisions spanning 200 pages and 66,000 words, a record at the time – Furman had the effect of invalidating the death penalty across the US and imposing a de facto moratorium on the punishment for the first time, reprieving 589 death row inmates.

Supporters of the death penalty were outraged by Furman. In a manifest demonstration of national consensus at the state legislative level, immediately after the decision 35 states scrambled to rewrite their capital statutes, and quickly enacted fresh legislation to restart executions and clear the now five-year backlog since Witherspoon. A majority in Furman might have deemed capital punishment unconstitutional as applied, but not per se. Retentionists knew this, and Florida was the first state to act. Furman was handed down on the 29th June 1972; Florida’s renewed capital scheme followed in December that

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118 ibid.
119 Branch (n 114).
120 Furman (n 114) 238.
121 ibid 310.
122 Mandery (n 51) 236 (noting that Furman was longer than many novels).
123 Joan Cheever, Back from the Dead (Wiley 2006) (Painting a picture of the monumental result of Furman and why it is worthy of the otherwise overused label “seminal”).
Broadly speaking, post-*Furman* legislation could be separated into two groups. The first, in which some states narrowed discretion by providing guidelines for aggravation and mitigation in sentencing, was where Florida rested. Adopting the Floridian scheme were Georgia and Texas, the states directly involved in *Furman*. The second group contained states that attempted to remove the arbitrariness condemned by the Court by requiring mandatory death sentences for capital crimes. North Carolina and Louisiana took this approach, in 1974 and 1975 respectively. Both sets of schemes were to face the Court just four years after *Furman*.

**2.4.3 GREGG v GEORGIA AND ITS PROGENY**

Ruling on the constitutionality of the fresh legislation, SCOTUS held in 1976 that the death penalty was capable once more of being exercised lawfully. In that case, *Gregg v Georgia*, mandatory sentencing, where the death penalty was the legislated minimum penalty for certain offences, failed constitutional muster. To pass the *Furman* test, SCOTUS held that states were required to show their capital penology to uphold human dignity, redolent of the decency element of the ESD principle. Importantly, the death penalty must also not be inflicted arbitrarily; nor be seen by society as wrong, or excessive. In so doing, statutes must not create ‘a substantial risk that the death penalty would be inflicted in an arbitrary and capricious manner,’ something which Louisiana and North Carolina neglected when enacting mandatory schemes. Moreover, capital legislation should provide

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126 ibid 14-16.
128 Decided in conjunction were *Gregg v Georgia; Woodson v North Carolina; Roberts v Louisiana; Proffitt v Florida; Jurek v Texas* 428 US 325 (1976), referred to by the moniker "Gregg".
129 *Furman* (n 114) Brennan, J.
130 ibid.
131 *Gregg* (n 128) 188.
132 *Woodson* and *Roberts* (n 128).
judges and juries with individualised sentencing, taking into account the ‘circumstances of the offense together with the character and propensities of the offender.’

The schemes in Georgia, Florida, and Texas, and by proxy those others which had adopted the weighing and balancing approach of aggravation versus mitigation, were upheld. In those states, with Georgia as the principal example on the docket, specific crimes were defined as capital, and guilt was determined in the first stage of a bifurcated trial. Next, at sentencing, ‘additional evidence in extenuation, mitigation, and aggravation of punishment’ was to be provided. Moreover, before a sentence of death could be imposed, at least one of ten statutory aggravating circumstances must have been found beyond a reasonable doubt. This scheme, the Court held, passed constitutional muster and satisfied the requisite individualised approach. When considering consensus, a majority determined that ‘[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to Furman [which] make[s] clear that capital punishment itself has not been rejected’. That element of ESD, the consensus among states, or “state counting”, is one for which much criticism exists, and will be addressed in Chapter IV.

Furman and Gregg demonstrated that the punishments clause was applicable not just to the states in abstract, but also to the nation’s historic death penalty. Incorporation, coupled with the Court’s new willingness to engage in evolutive interpretation of the Eighth, meant that while Gregg reinstated the death penalty, states’ liberty to execute their citizens would never again be so unfettered. Furman might have fallen, but the new era of capital punishment jurisprudence meant the death penalty would become litigated like never before in the ensuing decades.

133 ibid 189 (quoting Pennsylvania ex rel Sullivan v Ashe 302 US 51 (1937) 55).
134 Gregg (n 128) 180; Proffitt v Florida; Jurek v Texas 428 US 262 (1976).
136 Gregg (n 128) 163.
138 ibid §27-2534.1.
139 Gregg (n 128) 187-189.
140 ibid 179-181.
The *Gregg* condition of individualisation of punishments would soon be clarified in *Lockett v Ohio*,\(^\text{141}\) where the Court examined a capital scheme, which provided for only a restricted consideration of mitigation, such as the ‘history, character and condition of the offender’.\(^\text{142}\) *Lockett* made the assessment stricter, mandating that sentencing juries must be able to consider ‘as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense’.\(^\text{143}\) *Eddings v Oklahoma* expanded the standard further,\(^\text{144}\) requiring the inclusion of family history and emotional disturbance in mitigation. In the following term, *Zant v Stephens* and *Lowenfield v Phelps* further clarified that such aggravating factors in capital trials ‘must genuinely narrow the class of persons eligible for the death penalty’,\(^\text{145}\) at either trial phase.\(^\text{146}\)

In essence, *Gregg* determined that the Eighth Amendment’s protection against cruel and unusual punishments operated in a far broader context than simply methodological. Not only was the ESD principle now applicable to the Court’s punishments clause jurisprudence, including the death penalty, but also the Eighth was interpreted to contain a fundamental proportionality standard, one derived from the early decision in *Weems*. It was in the year following *Gregg*, 1977, when the Court first struck down the death penalty as disproportionate in respect of an entire category of offences as opposed to just the individual application of a punishment. *Gregg*’s progeny, as will become clear as this thesis progresses, founded a generation of punishments jurisprudence, so it is important to this thesis that these cases are understood in full.


\(^{142}\) Ohio Rev Code Ann §2929.04(B) (1975).

\(^{143}\) *Lockett* (n 141) 604 (emphasis added).


\(^{146}\) *Lowenfield v Phelps* 484 US 231 (1988).
2.4.4 Post-**Gregg** Evolution

Considering the constitutionality of capital punishment for rape in *Coker v Georgia*,\(^{147}\) the Court developed a bipartite proportionality test, which comprised an objective determination of current national consensus, and a subjective analysis. Under that assessment, the Court condemned death as an unconstitutional punishment for non-homicidal rape of an adult, an offence the majority viewed as falling short of the requisite ""severity and irrevocability""\(^ {148}\) for capital punishment to be imposed. Justice White’s majority judgment was confined to cases in which death did not result, and left the position of child rape and murder untouched. Half a decade later the *Coker* position was expanded to incorporate a restriction on capital punishment for felony murderers, those who were accomplices to a distinct criminal offence where a murder took place, in *Enmund v Florida*.\(^ {149}\) Forging the objective and subjective elements of the ESD assessment into one, the Court focused on the defendant’s ‘moral responsibility’\(^ {150}\) through his intent, to examine whether the correct sentence was one of death.

In *Enmund* the defendant acted as a driver for two accomplices who murdered two Floridian pensioners during a robbery. He was subsequently sentenced to death despite lacking homicidal pre-meditation, under the state’s felony murder rule.\(^ {151}\) In the Court’s view an insufficient demonstration of moral responsibility for capital punishment had been presented by the prosecution, and Enmund’s life was spared. By undertaking a review of state legislation to find ESD against this practice,\(^ {152}\) indicia that are considered in Chapter IV, SCOTUS overturned Enmund’s sentence and categorically prohibited capital punishment for

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\(^{147}\) 433 US 584 (1977).

\(^{148}\) ibid 598 (quoting Gregg (n 128) 187).

\(^{149}\) *Enmund v Florida* 458 US 782 (1982).


\(^{151}\) Fla Stat §921.141(2) (1981).

\(^{152}\) *Enmund* (n 149) 789-793.
felony murder.\textsuperscript{153} Although \textit{Enmund} symbolised a significant evolution of the Eighth and a consequent restriction of capital punishment, it was not to be for another three decades that the Court held in \textit{Kennedy v Louisiana} that death was unconstitutionally excessive when imposed on all non-murderers.\textsuperscript{154}

Through \textit{Kennedy} SCOTUS dissolved any residual uncertainty remaining after \textit{Enmund} by creating a \textit{per se} exclusion of capital punishment for all non-homicide offences. While undoubtedly an important case, the Court’s reasoning has been criticised as an ill-founded demonstration of a dubious consensus.\textsuperscript{155} This contention is revisited in Chapter IV when majoritarian state counting as a method of ESD-framing is considered. It can be concluded that \textit{Kennedy} symbolises a degree of finality with regard to Eighth Amendment evolution in the realms of “restricted categories”. Through an expansion of the punishments clause, death is now permissible only for aggravated murder.\textsuperscript{156} More recently the Court has clarified the \textit{Zant-Lockett-Eddings} standards developed to adhere to \textit{Furman-Gregg} scrutiny, noting in 2006 that there is no specific scheme required in the weighing of aggravating factors against mitigating factors.\textsuperscript{157} Moreover, factors which are ‘unconstitutionally vague’\textsuperscript{158} under \textit{Gregg} are those which have no ‘common-sense core of meaning…that criminal juries should be capable of understanding’.\textsuperscript{159} In essence, death can be imposed only in the most severe, individualised, and narrow of circumstances.

In addition to the permissible categories of capital crimes and relevant factors in determining their severity, the Court has also engaged in evolutive interpretation with respect

\textsuperscript{153} Katharine Braden, ‘\textit{Enmund v. Florida}’ [1983] Detroit College of LR 965, 982 (noting that ‘[f]elony accomplices may now have a license to participate in killings without fear of [capital punishment]’).

\textsuperscript{154} 544 US 407 (2008).


\textsuperscript{156} Lockett (n 141) and Eddings (n 144).

\textsuperscript{157} Kansas v Marsh 548 US 163 (2006).

\textsuperscript{158} Gregg (n 128) 195. There is a separate area of law and literature regarding statutes which are void for vagueness under due process requirements. See \textit{Kolender v Lawson} 461 US 352 (1983) 357: ‘a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’

\textsuperscript{159} Tuilaepa v California 512 US 967 (1994) 973.
to categories of death-eligible offenders. In so doing, the punishments clause has been expanded to protect juvenile offenders and those affected by intellectual disabilities, categories that will now be visited.

2.4.5 CLASSES OF CAPITAL OFFENDERS

The next sphere of Eighth Amendment jurisprudence evolution to be considered is the constitutional applicability of the death penalty to different classes of offenders. This section will evaluate age and mental capacity as relevant factors when determining the constitutional permissibility of capital punishment.

2.4.5.1 JUVENILES

Age was first declared a valid mitigating factor in 1978. In *Bell v Ohio* and *Lockett v Ohio*, the Court reversed two death sentences for aggravated murder committed by juveniles, aged under-18 in the US, holding that ‘the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character’, including age. Further clarifying the *Gregg* requirement of individualisation, the relevance of age to proportionate punishment was later noted in *Eddings v Oklahoma*. In that case Justice Powell declared that age ‘is more than a chronological fact’, striking down a capital sentence imposed on a 16 year old, because of a lack of consideration for his individual mitigating circumstances. While the juvenile in this case was protected from death, a categorical bar on the death penalty was not to follow for a decade. Decided in 1988, two years after a similar categorical case would protect insane offenders from death row, *Thompson v Oklahoma* provided the Court with such an opportunity to extend *Eddings*. Undertaking further evolution of the Eighth Amendment, a Justice Stevens-led majority in

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161 *Lockett* (n 141).
162 *Bell* (n 160) 642, citing *Lockett* (ibid) 604.
163 *Eddings* (n 144).
164 ibid 115.
165 *Ford v Wainwright* 477 US 399 (1986), discussed in Subsection 2.4.5.2.
Thompson declared that ‘it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense’ and declared the death penalty unconstitutional in those circumstances.

SCOTUS was next presented with an opportunity to refine the juvenile death penalty in 1989, in Stanford v Kentucky. In the majority’s opinion the Eighth Amendment’s standards of decency had not yet evolved to exclude under-18s from death row, as no national consensus persuaded them as such. Nonetheless, Justice O’Connor admitted in her concurrence that ‘the day may come’ when legislative consensus would bar the juvenile death penalty. The next shift in punishments clause jurisprudence saw the Court undertake a dramatic evolution against the holding in Stanford, realising Justice O’Connor’s prediction.

Though O’Connor herself dissented, a 5-4 majority in Roper v Simmons found a national consensus against the execution of all juveniles. In holding unconstitutional a Missourian statute, which provided for the execution of offenders aged under-18 at the time of the offence; the Court deemed all such statutes per se unconstitutional. This significant leap in evolutive jurisprudence has been described as ‘extremely important’, and hailed for finally enabling evolving standards ‘to join the civilized world’. The relevance of such transnational comparativism will be discussed in Chapter V, where this thesis will seek to develop the evolving standards approach to the Eighth Amendment beyond its state counting basis. Before exploring further objective indicia for ESD-framing purposes, however, another category of offenders must be considered.

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167 ibid 830.
169 Details of state counting are reserved for greater scrutiny in Chapter IV.
170 Stanford (n 168) 381.
171 ibid 381.
173 ibid.
2.4.5.2 **Intellectually Disabled Offenders**

In the same period that *Thompson* and *Stanford* were decided, the Court granted certiorari in two important claims regarding the mental state of capital defendants. It had long been accepted at common law that insanity precluded an offender from execution.\(^{176}\) The Court visited this issue again in 1986, in *Ford v Wainwright*.\(^{177}\) Declaring explicitly for the first time that the Eighth Amendment prohibited the execution of defendants with severe mental disorders, *Ford* was criticised for merely re-emphasising the common law defence of insanity, in line with a long-standing national consensus among the states.\(^{178}\) Regardless of any hypothesised constitutional impact of the case,\(^{179}\) its prohibition did not extend to individuals with ‘intellectual disabilities’\(^{180}\) and such conservativism regarding punitive punishment continued.

Soon after *Ford* was decided, SCOTUS experienced significant changes. Towards the end of a period when a strong conservative bloc held sway on the Court, one which consistently favoured states’ rights in criminal justice issues,\(^{181}\) Chief Justice Burger stepped down in 1986, delivering a significant blow to that bloc. President Reagan appointed William Rehnquist to replace him, and Antonin Scalia occupied Rehnquist’s vacant Associate seat. Far from the ‘myth’\(^{182}\) of Supreme Court Justices’ fidelity to the Constitution above all else, it is accepted that they operate with an underlying positioning on an ideological spectrum,\(^{183}\)

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\(^{176}\) *Nobles v Georgia* 168 US 398 (1897); *Phyle v Duffy* 334 US 431 (1948).

\(^{177}\) *Ford* (n 165).


\(^{179}\) See Ian Loveland, ‘Execution of mentally retarded criminals in the United States’ [2003] Public Law 52, 55 (arguing that *Ford* acted as a ‘constitutional restraint’ on future attempts by states to opt out of this consensus).

\(^{180}\) The term “mental retardation”, used in *Ford* (n 165), has since been replaced by “intellectual disability” in Federal law provisions. Rosa’s Law, 124 Stat 2643 Public Law 111-256 (2010) and is adopted throughout this thesis.


\(^{183}\) Lee Epstein, Andrew Martin, Kevin Quinn and Jeffrey Segal, ‘Ideological Drift among Supreme Court Justices’ (2007) 101 Northwestern ULR 1: ‘a claim dominant in public and scholarly discourse over the
a phenomenon that is observable and can be measured.\textsuperscript{184} By any measure, Rehnquist and Scalia brought deep conservativism to the bench, by design on Reagan’s part.\textsuperscript{185} The restrictive approach of the later Burger years promised to be strengthened by the new appointments, and that promise was soon fulfilled.

Woodhouse doubted any expansion of the Eighth to intellectually disabled defendants following \textit{Ford}, remarking that it was ‘unlikely that the Court would make an unpopular rule even more controversial by expanding its application to accommodate other mental disabilities’.\textsuperscript{186} This prediction proved accurate in \textit{Penry v Lynaugh} where, in the same year that the Court refused to protect under-18s shortly into the newly inaugurated Rehnquist Court, it similarly declined Eighth Amendment protection to intellectually disabled offenders.\textsuperscript{187} This perspective was to be mirrored in the following Presidential election and by the subsequent Republican government, where eventual winner Bill Clinton made clear his steadfast support for the death penalty. On the 1992 Presidential campaign-trail Clinton returned to his home state of Arkansas to oversee the execution of a man rendered acutely intellectually disabled when he failed to commit suicide following an equally botched robbery.\textsuperscript{188} Clinton’s backing of congressional policies to secure the most severe sentences, and to cut back on the capital appeals process followed,\textsuperscript{189} sustaining an attack on the judiciary’s Eighth Amendment progress over the two decades prior.\textsuperscript{190}

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\textsuperscript{184} A leading example is Andrew Martin and Kevin Quinn, ‘Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the US Supreme Court, 1953-1999’ (2002) 10 Political Analysis 134.

\textsuperscript{185} Jeffrey Toobin, \textit{The Nine} (Anchor 2008) 21-22 (‘Reagan’s election emboldened the hard-core conservatives in his administration’, and this extended to the judiciary).


\textsuperscript{187} 492 US 302 (1989).

\textsuperscript{188} Loveland [2003] (n 179) 52.

\textsuperscript{189} Congress enacted the Federal Death Penalty Act (18 USC § 2245) in 1994, expanding the scope of the national government’s capital punishment, and in 1995 the Prison Litigation Reform Act (PLRA) (42 USC § 1997e), which restricted the number of civil law suits a prisoner could bring. This cross-governmental effort to curtail the rights of prisoners led to a sharp decline in the rate of suits brought by prisoners, a trend which continues today. William Newman and Charles Scott, ‘\textit{Brown v. Plata}: Prison Overcrowding in California’ (2012) 40 Journal of the American Academy of Psychiatry and the Law 547.

\textsuperscript{190} See Section 2.5.
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Nonetheless, the rule in Ford was to be evolved even further, at an even faster rate than was demonstrated by Roper,191 just 13 years later. Atkins v Virginia,192 handed down in 2002, was to step off the restrictive approach demonstrated in the 1980s and 1990s, both on the Court bench and in the government. With a Court composition that the liberal Justice Stevens was able to turn into a majority, Atkins finally prohibited the execution of any individuals with intellectual disabilities, after finding a national consensus against such imposition.193 The ruling did not escape criticism, concerns which are discussed in greater detail in Chapter IV. One point was irrefutable: the decision marked a revival for evolution of the Eighth Amendment, strengthening the protection of mentally impaired defendants, casting the punishments clause’s net further while tightening its hold.

2.4.5.3 Race

One sphere of death penalty jurisprudence that has yet to experience the same application of the Eighth Amendment is the issue of racial bias in capital sentencing. One scholar noted in 1981 that, ‘[i]f a black man kill a white man, that be first degree murder; if a white man kill a white man, that be second degree murder; if a black man kill a black man, that be manslaughter; but if a white man kill a black man, that be excusable homicide’.194 Though hyperbolic to a certain degree, the message is not so far from the truth. Race plays a large role in the probability of a sentence of death, ‘throw[ing] into serious question the principles that underlie our entire criminal justice system’,195 that ‘arbitrary and capricious punishment is the touchstone under the Eighth Amendment’.196 This extract from the majority opinion in McCleskey v Kemp ‘capture[s] the twisted radical soul of American

192 Atkins (ibid).
193 ibid 321, quoting Ford (n 165) 405.
196 ibid 317.
The meteoric rise of African-American overrepresentation in prison (and on death row) continues, and is termed ‘The New Jim Crow’ by Michelle Alexander, who condemns the current American criminal justice framework for instituting a new caste system.

Writing for SCOTUS in McCleskey, Justice Powell accepted that ‘the criminal justice system was probably inherently racist,’ but denied Eighth Amendment protection until deliberate bias could be proven. In an extensive review of McCleskey published in 2015, Kirchmeier expressed a sense of disbelief at the Court’s fundamental failure to heed the warnings of the statistical evidence it cited favourably in 1987. Emphasising that the case had a major impact in many different ways, Kirchmeier describes a missed opportunity for the Justices, noting that three of them who upheld the death penalty – Stevens, Powell, and Blackmun – would later regret their decisions. Amsterdam, who had successfully argued Furman for the LDF, described McCleskey as ‘the Dred Scott decision of our time,’ in comparison to the decision 130 years earlier, which upheld slavery. Falling in what was, as noted above, a staunch conservative period for SCOTUS, McCleskey represented a departure from evolutive decency jurisprudence.

Stevens, Powell, and Blackmun’s regret was fruitless. The Supreme Court grew more conservative after Powell departed and, though lower courts might have shown willing to condemn the decision, the nation’s highest tribunal has yet to resolve the issue of race in capital sentencing. While race is reported to have been the elephant in the room during

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199 ibid 16-19.
201 McCleskey (n 195) 297. He was sentenced to death four years later. McCleskey v Bowers 501 US 1282 (1991) (cert denied).
202 Jeffrey Kirchmeier, Imprisoned by the Past (OUP 2015).
203 ibid 295.
204 Mandery (n 51) 429.
205 Dred Scott v Sandford 60 US 393 (1857).
206 See Subsection 2.4.5.2.
207 Justice Borden wrote for a unanimous Appellate Court in Abdullah v Commissioner of Correction 1 A3d 1102 (Conn App Ct 2010) indicating McCleskey as an outlier, but deferring due to its federal precedence.
Furman,208 racial disparities in sentencing are an unavoidable reality.209 A July 2015 a Missouri study concluded that 81% of individuals executed in that state since 1976 had killed white victims, even though whites account for less than 40% of all murder victims in that state.210 Similar results were reported from South Carolina.211 Until recently, any hope of a reconsideration of a McCleskey claim appeared unlikely, with silence at the Court surrounding the matter, but a grant of certiorari in June 2015 offers some solace. That challenge, Foster v Chatman,212 asks whether the Georgia Supreme Court failed to recognise racial discrimination in a capital appeal when it had become apparent that, at trial, prosecutors wrongly offered ‘race-neutral’213 justifications for what could in fact be deemed wilful and unconstitutional discrimination.214

Returning to the central question posed by this thesis, namely the future evolution of the Constitution’s punishments clause, this chapter will now turn to another area of sentencing. The Eighth Amendment does not end at capital punishment and, since its incorporation, progress has been made in the non-capital sphere as much as in the death penalty cases. This area will now be examined.

2.5 NON-CAPITAL PUNISHMENT

Since its dominance in Eighth Amendment jurisprudence in the 1970s and 80s, capital punishment has crawled towards a vanishing point.215 In the non-capital sphere, however, the

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208 See Mandery (n 51) 181-182 (noting that Brennan, while vehemently against the death penalty and in favour of the LDF’s arguments, regularly persuaded his colleagues to remove references to race, and Warren agreed).
209 Alexander (n 198) provides a compelling account of her “new Jim Crow” thesis, contending that post-Reagan sentencing is racist by design, not just by coincidence.
212 ibid.
213 ibid.
214 Prosecutors ‘(1) marked with green highlighter the name of each black prospective juror; (2) circled the word “BLACK” on the questionnaires of five black prospective jurors; (3) identified three black prospective jurors as “B#1,” “B#2,” and “B#3”’. ibid.
picture is somewhat different. This is an area generally left to the discretion of the states. Imprisonment is now utilised in the US at a rate never before witnessed anywhere in the world,\(^{216}\) with average periods of incarceration similarly snowballing. The constitutionality of mass incarceration has yet to be addressed head on,\(^{217}\) though a number of limits are imposed on sentencing by the Court’s interpretation of the Eighth. The Court with a view of evolving standards doctrine, for example, has adjudicated the use of mandatory minimums for specific offences and the application of these methods to juveniles. It is on those areas of non-capital sentencing which this chapter will now focus.

### 2.5.1 PROPORTIONALITY IN NON-CAPITAL SENTENCING

The Supreme Court delivered a trilogy of judgments in the 1980s, which considered the Eighth Amendment’s proportionality principle and contributed to a marked development of the relevance of the Constitution to non-capital sentencing. In *Rummel v Estelle*\(^ {218}\) SCOTUS reviewed a sentence imposed under a “three-strikes” statute mandating life imprisonment for a third felony theft.\(^ {219}\) Justice Rehnquist delivered the Court’s opinion, declaring that ‘a sentence of death differs in kind from any sentence of imprisonment’\(^ {220}\) and concluding that *Weems* was inapplicable in this context. The Court justified this conclusion by relying upon a case heard just after *Weems*,\(^ {221}\) with a majority in *Rummel* holding that any nationwide trend moving away from recidivist statutes - those which aim to punish reoffenders more severely - must be demonstrated by state legislatures, not federal judgments.\(^ {222}\) The effect of the ruling was to uphold the Texan statute, designed to punish habitual offenders with severe sentences after three offences.\(^ {223}\) The Court left open the


\(^{217}\) As later chapters will show, SCOTUS has addressed the consequences of mass incarceration in recent years.

\(^{218}\) 445 US 263 (1980).

\(^{219}\) ‘Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.’ Texas Penal Code Ann Tit 3 §12.42(d) (1974).

\(^{220}\) *Rummel* (n 218) 272.

\(^{221}\) *Graham v West Virginia* 224 US 616 (1912).

\(^{222}\) *Rummel* (n 218) 284.

\(^{223}\) ibid.
question of how Eighth Amendment proportionality applied to non-capital sentencing, with one commentator noting that the limited guidance left the punishment clause’s non-capital arm ‘in limbo’ and initiated an increasing prison population in the US.

Confusion among the lower courts caused by Rummel was noted in Hutto v Davis, where SCOTUS considered a sentence of 40 years’ imprisonment for a first-time drug conviction. The Fourth Circuit had affirmed the sentence, claiming that any other decision would be the first of its kind. On review, the Supreme Court condemned the lower courts for abandoning the rule it believed was set in Rummel. The Hutto majority chided the federal courts, warning that ‘unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.’ Justice Powell, who had dissented in Rummel, conceded that Hutto’s punishment was grossly disproportionate, but explained that he was constrained by precedent. Once again, the Court upheld its view that the duration of prison terms was ‘purely a matter of legislative prerogative’, other than in exceptionally severe cases.

Further clarification of the proportionality principle came soon after in Solem v Helm, with Justice Powell delivering the opinion. The immediate result was that the sentence of life imprisonment imposed on petitioner Jerry Helm, convicted in South Dakota for a seventh nonviolent felony under a recidivist statute, was deemed unconstitutional. Solem would, however, evolve the Eighth Amendment’s proportionality principle far beyond these immediate ramifications. One key importance of the holding was that it gave credence

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226 Possession of marijuana with intent to distribute (Va Code Ann §18.248.1(a)(2) (1981)) and distribution (ibid §18.10(e) (1975)).
227 Davis v Davis 646 F2d 123 (4th Cir 1981) (en banc).
228 Hutto (n 225) 375.
229 Rummel (n 218) 285-308.
230 Hutto (n 225) 379-380 fn5.
231 ibid 373, quoting Rummel (n 218) 274.
to the notion that proportionality was deep-rooted in the punishments clause and that it applied to all criminal sentences, including those which were non-capital.234 Demonstrating that proportionality can also evolve as time works changes, Powell laid out a test subsequently criticised as ‘unobjective’ and ‘readily manipulable’.235 The tripartite assessment laid out for unconstitutional gross disproportionality first compared the gravity of the offence with the subjective harshness of the penalty. This was followed by both a comparative reading of sentences for other crimes in the trial court’s jurisdiction, ‘ordinal proportionality’,236 and the same crime in other jurisdictions.

In Solem SCOTUS read into its recent capital punishment cases, Enmund and Coker, in which death had been condemned as unconstitutionally excessive punishment in certain circumstances,237 distinguished Rummel, and found no basis to assert ‘that the general principle of proportionality does not apply to felony prison sentences’.238 Dissenting, Chief Justice Burger warned that the Court had ‘launch[ed] into uncharted and unchartable waters’.239 The notion that navigating proportionality in the prison setting is unchartable is contestable, given that the Court has so readily navigated the waters of punishment in other contexts and, more importantly, that Marbury v Madison has long established that ‘it is emphatically the province and duty of the judicial department to say what the law is’.240 Judicial review or “chartering the waters” in this context is therefore the duty of the Court, a role Burger readily took on elsewhere.241

234 Solem (n 232) 284.
236 Andrew von Hirsch and Andrew Ashworth, Proportionate Sentencing (OUP 2005) 68-70.
237 Enmund (n 149); Coker (n 147).
238 Solem (n 232) 288.
239 ibid 314.
240 Marbury (n 9) 177.
241 While Burger’s Court might have been known for its ‘balanced treatment of congressional power vis a vis the states’ (Stefanie Lindquist and Rorie Solberg, ‘Judicial Review by the Burger and Rehnquist Courts: Explaining Justices’ Responses to Constitutional Challenges’ (2007) 60 Political Research Quarterly 71, 76) the Chief Justice concurred in Roe v Wade 410 US 113 (1973), finding a constitutional right to privacy in the Fourteenth Amendment’s due process clause, reshaping national politics.
The evolution evidenced by this series of cases demonstrates the increased justiciability of non-capital sentences under the cruel and unusual punishments clause. It would soon transpire that the non-capital foundations laid by *Solem* were prophetic of a much darker phenomenon building on the legislative plane. Crack cocaine had arrived on the streets and,242 in response, a much more aggressive form of penal policy followed.

### 2.5.2 Mandatory Minimums

In the decade after the proportionality cases the Court was faced with a challenge to the constitutionality of mandatory life imprisonment without parole (LWOP) sentences. Implemented in response to the onset of crack cocaine in urban areas across the US as part of Reagan’s “War on Drugs”, the Anti-Drug Abuse Act of 1986 created mandatory minimums for first-time drug offences.243 Examples of sentences were ten years’ imprisonment for the first offence of possessing with intent to distribute crack cocaine,244 and for the second such offence, life.245 The states followed suit by enacting similarly punitive policies, akin to those in the capital sphere deemed unconstitutional in 1976 by *Woodson* and *Roberts*,246 Gregg’s companion cases. One example reached SCOTUS in 1991.

The petitioner in *Harmelin v Michigan*247 had been sentenced to mandatory life imprisonment without parole (LWOP) for the possession of around 650 grams of crack cocaine.248 Upholding the sentence, a 5-4 majority opinion was driven by two distinct rationales. On one hand, Justice Scalia denied that the Court had ever identified a proportionality principle in the Eighth,249 binding that conclusion to an ‘eighteenth century

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243 Pub L 99-570, 100 Stat 3207.
244 See the review of federal policies provided by Families Against Mandatory Minimums, ‘Federal Mandatory Minimums’ <https://tinyurl.com/otzt45h> accessed 28th May 2015.
245 ibid.
246 *Woodson* and *Roberts* (n 128).
249 *Harmelin* (n 247) 961-996.
interpretation" which accepted only torturous punishment as violative of the cruel and unusual punishments clause. Scalia’s approach has been described as unjustified and offensive to the evolving nature of the Amendment, failing to consider evolving standards over an outdated (originalist) standard. Justice Kennedy, on the other hand, justified the mandatory LWOP sentence imposed on Harmelin by focusing on the secondary effects of drug use, namely ‘a direct nexus between illegal drugs and crimes of violence’.

In reaching a conclusion in favour of the state, the majority in Harmelin betrayed the duty it owed to apply the Eighth to non-capital sentences, as established in Solem and Hutto. This omission of responsibility provided legislatures with ‘carte blanche to impose severe sanctions for petty crimes’ without the prospect of judicial review. Though six of the Justices in Harmelin agreed that there was a ‘narrow’ proportionality principle, which applied to non-capital sentences, the case represented a failed opportunity to clarify the non-capital punishment proportionality test from Solem and left the lower courts with further uncertainty. It would take another decade and a revision of the bench to revitalise the Court’s approach.

In 2003 SCOTUS handed down two landmark Eighth Amendment decisions on the same day: Lockyer v Andrade and Ewing v California. Both concerned petitioners from California, and the same Justices split 5-4 in each case. Delivering both judgments, Justice O’Connor noted in Ewing that the narrow proportionality principle, which had been identified in Harmelin, was applied with extreme rarity. She concluded that the Solem test could not

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252 Harmelin (n 247) 1003.
254 Harmelin (n 247) 996.
257 Justices Souter, Stevens, Ginsburg and Breyer dissented.
258 Cf Solem (n 232).
be applied in this instance as *Ewing* concerned a recidivist statute,\(^{259}\) rather than a first-time grossly disproportionate sentence.\(^{260}\) The effect of the ruling was to uphold mandatory sentences of 25 years’ imprisonment before parole eligibility as applied to those convicted of a third violent felony.\(^{261}\) O’Connor directed that any challenges to such state statutes should be deferred to state legislatures, continuing the hands-off theme demonstrated in *Rummel*.\(^{262}\)

*Lockyer* concerned a sentence of two consecutive 25-year terms for two counts of petty theft with a prior conviction,\(^{263}\) each triggering the ‘three-strikes’\(^{264}\) mandatory minimum. Assessing whether to follow *Rummel*, where a life sentence imposed on a third-time felon was deemed proportionate, or *Solem*, where a life sentence for a seventh nonviolent felony was disproportionate, Justice O’Connor held Lockyer’s sentence to fall between the two, but most closely to *Rummel*. As such, Eighth Amendment protection was not afforded to Lockyer and the sentence was deemed proportionate, thus constitutional.

While it must have seemed through *Lockyer* as if the Court was unwilling to broaden the Eighth Amendment’s scope in order better to protect non-capital convicts from lengthy sentences, thereby rendering the *Solem* direction merely historical,\(^{265}\) two cases handed down in 2010 and 2012 demonstrated a shift in this unwillingness. This shift was the greatest towards evolution in the non-capital sphere since *Solem* was heard.

### 2.5.3 Juveniles

In 2004, *Roper* marked the death knell of juvenile capital punishment, with SCOTUS holding by a narrow majority that the US was to join the rest of the world in banning the practice. One year later, in *US v Booker*,\(^{266}\) the Court held that the Federal Sentencing

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\(^{259}\) *Ewing’s “third strike” was a $1200 theft while on parole, which could have been reduced to a misdemeanour (Cal Penal Code Ann §17(b)(5) (West 1999)) but the state court had refused to use their discretion to do so.*

\(^{260}\) *Harmelin* (n 247) 996-997.

\(^{261}\) Cal Penal Code Ann §667(b) (West 1999).


\(^{263}\) Thefts of videotapes totalling $84.70 and $68.84. Andrade’s prior convictions made these thefts “wobblers” and discretion was refused.

\(^{264}\) Cal Penal Code Ann §667(b) (West 1999).

\(^{265}\) Given the reluctance by SCOTUS in *Lockyer* (n 255) and *Ewing* (n 256) to apply the proportionality test.

\(^{266}\) 543 US 220 (2005).
Guidelines were only advisory, not mandatory, affording greater discretion to sentencing judges. *Booker* also indicated a renewed willingness by the federal judiciary to engage in non-capital proportionality review. Following the introduction to Congress of the Fair Sentencing Act in 2009, which finally reduced Reagan’s residual mandatory minimums, the Court granted review in *Graham v Florida* to a challenge against sentences of LWOP imposed on juveniles.

Jamar Graham, a 16-year-old Floridian schoolboy, entered a home armed with a firearm, thereby violating the probation conditions of a plea deal following a previous armed robbery conviction. As a result of the latter conviction, Graham received a sentence of LWOP. Reviewing the Floridian scheme, which mandated the punishment, the Court deviated from the *Solem* proportionality assessment and noted that the case ‘implicated [an] entire class of offenders’. The Justices compared national consensus counting and contemporary sentencing practices to inform their decision on ESD grounds. Justice Kennedy noted that, while 37 state legislatures permitted LWOP for some juvenile non-homicide offences, in practice more than 60% of those sentences were from Florida alone, indicating a national consensus against Florida’s practice and thus against the penalty itself. The *Graham* Court reasoned that there were fundamental psychological differences between adults and juveniles, which rendered the latter less culpable. In addition, a majority noted a similar consensus in opposition to the practice of sentencing under-18s to whole-life sentences, this time at the international level, an indicator of ESD considered in Chapter V.

Through *Graham*, Powell’s statement in *Eddings* that age ‘is more than a chronological fact’ was extended to non-capital sentences, and the Eighth Amendment’s

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267 ibid 245
270 Affirmed by the First District 982 So 2d 43 (2008); review denied 990 So 2d 1058 (2008) (Florida).
271 *Graham* (n 269) 10, Kennedy, J.
272 77 of 123, see *Graham* (ibid) 12-13, Kennedy, J.
273 ibid 29, Kennedy, J.
275 *Eddings* (n 144) 115.
protection was evolved far beyond its early origins or even its Robinson incorporation. A willingness to engage in a review of professional consensus, another element analysed in later chapters, was also evidenced. The evolution in Graham was to be progressed, perhaps sooner than expected, just two years later, in Miller v Alabama. This time concerning two 14-year-olds who had received mandatory LWOP sentences for murder, Justice Kagan’s majority opinion referred expressly to the ESD principle within the Eighth Amendment. Re-emphasising that young people are constitutionally different from adults, but rather than barring a specific penalty for a class of individuals, as it had done in Graham, the Court insisted that LWOP was not per se unconstitutional when imposed on under-18s. Instead, the judgment expanded the Graham reasoning to ban mandatory LWOP sentences for juveniles, bringing the non-capital standard into line with that imposed by Gregg.

Four dissentients protested that homicide is ‘special’ and, in any case, the demonstrable objective indicia of society’s standards were not nearly as compelling as in Graham. Justices Alito and Scalia dissented even more vehemently against the ESD element, declaring that the Constitution does not provide the Court with authorisation to ‘take the country on this journey...toward some vision of evolutionary culmination.’ In spite of that dissent, through Miller the current bench demonstrated a renewed commitment to evolving standards of decency surrounding penalties other than death, especially in the context of juveniles and those with reduced culpability.

Despite the promise of proportionality from Booker, the individualisation in Graham and Miller, and a patent commitment by the Court to expand the protection of the Eighth,

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277 Miller was found guilty of murder in the course of arson, receiving mandatory LWOP. Ala Code §§13A-5-40(9), 13A-6-2(c) (1982). Jackson was convicted of capital felony murder and, again, the statutory mandatory sentence was LWOP. Ark Code Ann §5-4-104(b) (1997).
278 Miller (n 276) Kagan, J.
279 Roberts, CJ, Scalia, Thomas and Alito, JJ.
280 Miller (n 276) 4, Roberts, C.J.
281 ibid 7, Alito, J.
282 Lerner argues that Miller could be expanded to protect juveniles from lengthy terms-of-years sentences that equate to de facto life. Craig Lerner, ‘Sentenced to confusion: Miller v. Alabama and the coming wave of Eighth Amendment cases’ (2012) 20 George Mason LR 25, 39.
Adelman has urged caution. ‘In comparison to the immense scope of the public policy disasters that gave us mass incarceration,’ she warns, ‘the positive changes of the last decade are small beer’.\textsuperscript{283} Furthermore, these shifts deal only with one issue: proportionality in sentencing, not the lived-experiences of prisoners who are suffering in worsening conditions of imprisonment. Such conditions are most acutely experienced by those held in solitary confinement, now numbering around 81,000.\textsuperscript{284} In recent decades SCOTUS has extended the reach of its non-capital punishment jurisprudence beyond the prison walls, to conditions of confinement and treatment of prisoners. That sector of Eighth Amendment evolution is reserved for later chapters, where solitary confinement will be assessed under the ESD framework reworked in Chapter III.

\textbf{2.6 CONCLUDING REMARK}

In 1816 Thomas Jefferson wrote that ‘[w]e might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.’\textsuperscript{285} As this chapter has shown, this tenet of evolutive interpretation, addressed on a theoretical level in Chapter III, pervades the Eighth Amendment. Since Justice McKenna applied such reasoning to the Constitution’s punishments clause in 1910,\textsuperscript{286} and Chief Justice Warren after him,\textsuperscript{287} the ESD principle has markedly transformed the Amendment’s scope and application. Since Gregg, the Court has narrowed capital punishment to near vanishing point and non-capital punishment has recently faced similar, albeit not so conclusive, judicial activism.

In \textit{Graham} and \textit{Miller}, the Court’s commitment to proportionality and individualisation in non-capital sentencing demonstrates a willingness further to evolve the punishments clause. As Chapter VI will show, the constitutional rights made available to

\textsuperscript{286} \textit{Weems} (n 23) 373.
\textsuperscript{287} \textit{Trop} (n 4) 100-101.
prisoners have similarly flourished. Nonetheless, rates of incarceration continue to rise and, in addition, an ever-increasingly oppressive use of solitary confinement pervades criminal justice in the US. In 2014 Ferguson described the American criminal justice system as having ‘gone astray, lost in a dark wood of its own making.’ This thesis will demonstrate a way out, by applying evolutive interpretation of the punishments clause to the hidden corner of the prison: solitary confinement. Before doing so, the analytical components of the ESD assessment must first be examined. In the next chapter, Chapter III, a framework will be built using Dworkin’s concept of law as integrity, by which this thesis will later seek principles of political morality, which provide for the best interpretation of the Eighth Amendment.

CHAPTER III

A DWORKINIAN APPROACH TO INTERPRETATION

The Eighth Amendment’s evolving standards of decency (ESD) principle provides a strong example of the Supreme Court’s willingness to consider the Constitution in light of contemporary values. An understanding of the theoretical underpinnings of the ESD will be essential to inform analysis of its potential to evolve the Eighth Amendment’s reach beyond the prison walls, into solitary confinement. To that end, this chapter will make the case for one approach, namely that ESD is best understood through Ronald Dworkin’s explanation of constitutional interpretation as one of morality, rather than living versus dead constitutionalism. The discussion will begin with an overview of the key tenets of such interpretation.

This introduction will then be followed by an assessment of Dworkin’s opposition to traditional post-Enlightenment understandings of law (Section 3.2); an examination of Dworkin’s interpretivism and the tenets of this theory of adjudication relevant to the ESD assessment (Section 3.3); a consideration of the forces opposing such methods of enquiry (Section 3.4) and, finally, a framework for analysis which will shape the following chapters (Section 3.5). Throughout this chapter it will be argued that the Eighth Amendment’s evolution is best explained by an interpreter’s recourse to moral principles, not to policies. This tenet of rights being trumps is a key feature of Dworkinian jurisprudence, and one which will be defined and discussed shortly. Before doing so, a theoretical review of the legal theory which prevailed prior to Dworkin’s arrival will serve as the foundation of this chapter’s discussion.
3.1 INTRODUCTION: THE CONSTITUTION: LIVING, DEAD, MORAL?

During the framing of the punishments clause, one First Congress delegate noted that it was ‘too indefinite’,¹ with another expressing that, ‘as it seems to have no meaning in it, I do not think it necessary.’² Originally intended as ‘an admonition to all departments of the national government to warn them against such violent proceedings as had taken place in England’,³ the Eighth is now understood to be tied to a principle of evolutive decency which gives it the meaning lamented as missing in 1789. Chapter II showed the line of punishments clause jurisprudence, which has developed over the past fifty years, and this chapter aims to tie those constitutional developments to a coherent theory of adjudication.

Strauss describes the concept of a living constitution as ‘one that evolves, changes over time, and adapts to new circumstances, without being formally amended.’⁴ Such an approach to interpretation was endorsed by Thomas Jefferson,⁵ who believed that each generation of citizens and governments should be viewed as independent of the one preceding it, and that the Constitution must ‘keep pace with the times’.⁶ Broadly speaking, the polarisation of “living” versus “dead” (or original) interpretation was accepted as the dividing line in constitutional law throughout the last century.⁷ In 1980 Ely notably distinguished between two principal methods of interpretation: those which look to the text and values explicit in the text, which might be viewed as a “dead” theory, since the text

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¹ Annals of Congress (1789) 782: ‘Mr. SMITH, of South Carolina, objected to the words “nor cruel and unusual punishments;” the import of them being too indefinite.’
² ibid 783: ‘Mr. LIVERMORE. -The Clause seems to express a great deal of humanity...but as it seems to have no meaning in it, I do not think it necessary.’
⁵ The phrase ‘living constitution’ was itself coined by Howard McBain, The Living Constitution (Workers Education Bureau Press 1927).
⁷ Fleming has noted that, ‘In recent years, some have posed the question, “Are we all originalists now?”’ James Fleming, ‘Living Originalism and Living Constitutionalism as “Moral Readings of the American Constitution” (2012) 92 Boston ULR 1171, 1173 (citing Keith Whittington, ‘Dworkin’s “Originalism”’ (2000) 62 Review of Politics 197, 201 (interpreting Dworkin as an originalist)).
cannot change merely by interpretation, and those which venture beyond it: “living”.\(^8\) One author identified as many as 72 types of originalism,\(^9\) though broadly speaking the theory can be separated into two main areas. First is textualism,\(^10\) where the literal meanings of the words prevail, known as “narrow” originalism. The next type is original intent,\(^11\) where the text’s definition is informed by the intention of its authors. It is unsurprising that originalism has been equated to ‘fundamentalism’,\(^12\) for its seemingly secular commitment to the text.

On the other side of the division again different approaches exist to the “living” method of constitutional interpretation. While the various theories need not be explained in depth for this discussion, a helpful overview is provided by Waluchow,\(^13\) who explains the living Constitution in terms of common law constitutionalism, with the analogy of a tree. In that analogy the trunk is rooted by the Constitution, planted by the People, but the branches are tended to by SCOTUS, which controls the direction and height of the Constitution’s eventual growth. Friedman and Smith discuss the sedimentary Constitution,\(^14\) an approach to living historicism which encourages interpreters to take heed of all relevant historical changes up to the present day, not just the history of the Constitution’s founding. This is a modification of Ackerman’s thesis,\(^15\) which distinguishes between mere historical change and ‘constitutional moments’.\(^16\) The latter “moments” are arguably the only changes worth noting when interpreting the Constitution.

\(^15\) Bruce Ackerman, *We the People, Volume I: Foundations* (HUP 1991).
\(^16\) ibid 345.
Chapter III: A Dworkinian Approach to Interpretation

Recalling the Court’s invocation of evolutive interpretation in *Trop v Dulles*, that ‘[t]he provisions of the Constitution are...vital, living principles’, the Eighth Amendment’s ESD principle appears on its face to fit neatly with Strauss’s definition of a Constitution which is alive. In Ely’s terms, the ESD principle seems to equip judges with the opportunity to venture beyond the document. The punishments clause’s constraint on governmental power to punish has been defined by a set of collective values that adapt over time. As a consequence, SCOTUS, both in capital and non-capital sentencing, to protect more individuals from disproportionate punishment or that which offends decency, has expanded the clause.

What this chapter will argue, however, is that a theory of law informed by morality need not ask whether judges should ‘change’ the Constitution, but asks only how they interpret its existing provisions. Such a reading does not require, or indeed permit interpreters, in practice Supreme Court Justices, to adapt the Constitution. The assessment is not about whether the text is read as being alive or dead, but about an approach to interpretation that views rights in light of background values intertwined within the community. Elements of fidelity to the framing of the Constitution are respected by this approach, as will be shown, as are principles of living constitutionalism.

### 3.2 Post-Enlightenment Jurisprudence

The Age of Enlightenment ended the ‘god intoxicated’ age of philosophy and natural law, instead giving rise to epistemology, where rights depended on convention. Porter notes that this period should not be viewed simply as ‘a canon of classics, but as a living

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18 ibid 100.
20 See Gregg v Georgia 428 US 153 (1976) and its progeny, discussed throughout Chapter II.
21 Strauss (n 4) 1.
language, a revolution in mood, a blaze of slogans, delivering the shock of the new’. 24 Within the new framework of identifiable, describable proscriptions, men, for men, created law. 25 The school of jurisprudence, which gained momentum during this philosophical departure from natural law, 26 legal positivism, can be traced back to Thomas Hobbes’s mid-17th Century writing. 27 Positivism was introduced to the wider discourse through Bentham’s work two centuries later, 28 where he reproached natural rights as ‘simple nonsense...nonsense upon stilts’, 29 denying the idea of rights being inalienable and ‘imprescriptible’, 30 instead endorsing ‘expository jurisprudence’, 31 wherein laws are a subset of sovereign commands. Austin propagated Bentham’s original endorsement of this more empirical approach to legal theory, delivering to the broader political community the edict that the province of jurisprudence was concerned only with imperative legal commands. 32

Austin sought to push jurisprudence in the direction of science, casting aside all non-legal principles along the way. 33 To do so he defined what he viewed as truly “genuine” laws; those, which were ‘a species of commands’, 34 issued by a sovereign and backed by sanctions. This became known as Austin’s ‘Command Theory’. 35 Under the command theory, no place is reserved for the normative; the intangible concept of morality is merely law by analogy:

25 An expansion of basic civil and political rights to women was not forthcoming, in the US at least, until the 20th Century. The 19th Amendment gave women the right to vote in 1920, US Const, Amend XIX. The Equal Rights Amendment of 1979, which only gathered 35 of the requisite 38 state ratifications, unsuccessfully attempted to generate a constitutional right to gender equality. ‘Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.’ Eileen Kelly, ‘The Equal Rights Amendment’ (1978) 69 Social Studies 126.
30 ibid.
32 Freeman (n 26) 255-256. Also see John Austin, *The Province of Jurisprudence Determined* (*PJD*) (1832) (CUP, Wilfred Rumble ed 1995).
33 ibid, generally.
34 ibid 21 (original emphasis).
35 Freeman (n 26) 248.
composed of a set of desirable principles that are insufficiently “legal” to constitute enforceable restrictions or rights. Austin’s foundations in legal positivism would serve the basis for a much larger following in the 20th Century, at the same time that the US Constitution’s incorporation to the states was beginning to gain steam.

3.2.1 MODERN POSITIVISM

A significant contributor to legal positivism at this time was Hart, who edited a significant yet previously unseen Bentham treatise alongside his own extensive work and,36 more recently, Raz.37 Indeed, Hart’s theoretical commitments, which will be explored shortly, are ones from which Dworkin developed his opposing theses. Without Hart’s endorsement of, and updates to, Austinian positivism, Dworkin’s grounds for criticism would have been much shakier.

In the 1960s Hart mounted a defence of positivism, which he viewed as remedying the shortcomings of the Austinian approach,38 providing three theoretical claims regarding the criteria of legality. As a legal positivist, Hart agreed with Austin, that morality is conceptually distinct from law. This is the first claim: the Separability Thesis.39 In Hart’s words, ‘it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so’.40 It is argued simply that law and morality are separate when legal validity is being ascertained, has nonetheless been split into two further categories: soft and hard. Soft Separability emerged in later Hartian writing, which

36 Bentham, OLIG (n 31) written in 1782. If it had been released during Bentham’s lifetime, Hart claimed that OLIG would have dominated English jurisprudence. HLA Hart, ‘Bentham’s “Of Laws in General”’ (1971) 2 Rechtstheorie 55, 57.
37 Joseph Raz, The Authority of Law (AL) (2nd edn, OUP 2009). Both have been embraced by the legal and political academic communities as contributing the most compelling displays of contemporary positivism. Coleman described Hart’s The Concept of Law as ‘the most important and influential book in the legal positivist tradition [and] its importance is undisputed.’ Jules Coleman, ‘Incorporationism, Conventionality, and the Practical Difference Thesis’ (1998) 4 Legal Theory 381. A recital of further literature demonstrating the prominence of these two jurisprudences would not provide much benefit here. Instead, see an introduction by Stephen Guest, Ronald Dworkin (3rd edn, SUP 2012) 22.
39 ibid 203.
40 ibid 185-186.
Chapter III: A Dworkian Approach to Interpretation

acknowledged that sometimes morals are included in law.\textsuperscript{41} Hard Separability remains loyal to the original premise that strict or ‘exclusive’\textsuperscript{42} separation is required by the conceptual distinction between law and morality. In positivism, law may (and in many cases probably will) in itself be conceptually related to morality, as both Hart and Raz have acknowledged,\textsuperscript{43} but law never defers to moral authority; a rule does not depend on a moral value-judgement to provide it with legal validity.

Hart’s second criterion of legality is the Rule of Recognition, which, according to Hart, holds that law derives only from rules of social convention.\textsuperscript{44} By considering a community without law in the form of rules, Hart demonstrates that the hypothetical social problems encountered by that lawless community would be solved only by a series of rules, including the Rule of Recognition, where members of the community recognise and accept those rules by which they are bound.\textsuperscript{45} Shapiro summarises Hart’s conclusion as providing legal systems with a method to resolve uncertainty surrounding the binding nature of rules since through ‘the “rule of recognition” – normative questions can be resolved without engaging in deliberation, negotiation or persuasion.’\textsuperscript{46} This theoretical commitment is accompanied by the assumption that behaviour is governed only by those legal rules established by elected officials: ‘Conventionality’.\textsuperscript{47} Coleman notes that modern positivism is best understood through this tenet of Hartian jurisprudence, wherein positivist jurists are ‘committed to explaining law as ultimately resting on a social convention’.\textsuperscript{48}

\begin{footnotesize}
\begin{enumerate}
\item ibid 250-254.
\item Raz, \textit{AL} (n 37) 48. See Ronald Dworkin, ‘Thirty Years On’ (TYO) (2002) 115 HLR 1655, 1656. Dworkin condemns inclusive forms of positivism (softer than Raz’s) for deploying ‘artificial conceptions of law and authority’ in a convenient attempt to keep positivism alive.
\item Raz (n 37) 48. See Ronald Dworkin, ‘Thirty Years On’ (TYO) (2002) 115 HLR 1655, 1656. Dworkin condemns inclusive forms of positivism (softer than Raz’s) for deploying ‘artificial conceptions of law and authority’ in a convenient attempt to keep positivism alive.
\item ibid Chapter 5.
\item Scott Shapiro, ‘What is the Rule of Recognition (and Does it Exist)?’ in Matthew Adler and Kenneth Himma (eds) \textit{The Rule of Recognition and the US Constitution} (OUP 2009) 238.
\item Hart (n 38) 94. Cf Joseph Raz, ‘Can There Be a Theory of Law?’ in Martin Golding and William Edmundson (eds) \textit{The Blackwell Guide to the Philosophy of Law and Legal Theory} (Blackwell 2005) 332 (denying Hart’s Rule of Recognition, but endorsing the importance of convention among elected officials).
\item Coleman (n 37) 385: 385 fn9 (comparing elements of Hart to those of Raz, but concluding that official conventionality is ‘common to all positivists.’)
\end{enumerate}
\end{footnotesize}
Chapter III: A Dworkinian Approach to Interpretation

Hart’s third commitment to positivism, the rule most closely derived from Austinian theory, is the ‘Social Fact Thesis’, or ‘Pedigree Test’. This holds that the viability of law depends on the threats of sanctions, which officials are able to carry out. While adopting elements of Austin’s more traditional positivist jurisprudence, Hart identifies a lacuna in Austin’s thesis: secondary rules. Secondary rules contain the procedures through which primary, right-granting rules can be created, modified, and extinguished. These secondary, or ‘meta’ rules, should unite, according to Hart, with primary rules, to provide the final word on what is law.

Positivism, in any of the forms introduced above, does not fit with the Eighth Amendment’s ESD principle. That principle, which underscores the Court’s jurisprudence in this field, is one which is morally inquisitive and has been shown to contain value judgements of decency for which positivism’s exhaustive rules cannot cater. To attach interpretation of the punishments clause to an adequate theory of adjudication, this thesis therefore proposes an alternative theoretical approach, which integrates morality with law. From a theoretical perspective this approach will be derived from Dworkin’s ‘interpretivism’, crafted in direct opposition to Hartian positivism in order to effect a ‘fusion of constitutional law and moral philosophy’.

49 Austin updated this principle from the jurisprudence of Bentham (nn 28-31).
50 Hart (n 38) 79-99.
51 John Austin, PJD (n 32) 166. Austin also viewed constitutional law as an example of ‘positive morality’, which he separated from law itself. John Austin, Lectures on Jurisprudence and the Philosophy of Positive Law (1869) (Scholarly Press 1977) 107. Cf the irreconcilable yet basic tenet of constitutional law, that ‘an unconstitutional act is not a law; it confers no rights; it imposes no duties…as though it had never been passed.’ (Norton v Shelby County 118 US 425 (1886) 426).
52 Hart (n 38) 76.
53 ibid 83-84.
54 A far deeper explanation can be found in Hart (n 38) and Scott Shapiro, ‘The “Hart-Dworkin” Debate: A Short Guide for the Perplexed’ in Arthur Ripstein (ed) Ronald Dworkin (CUP 2007) 22-49.
55 Ronald Dworkin, Law’s Empire (LE) (Hart 1986) 45-47, largely a means to explain Dworkin’s position and, beyond refuting Hartian positivism, which he had already done in Ronald Dworkin, Taking Rights Seriously (TRS) (Gerald Duckworth 1977), to create a coherent counter-thesis termed “interpretivism”.
56 Dworkin, TRS (ibid) 149.
3.3 DWORKIN’S ANSWERS

Dworkin’s work attempts to carry out the fusion of law and morality, concepts torn apart by Hart’s positivism, to appreciate more clearly how judges interpret legal rules and constitutional principles. Dworkin’s theory of legal interpretation, provides for more than simply moral objectivity. Interpretivism directly depends on answers to moral questions in order to address legal questions. The moral questions posed by the ESD enquiry form the subject matter of the remainder of this chapter, which deems Dworkin’s interpretivism to provide the best framework for Eighth Amendment adjudication. To understand the value of interpretivism to this thesis, it is necessary to explore the main tenets of Dworkinian theory.

3.3.1 MORALITY

Hume, widely considered a leader in empirical Western philosophy during the Enlightenment, adopted a naturalistic position on moral values: no amount of observable empiricism could ever discover morality, identifiable only through normative judgements of what the law ought to be, rather than descriptive assessments of what the law is. This marked a departure from the predominant empiricism of Locke, who had centered his moral philosophy on reason and had asserted that there was not a single idea which was universally held, and so morality could only arise from experience. Hume, however, insisted that morality arose out of a moral sense, which reason could not explain. Under this reading, morality is best understood as a normative combination of core values of human dignity, including equality, fairness, justice, and self-respect. Morality is, thus, a ‘separate

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58 Dworkin, *JFH* (n 23) 17.
63 Hume, *Treatise* (n 61) 522.
64 Dworkin takes pain to define these concepts in *JFH* (n 23) 62-209.
department of knowledge with its own standards of inquiry and justification,’\textsuperscript{65} requiring a rejection of the Enlightenment’s epistemology and of Locke’s insistence on scientific rationality. The ESD principle underlying the Eighth Amendment depends on a sense of justice which pervades the Constitution’s punishments clause; a provision which exists to guard citizens against excessive power. It is fundamental to that tenet of interpretation that the ESD is a normative value, and one which provides interpreters with the momentum to view the law in its best light.

Dworkin explains that moral judgements are made only through second-order assessments of morality: for a moral judgement to be true it must be made ‘by an adequate moral argument for their truth.’\textsuperscript{66} In this sense, the accuracy of moral convictions cannot be tested without recourse to further moral convictions.\textsuperscript{67} This endeavour, ‘moral responsibility’,\textsuperscript{68} is idealistic and practically troublesome. It can only be achieved by seeking ‘the most comprehensive account’\textsuperscript{69} of morality that a given interpreter can achieve. This, Dworkin wrote, is an ‘interpretive goal’.\textsuperscript{70}

Adopting Hume’s position on normative moral values,\textsuperscript{71} Dworkin explains that there is a value judgement to be found in all forms of interpretation, and that this judgement constitutes ‘background morality’.\textsuperscript{72} When discussing legal adjudication, Dworkin extends Hume’s position and argues that a form of moral assessment is also observable when courts assess the rights or obligations envisaged by legal rules. In undertaking this interpretive project, judges draw on ‘political morality’,\textsuperscript{73} providing interpreters with the tools to ‘dig deeper into the law to find the strongest moral and political principles that could justify an

\begin{footnotesize}
\begin{itemize}
    \item \textsuperscript{65} ibid 17.
    \item \textsuperscript{66} ibid 37.
    \item \textsuperscript{67} ibid 100.
    \item \textsuperscript{68} ibid 38.
    \item \textsuperscript{69} ibid 38-39.
    \item \textsuperscript{70} ibid 39.
    \item \textsuperscript{71} Hume, \textit{Treatise} (n 61) 494.
    \item \textsuperscript{72} Dworkin, \textit{JfH} (n 23) 16-17.
    \item \textsuperscript{73} Ronald Dworkin, ‘“Natural” Law Revisited’ (NLR) (1982) 34 University of Florida LR 163, 165 & 171.
\end{itemize}
\end{footnotesize}
authoritative decision.’\textsuperscript{74} Those principles are identified through an internal investigation into ‘the integrity of legal practice.’\textsuperscript{75} Interpreters who read law as integrity reject Hart’s Separability Thesis, instead advocating for law to be understood not as parallel to, but intertwined with morality. That concept, “integrity”, in Dworkinian terms, will now be applied by this thesis to the ESD principles of decency and political morality underlying the punishments clause.

3.3.2 \textbf{Law as Integrity and Best Fit}

Dworkin introduced his integrity thesis in \textit{Law’s Empire}, by denying the conventional assumption that legal interpretation was split between looking back (at rules) and looking forward (at application of those rules), instead seeing the role of judges as a combination of both: ‘an unfolding political narrative.’\textsuperscript{76} As noted in the introduction, this theory – integrity, essential to interpretivism – is an approach to interpretation, not some kind of judicial amendment process. The concept of integrity leads judges to understand rights and duties as informed by the political morality underlying the community from which they originated. Those rights and duties can therefore be interpreted in the future through a consideration of the core principles of justice, fairness, and due process,\textsuperscript{77} with a view of the past and the present. Complementary to these principles, political integrity is part of law as integrity, entailing that like cases should be treated alike.\textsuperscript{78} This is referred to by Dworkin as ‘coherence in principle’\textsuperscript{79} and ties into the idea that interpretations of the law should ultimately ‘express a single and comprehensive vision of justice’\textsuperscript{.80} An example arises from one of the values of majoritarian democracy: if the government applies majoritarianism to

\begin{thebibliography}{10}
\bibitem{74} Thomas Simon, \textit{Law and Philosophy} (McGraw-Hill 2001) 139-140.
\bibitem{75} ibid.
\bibitem{76} Dworkin, \textit{LE} (n 55) 225.
\bibitem{77} ibid.
\bibitem{78} ibid 165.
\bibitem{79} ibid 164-165.
\bibitem{80} ibid 134; Randall Peerenboom, ‘A Coup D’État in Law’s Empire’ (1990) 9 Law and Philosophy 95, 95-98.
\end{thebibliography}
voting and permits one-person-one-vote, which it does, \(^81\) then interpretivist coherence requires that government to adhere to the same principle when voting-apportionment takes place, to ensure coherence in the principle of one-person-one-vote. \(^82\)

Assumptions must be made, Dworkin explained, in order to view community principles in the best possible light. \(^83\) While assumptions might give rise to a lacuna in interpretation, the interpretivist project strives for an optimistic reading of rights, whereby judges are capable of reflecting on a given community’s practices and doctrines without necessarily making recourse to rigid text-based originalism. \(^84\) These judges select the best interpretation of the right or duty to show a community in the best possible light; the sources of integrity, which provide the ‘best fit’. \(^85\) On this view of law, Anderson describes law as integrity as ‘an ongoing project of interpreting...social practices’. \(^86\) This thesis intends to undertake that project in the following chapters, but only after two further tenets of interpretivism are considered: the concepts of hard cases and of principles trumping policies.

### 3.3.3 Hard Cases

Dworkin wrote that legal structures, rights and obligations, have ‘become too complex to suit positivism’s austerity’. \(^87\) If positivism constructs law only out of rules; where rules run out, so does law. Often involving questions of constitutional interpretation or of clashing rights, ‘hard cases’ \(^88\) are situations of novelty where rules and policies (with which positivism is preoccupied) \(^89\) will not provide comprehensive answers. Where Hart failed, in allowing judges to reach their own subjective value-judgments when sources of positivism

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\(^81\) This principle was championed in Reynolds v Sims 377 US 533 (1964); Baker v Carr 369 US 186 (1962) where SCOTUS waded into the political thicket for the first time, paving the way for Reynolds.

\(^82\) Dworkin, LE (n 55) 165, to a certain extent honoured in Davis v Bandemer 478 US 109 (1986).

\(^83\) Dworkin, LE (ibid) 226.

\(^84\) ibid 225.

\(^85\) First introduced in Ronald Dworkin, ‘Hard Cases’ (HC) (1975) 88 HLR 1057.


\(^87\) Dworkin, TYO (n 42) 1677.

\(^88\) Dworkin, LE (n 55) 37-43, first introduced in Dworkin, HC (n 85) 1057.

\(^89\) This is the ‘Pedigree Test’ or ‘Social Fact Thesis’ discussed in Hart (n 38) 79-99.
run out, a judge led by interpretivism seeks guidance through integrity (moral principles), ensuring that interpretation is unhindered.  

Because it treats law as informed by morals, which are viewed as part of the framework of legal validity, Dworkin’s interpretivism succeeds here where positivism fails, by tying jurisprudence to a theory of adjudication, and one which this thesis will tie to the Eighth Amendment’s ESD. Dworkin ‘embarrass[es] positivism’ by filling the gap it leaves behind in hard cases. He achieves this with his theories of ‘right answers’ and ‘best fit’. Law, under interpretivism, must always depend at least in part on what it ought to be. To this end, the Dworkinian interpreter must identify principles of political morality, which are interlaced with rules to form law. As well as the principles of integrity and best fit discussed in the previous subsections, Letsas identifies further examples such as justice, democracy, liberty, and equality. Guidance sought through an application of these principles and community standards closes the gap in the hard case, reading a provision in its most optimistic and aspirational moral light.

Under Dworkin’s theory, law is seen as a branch of evolving political morality, where the law must be pliable to socio-legal-political forces. ‘We must’, Dworkin insists, ‘therefore do our best...to make our community’s fundamental law what our sense of justice would approve’. To provide definition to evolution expedited by such a theory of law, Dworkin applies his ‘best fit’ thesis, with the aspiration to answer hard questions with “principled” answers. Within this concept of interpretation, Dworkin explains that constitutional evolution is not achieved by unfettered judicial amendment, but accommodates
a principled method of interpretation ‘by appealing to an amalgam of practice’. In doing so, interpreters ensure that principles always trump policies: the next tenet of Dworkin’s theory that must be explained.

3.3.4 PRINCIPLES TRUMP POLICIES

Filling the void left by positivism’s exhaustiveness in the hard case, Dworkin makes recourse to principles. Here he describes ‘a fundamental distinction within political theory’ that between policies and principles. Policy arguments, Dworkin explains, justify a political decision with a functional community goal. Principles, however, are grounded in ‘past official acts (for example, the text of statutes, judicial decisions, or constitutions).’ Moreover, interpreters of rights should, and do, seek information from those principles cited or implicit in ‘past political decisions of the right sort.’ The right sort, another problematic phrase, depends on a decision, which is based on the key principles of political morality: justice, democracy, liberty, and equality. Pre-interpretive data (in the Eighth Amendment sphere this might include opinion polls and counted states, for example) is selected by an interpretivist judge, who then ‘puts the object or practice [of interpretation] in the best possible light’ in the interpretive stage. In the post-interpretive stage, the judge interprets, often improves, and attempts to view moral sources at their highest value.

Take the Fourteenth Amendment, which provides, inter alia, that ‘[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.’ The initial (pre-interpretive) policy goal behind that clause was to guarantee African Americans

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100 Dworkin, TRS (n 55) 36.
101 ibid 82.
102 ibid.
103 Brian Bix, ‘Natural Law Theory’ in Dennis Patterson (ed) A Companion to the Philosophy of Law and Legal Theory (Blackwell 1996) 234.
104 Dworkin described his theory of law as integrity as ‘the best interpretation of what lawyers, law teachers, and judges actually do’. Dworkin, LE (n 55) 94.
105 ibid 93.
107 Dworkin, LE (n 55) 90.
108 ibid 538.
110 US Const, Amend XIV.
citizenship, no more, no less. A positivist might draw the line at the understanding explicit in the Conventionality of the right: the text; original legislative intention; and accepted community practice. In a move which aligns neatly within an interpretivist framework, however, the Fourteenth’s due process clause has been interpreted to contain a broader (interpretive) principle of equal treatment; one which would later become the basis for revolutionary cases such as Brown v Board of Education. Brown was at first condemned as an expression of judges acting as the ‘third legislative chamber’. This charge, commonly phrased “legislating from the bench” is faced by activist judges who are viewed by legal conservatives with suspicion. Moreover, the decision in Brown spoke against the tide of public opinion, and certainly against the public opinion at the time of the Fourteenth Amendment’s adoption, hence an interpretivist example of constitutional evolution. The case provided the Court with the tools to dismantle racial segregation in earnest, applying the equal protection clause of the Fourteenth Amendment to racist school practices (post-interpretive refinement). Dworkin saw Brown as:

‘a potential embarrassment to any theory that emphasizes the importance of the framers’ intentions...there is no evidence that any substantial number of the congressmen who proposed the Fourteenth Amendment thought or hoped that it would be understood as making racially segregated education illegal.’

Policies, therefore, fall by the wayside when trumped by principles. Brown provides an example of this interpretivist tenet, demonstrating that positivism’s limited rubric is enlightened by moral guidance. This approach arrived after ‘generations of increasingly refined utilitarian thought’, with Dworkin’s Taking Rights Seriously provoking ‘familiar

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114 Dworkin, ibid.
family squabbles’\(^{116}\) with positivists. Majority and utility are trumped under this heading by rights-oriented principles, informed by morality.

Writing at the same time as Dworkin, Rawls also drew more patently on the construction of law through principles of morality rather than the mere identification of rules-driven positivism.\(^ {117}\) Moral judgements, Rawls wrote, allow interpreters to fix communities by creating suitable morals out of the principles embedded in that community.\(^ {118}\) While this refusal to accept the Separability Thesis speaks to Dworkin’s interpretivism, Dworkin rejects Rawls’s constructivist attempt to find some kind of morally neutral consensus regarding the ‘account and justification of the liberal traditions of law and political practice.’\(^ {119}\)

Challenging Rawls’s project, Dworkin explained that, ‘[i]f you ask the present judges on the United States Supreme Court to describe [those embedded principles] you will receive nine different answers’\(^ {120}\) and, therefore, Rawls’s undertaking is impossible without a moral value component.

Dworkin’s search for the right moral answer is not immune to the same criticism. When describing a hypothetical situation in *Justice for Hedgehogs*, he reveals his idea of a ‘conscientious judge’\(^ {121}\) who tests a principle by ‘casting the net wide’\(^ {122}\) and asking what the best answers would provide. ‘We may not succeed,’ Dworkin wrote of the interpretive endeavour, ‘but the struggle is better than the pretense.’\(^ {123}\) Moral responsibility requires what Dworkin terms “integrity” and, in that vein, the philosophy of someone who is morally responsible is ‘interpretivism’.\(^ {124}\) In adjudication, this optimistic endeavour requires an

\(^{116}\) ibid 311.


\(^{118}\) Rawls, ibid 262, 324.

\(^{119}\) Dworkin, *JfH* (n 23) 66.

\(^{120}\) ibid.

\(^{121}\) ibid 78.

\(^{122}\) ibid.

\(^{123}\) ibid 86.

\(^{124}\) ibid 101.
interpretive judge: Hercules, to whom this chapter has alluded, and whom Dworkin introduced through his earlier work. The jurisprudence of Hercules must now be revealed.

3.3.5 Hercules

Dworkin’s interpretivism holds that there is always a right answer which provides the best fit to every legal question; it is through moral inquiry that this answer is found, filling, in hard cases, the gaps left by conventional rules.125 Whilst real-world interpreters can but strive to achieve the formidable standard of the “right” answer to a problem, Dworkin’s Hercules is the only judge capable of delivering the most right answer.126 Hercules is an omnipotent interpreter due to his unfettered access to any information on any topic, and his unlimited capacity to process that information without time constraints.127 Hutchinson and Wakefield note that it is plain that Hercules ‘adopts a cavalier attitude towards rules,’128 but will defer to those textual sources where they are adequate to reach the best result.129

Dworkin explained that Hercules is useful in elucidating exactly what it is judges should do.130 They cannot transform into Hercules in hard cases, but they can certainly strive to think in the same, ideal,131 way that Hercules would, and one way to achieve that is by viewing legal interpretation as dependent on an intertwined system of morality.132 In practice, Dworkin continues, his judge must show pre-interpretive data in its best light.133 Dworkin relies on the analogy of a hypothetical chain-novel to explain this concept, with the interpreter positioned as the author. The author must choose the best fit for her portion of the story, which follows various interdependent chapters, and the underlying target before all

125 Conventional refers to Hart’s positivism, Hart (n 38) 94.
126 Dworkin, TRS (n 55) 105-130.
127 ibid; JFH (n 23) 265 explaining that Hercules has eternal time and operates faster than real-world judges.
129 ibid.
130 Dworkin, NLR (n 73) 166.
132 Dworkin, NLR (n 73) 166.
133 ibid 170.
authors is to write the best novel possible.134 Perhaps only the Herculean author is able practically to find the truly “best” outcome, but the authors can strive for that standard. Equally, a judge can attempt to interpret the law as best possible, given the constraints on him as a human interpreter, warts and all.

As the principal architect in Dworkin’s interpretivist solution, Hercules has unsurprisingly met numerous criticisms. The criticisms of this solution provide the fuel of the next section, which serves to examine the potential shortcomings of Dworkin’s work.

3.4 RESPONDING TO OPPOSITION

Dworkin’s theories have been described as ‘distressingly obscure’ and ‘tantalizingly incomplete’,135 though it is worth remembering that he later clarified that interpretivism does not purport to find the right answer to hard questions, only to explain that there exists such an answer and that it can be found through an assessment of moral principles.136 During Dworkin’s thirty years of further scholarship he refined his approach,137 incorporating responses to critics alongside the developments of his own legal and political philosophy. Despite descriptions of Dworkin as ‘besieged and friendless’138 and ‘something of a tragic figure’139 in the history of jurisprudence, his work often resulted in far more positive legal citations than others in the academy over the past thirty years.140 Raz, who is argued to have had the greatest influence in the field of jurisprudence,141 has criticised Dworkin’s interpretivism, accusing the theory of proffering answers to legal questions through abstract

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134 ibid 166-169.
135 ibid; Mirko Bageric, Punishment & Sentencing (Cavendish 2001) 118-119 (criticising Dworkin’s vagueness).
136 Dworkin notes this in LE (n 55) ix, where he explains that a descriptive reading of the Constitution will not unveil the right answers, but that the existence of right answers guides the aspirations of judges.
137 See Dworkin, JFH (n 23) and FL (n 59).
139 ibid 1502.
141 Brian Leiter, ‘The Law School Observers’ [2001] Green Bag 101, 103: ‘Among philosophers, [Dworkin] has long been overshadowed by Raz, who is generally thought by specialists in the field to be the most important living legal philosopher.’
considerations of fit and morality, without solving those problems in an empirical and logical manner.\textsuperscript{142} positivism.

This thesis has demonstrated how positivism provides an unhelpful fit for ESD adjudication, a stalwart of contemporary Eighth Amendment adjudication for which the moral, decency, component is vital.\textsuperscript{143} Positivism provides a restrictive approach to the inclusion of morality. In straightforward cases, this might be quite sensible since precedent controls the outcome. In hard cases such as novel constitutional evolution, positivism is less helpful.\textsuperscript{144} The positivist’s pedigree test therefore cannot cater for the complexity of hard cases, for which, under a Dworkinian interpretation, only moral questions can find the right answer.\textsuperscript{145} There remain, however, significant challenges to Dworkin’s work. The remainder of this section seeks to address those charges in order properly to appreciate the providence of interpretivism’s abstract, often-idealistic ideas, and their efficacy for Eighth Amendment adjudication.

3.4.1 Subjectivity

A core criticism of Dworkinian theory is that it is guided by unconstrained subjectivity.\textsuperscript{146} This reading of Dworkin seems to be based on his concept of integrity, which requires judges to reach beyond rules into principles such as equality and fairness, requiring a degree of individual discretion by the interpreter.\textsuperscript{147} Guest points out that all legal interpretation has, at its base, the requirement of arguments made to reconstruct an ideal.\textsuperscript{148} Any such arguments rely on individual reasoning and therefore subjectivity. Unlike positivists, Dworkin does not urge judges to use unbridled discretion in seeking answers left

\textsuperscript{142} Joseph Raz, ‘Dworkin: A New Link in the Chain’ (1986) 74 California LR 1103, 1118.
\textsuperscript{143} For a hypercritical response to Raz see Dworkin, TYO (n 42) 1655.
\textsuperscript{144} Dworkin views policies as teleological and based on utility. Livingston Baker, ‘Dworkin’s Rights Thesis’ (1980) 4 Brigham Young ULR 837, 840. Principles are deontological and grounded in the idea of ‘rights as trumps’, whereby only rights can trump other rights. Dworkin, TRS (n 55) 194-195.
\textsuperscript{145} ibid 59-64, where Dworkin wholly rejects any kind of “test”.
\textsuperscript{146} Stephen Guest, ‘How to Criticize Ronald Dworkin’s Theory of Law’ (2009) 69(2) Analysis 1, 3.
\textsuperscript{147} Dworkin, LE (n 55) 190-195 (underlining the connection between integrity and moral authority).
\textsuperscript{148} Guest (2009) (n 146) 3.
by the gaps in hard cases. Instead, judges are encouraged to take interpretive guidance beyond rules by considering community principles of political morality, which are already established within the framework of the law. In order to oppose accusations of unbridled discretion at this juncture, Dworkin insists that moral judgements must be made true ‘by an adequate moral argument for their truth’: moral responsibility. Moral responsibility is ensured where interpreters act with the guidance of ‘the most comprehensive account’ of principles of morality.

To condemn Dworkin for imposing subjectivity is therefore to misunderstand both the underlying precepts of interpretation, and the role of integrity as a rational sieve for discretion. Rationality in this sense is ensured by responsibility. A level of abstraction must be accepted for analysis: real-world judges are objects of fallible human agency with subjective insights and varying world-views, but this should not lead to a dismissal of an aspirational approach to adjudication. Interpretivism, as adopted by this thesis, guides interpreters to strive for moral responsibility and best fit.

3.4.2 FIDELITY

That US citizens should pay respect and “fidelity” to their Constitution is described by Balkin as ‘pretty much an unquestioned good.’ Such loyalty is embedded in political culture, as represented by the Pledge of Allegiance. Levin provides a comprehensive study of the cultural permanence of constitutional fidelity in the US, demonstrating its ‘perceived capacity for preserving civil virtue, and the perceived necessity for recreating that virtue’. He tracks the Constitution’s status as a ‘symbol of popular sovereignty’, with evidenced

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149 He condemns this when discussing the shortcomings of value judgements. Dworkin TRS (n 55) 31-39.
150 Dworkin, JfH (n 23) 37.
151 ibid 38-39.
152 ibid.
153 Rather than merely pose normative values, this thesis will follow the directions outlined above, eventually applying this rational framework to contemporary imprisonment.
156 Daniel Levin, Representing Popular Sovereignty (SUNY 1999) 97.
157 ibid 127.
cultural acceptance of the Constitution as a symbol not just of American community, but of deeply embedded ‘normative agreement among fellow citizens’.  

All judges in the US are required to pledge allegiance to ‘all the duties incumbent … under the Constitution’, and the idea of a Constitution ‘of the people, by the people, for the people’ is fundamental to American representative government. As such, a high degree of fidelity can be expected in the branches of government.

It is clearly destructive, or at least controversial, to describe a legal philosopher’s jurisprudence as invidious to such constitutional allegiance without strong evidence for such a claim. Narrow originalists such as Scalia and Bork refute the constitutional fidelity of moral reasoning such as that found in interpretivism, as it deviates from the text of the Constitution. In fact, even authors with sympathy for constitutional evolution have decried Dworkin on similar grounds. Ackerman, Lessig, and Sunstein, despite having little in common with narrow originalist ideology, each argue that fidelity requires a rejection of Dworkin’s moral reasoning, for interpretivism is seemingly less concerned with faith to the text than with its improvement. This criticism is part of Fleming’s ‘originalist premise’, the assumption that the only method of fidelity to the Constitution is originalism. Under this line of thought Dworkin is a constitutional revisionist, an accusation that misunderstands moral interpretation.

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158 ibid 157.
159 28 USC §453.
161 Robert Bork, The Tempting of America (Free Press 1990) 200 (arguing that ESD invites judges to impose personal philosophy by way of common law constitutional amendments) and Antonin Scalia, ‘Originalism: The Lesser Evil’ (1989) 57 University of Cincinnati LR 849, 854 (condemning Dworkin as ‘nonoriginalist’).
163 For clarity this thesis adopts Barber and Fleming’s scale of fidelist ideology, the right end at which are Bork, Scalia, and Rehnquist and with Dworkin residing at the far left. See Sotirios Barber and James Fleming, Constitutional Interpretation (OUP 2007) 100-102, 101 fn5.
165 Fleming in Hershovitz (ed) (n 162) 31.
The further charge from Lessig, that Dworkin is a constitutional ‘infidel’,\textsuperscript{166} is an ungrounded \textit{ad hominem} attack against an aspirational understanding of law as informed by morality. This thesis accepts that interpretivism is an approach, which aspires to ‘purify and perfect’\textsuperscript{167} rights, and that such aspiration brings challenges due to its abstract and indefinite status, but it is not revisionist because it accepts political morality as having been part of the background framework of the law since its drafting. Notwithstanding, the existence of challenges should not stifle moral ambition, nor should they lead a critic wholly to disregard the interpretive approach. The ‘Rule of Law’ (RoL),\textsuperscript{168} which gathers virtually unanimous support, but brings with it conflicting definitions and components,\textsuperscript{169} provides a familiar example of another aspirational tenet of legal rights and obligations. Naturally, Dworkin approaches the RoL differently from positivists like Raz, and this is unsurprising given the nature of their conflicting views of a ‘dichotomy between form and substance’,\textsuperscript{170} which interpretivism opposes. Nonetheless, even the phrase “Rule of Law” ‘has a power or force of its own. To criticise governmental action as contrary to the rule of law immediately casts it in a bad light’.\textsuperscript{171} Similarly, interpretivism seeks the best light when defining a constraint on government. Rather than amending the constraint, such as the punishments clause, in a revisionist way which disregards history, the interpretivist judge seeks to inform that restriction according to its background morality. Definitions of such morality might differ from judge to judge, but harmony and consistency should come from their unified commitment to interpreting the clause in the best light.

\textsuperscript{166} Lessig (n 164) 1260. Lessig and Sunstein accept that Dworkin’s philosophy provides answers preferable to originalism, but contend that his philosophy is mainly concerned with ‘improving the Constitution in a left-liberal direction.’ Barber and Fleming (n 163) 101. See Lawrence Lessig and Cass Sunstein, ‘The President and the Administration’ [1994] 94 Columbia LR 1, 11 fn35 & 85 fn336.

\textsuperscript{167} Keating (n 91) 528.

\textsuperscript{168} Paul Craig, ‘Formal and substantive conceptions of the rule of law’ (1997) 21 Public Law 467.


\textsuperscript{170} Craig (n 168) 479.

\textsuperscript{171} ibid 487.
Contrary to accusations of infidelity, this thesis makes the claim that a turn to history should not descend into an escape into that history.\textsuperscript{172} In the face of accusations of infidelity to tradition, Dworkin’s theory of interpretation in fact encourages a review of history and precedent, with an added moral lens.\textsuperscript{173} It understands morality to have been an undercurrent in the drafting, adoption, application, and therefore the future interpretation of the Constitution.\textsuperscript{174} Fidelity to the Constitution is thereby upheld by adjudication, which exercises political morality-driven judgments, guided by principles and inclusive of a critical view of historical and cultural sources. Interpretive coherence is ensured by best fit.

Similar falsehoods have been propagated through arguments that interpretivism cannot explain the rigidity of the Constitution. Eisgruber bases this claim on a distinction between history and substance.\textsuperscript{175} As argued previously, for Dworkin there is no distinction between these two concepts. Historical facts cannot possibly be identified as distinct from their moral substance, since that moral substance was present during the Constitution’s framing, and its various amendments since. Arguments against interpretivism founded upon this distinction are therefore viewed by this thesis as contradictory from the outset, for misunderstanding the connection of history with political morality.

While it is understandable that a critic may sustain a challenge against such a theory, which seems to have the answer to everything, it is important to emphasise that Dworkin provides this model as one of best practice. By championing that model, his idealistic judge Hercules is also prone to attack.

\textbf{3.4.3 Hercules}

In \textit{Law’s Empire} Dworkin admits that Hercules, his ‘mythical reigning jurisprude’\textsuperscript{176} best equipped to rise to the interpretive challenge, can be accused of being a ‘fraud’.\textsuperscript{177} This

\begin{footnotes}
\item\textsuperscript{172} As noted by Fleming in Hershovitz (ed) (n 162) 32.
\item\textsuperscript{173} See Dworkin, \textit{FL} (n 59) 2-4.
\item\textsuperscript{174} ibid.
\item\textsuperscript{175} Christopher Eisgruber, ‘Should Constitutional Judges be Philosophers?’ in Hershovitz (ed) (n 162).
\item\textsuperscript{176} Peerenboom (n 80) 95.
\item\textsuperscript{177} Dworkin, \textit{LE} (n 55) 260.
\end{footnotes}
objection hinges on the belief that there is no *one* right answer: a direct contradiction to Dworkin’s ‘right answer thesis’. On this charge, Hercules is exposed as offering only his own opinion about how the law should apply. Dworkin admits that this objection ‘will seem powerful to many readers’, and forges it into two prongs. In the first prong, Hercules’s right answer is fraudulent because political morality is always subjective: there cannot be a single right answer, only varying levels of good and bad answers. Dworkin describes this as the challenge of moral scepticism. Such scepticism is ill founded on the critic’s quest for “subjectivity”, for the reasons outlined previously. Hercules’s omnipotent nature is inherently objective; his judgements of morality and principles are implicit and need not be side-tracked by hyperbolic terminology such as “really” or “objectively”. His endeavour is one of *the* right answer, not *his* right answer.

In the second prong, Hercules’s answer is fraudulent even if it is objective, because he has discovered an answer to the wrong question. By recourse to morality, a Herculean interpreter establishes what she thinks the law ought to be, not what the law is. Again, this constitutes a misunderstanding. Dworkin explains that ‘[t]he spirit of integrity...would be outraged if Hercules were to make his decision in any other way than by choosing the interpretation that he believes best from the standpoint of political morality’. Integrity operates under the assumption that the interpreter is able and willing to value fairness and justice. Hercules is able to do this, and Herculean interpreters must strive to do the same. The resultant answer is indeed one of normative *ought*, but not of personal value.

At this juncture rationalisation with sceptics is difficult, if not impossible. Those who refute the existence of moral values will of course refute the ability of an interpreter (even

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178 ibid 261.
179 ibid.
180 ibid 267.
181 See Subsection 3.4.1.
183 ibid 263.
184 Wayne Morrison, *Jurisprudence* (Routledge-Cavendish 1995) 437, arguing that Dworkin’s Hercules solution is really about questions of legitimacy, ‘rather than purely describing it as an external observer may be attempting’.
one of Hercules’s calibre) to reason with the guidance of principles. Dworkin dedicates a significant portion of Justice for Hedgehogs to arguing that even disparities about the existence of morality are themselves moral arguments, but that meta-moral analysis is far beyond the scope of the current study. For present purposes it is sufficient to note that principles need not compete: in negligence cases, for example, Dworkin admits that both sympathy and responsibility can find a place in the interpretivist search for the right moral answer to difficult legal questions. That does not guarantee ease in finding answers, but it makes their detection possible.

Before moving to the final category of criticism faced by Dworkin’s work it is worth considering another attack on Hercules, that he is a myth; that he is merely idealistic and does not act as a real judge would act. In reality, this criticism sustains, a judge has more reliance on facts and doctrine and must consider the burden of an overflowing docket, worsened by the time-consuming theoretical enquiries Hercules has to undertake. Rather than reject this argument with his traditional defensiveness, Dworkin is helpful on this point, clarifying that Hercules is not designed to be a model judge. Hercules is a method by which to critique the way in which judges interpret rights. Like the RoL, the theoretical judge Hercules offers a view of the best and most aspirational traits in legal interpretation. Tamanaha describes the RoL as ‘just one aspect of a larger social-political complex and what matters is not any one piece on its own but how it all comes together.’ Herculean interpretation is not so different; it is the bringing together of the right political moral values, albeit in the abstract, which sparks the interpretive thrust. The action fuelled by this aspirational method of understanding law can only really lead to a positive force for good, despite its level of abstraction.

185 See Dworkin, JfH (n 23) 15-19, 23-96, and generally.
186 A clash might arise between sympathy towards those suddenly burdened with large claims, and the responsibility for upholding the contract. The outcome which shows the community in the best light is the right one, according to Dworkin, but both of these concerns can be weighed. Guest (2012) (n 37) 71.
187 Dworkin, LE (n 55) 269.
188 Morrison (n 184) 436-437.
189 Dworkin, LE (n 55) 265.
190 ibid 236.
3.4.4 CRITICAL LEGAL STUDIES

The final core criticism of Dworkin to be considered is that of the Critical Legal Studies (CLS) movement, a body of scholars who gained ground following the Civil Rights Movement but whose views, according to one author, have only been considered ‘text-book-worthy’ since 1989. CLS scholars, “Crits”, have claimed Dworkin’s philosophy to be ‘elitist’ and they denounce it for having insufficient concern for those disadvantaged within society. This is misdirection. Dworkin’s Hercules may appear as an elite when taken at face value, but he strives for (and succeeds in finding) results, which are ultimately egalitarian in substance. The communities from which the objects of interpretivism’s inquiry are derived are treated as the ultimate sovereign: the members’ rights are upheld as trumps against the power of the state. It is not Dworkin’s philosophy or Hercules’s judgments, which are elitist, but the rights themselves.

Kennedy, considered one of the founders of the CLS movement, accepts the Dworkinian concept of law infused with morality. Beyond this acceptance, however, the CLS movement rejects Dworkin’s assumption that underlying principles exist within the framework of law. Kennedy describes this contradiction as on a ‘deeper level’, wherein individuals are supposedly divided by their different aspirations for the future. Conversely Dworkin accepts the existence of a right answer, which can be found when recourse to the right sources is made. Without such acceptance, the pursuit of evolutive principles such as the ESD is futile in hard cases. This thesis has consistently argued that the questions posed by Eighth Amendment adjudication requires the interpreter to search for the best moral answer,

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191 For a summary of the core CLS scholars writing in this context see Andrew Altman, ‘Legal Realism, Critical Legal Studies, and Dworkin’ (1986) 15 Philosophy & Public Affairs 205, 216-222.
195 Dershowitz addresses this in Alan Dershowitz, Rights from Wrongs (Basic Books, new edn 2005) 111-119.
196 Tushnet (n 192) 1523.
198 ibid 1685.
199 See (nn 136, 176-180) and accompanying text.
and Dworkin’s right answer thesis is fit for that purpose. Dworkin condemned some unnamed members of the CLS movement for wanting ‘to show law in its worst rather than its best light’, setting it aside as a dam to the waters which interpretivism seeks to navigate in search of the best moral fit. Dworkin later maintained that his noted lack of response to the Crits was intentional, because there was ‘nothing in what they once said for [him] to answer.’

With similar ferocity Gardner has attempted to prove that Dworkin’s theories are in fact positivistic, because Dworkin ‘descriptively incorporate[d]’ moral judgements. Gardner attempts to do so through a series of bewildering Greek letters and elaborate personifications of law as rules. This demonstrates a fatal misunderstanding of Dworkin, who would not accept pre-interpretive data (descriptive positivism) without first filtering it with morality (the interpretive stage), which Gardner fails to do. An interpretivist will only accept guidance from sources and practice when they are seen through a lens of morality, interpretive strategies that rely far more heavily on principles than Gardner acknowledges. Dworkin is an optimist, at least to the extent that his theory is embraced, and those who rival him are thereby pessimists and sceptics. He is staunch in his support of moral and social

200 Dworkin in Hershovitz (ed) (n 162) 275.
201 Dworkin, HC (n 85).
203 In response to a contribution by Jeremy Waldron, ‘Did Dworkin Ever Answer the Crits?’ in Hershovitz (ed) (n 162) 155-181.
204 Dworkin in Hershovitz (ed) (n 162) 304.
205 John Gardner, ‘Law’s Aims in Law’s Empire’ in Hershovitz (ed) (n 162) 222-233. Gardner attempts to apply an equation of Greek notation, textually analysing Law’s Empire (n 55) 52.
206 Ronald Dworkin, ‘Response’ in Hershovitz (ed) (ibid) 305. Dworkin goes on to describe this feat as ‘amusingly mischievous’. ibid.
207 Dworkin in Hershovitz (ed) (ibid) 222-223.
208 Gardner in Hershovitz (ed) (ibid) 309.
209 Another example of those who reject Dworkin’s aspirations is Ely, who argued that ‘[o]ur society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles…that could plausibly serve to overturn the decisions of our elected representatives.’ John Hart Ely, Democracy and Distrust (HUP 1980) 54. As shown by long-established precedent and the prevailing view of this thesis that interpretivism provides the “best fit” for the Eighth Amendment, Ely’s refutation of the providence of SCOTUS as an interpreter is antithetical to the principle of ESD.
improvement,\textsuperscript{211} and has ‘convincingly argued’\textsuperscript{212} that a number of provisions found in the Bill of Rights, either expressly or by interpretation,\textsuperscript{213} operate as ‘liberal-egalitarian trumps over’\textsuperscript{214} governmental policy.\textsuperscript{215}

That Dworkin is idealistic and non-empirical is not a criticism, it is a commendation of his resolute defence of morality and something that should and will be embraced. It has been shown that communal principles of political morality are vital to the Eighth Amendment’s pursuit of ESD. Dworkin provides a coherent view of such a pursuit, and this thesis deems it fit for the interpretive assessment intended in the following chapters. To assess how the Court has and should further evolve the punishments clause, the objective indicia available to interpreters must first be assessed through the theoretical framework developed by this chapter.

3.5 \textbf{Conclusion}

Dworkin may not have converted many disciples,\textsuperscript{216} and the critics highlighting the shortcomings of his theories are not wholly without merit, but a piece of advice endorsed by Fleming becomes relevant at this stage: ‘[d]o as Dworkin says, not as he does’.\textsuperscript{217} Dworkin’s adjudicative theories arguably did not always do the “fit” work called for by his own tenets of interpretivism, but to use that flaw as a charge against his jurisprudence is again to over-expect of the very idea of theory. Instead Dworkinian interpretivism provides the “best fit” for considerations of evolving standards of decency. Throughout this thesis respect will be paid to the idea of general, communal will, not merely pre-interpretive statistics about

\begin{itemize}
\item \textsuperscript{211} Exemplified by \textit{Brown} (n 111) which Dworkin describes as an embarrassment to positivism, (Dworkin, ‘The Bork nomination’ (n 113)) for its moral improvement of the majoritarian standard. Interpretivism seeks to refine and improve the law and, subsequently, society.
\item \textsuperscript{212} George Letsas, ‘Dworkin on Human Rights’ (2015) 6 Jurisprudence 327, 333.
\item \textsuperscript{213} The Ninth Amendment provides for ‘[t]he enumeration in the Constitution, of certain rights’. US Const, Amend VIX. See \textit{Griswold v Connecticut} 381 US 479 (1965) 485, where SCOTUS found a right to privacy contained in the Constitution’s ‘penumbral rights’.
\item \textsuperscript{214} Letsas (2015) (n 212) 333.
\item \textsuperscript{216} Thom Brooks, ‘Book Review’ (2006) 69 Modern LR 140. Brooks remarks that ‘[i]t is quite rare to find anyone in the field identifying herself as a “Dworkinian”’.
\item \textsuperscript{217} Fleming in Hershovitz (ed) (n 162) 35, endorsed as ‘very good advice’ by Dworkin in Hershovitz (ibid) 294.
\end{itemize}
collectivity such as those provided by quantitative, morality-devoid empiricism.\textsuperscript{218} For the ESD principle underlying the punishments clause to have any real evolutive value beyond its text, deference must be shown to the morality inherent in its framework. Any less is to risk the Eighth becoming a mere ‘parchment barri[e]r against the encroaching spirit of power’.\textsuperscript{219}

Respect for the morality underlying the punishments clause can be sustained by making the case for legal sources and social facts to be sifted by a ‘rational sieve’,\textsuperscript{220} which is developed from a more morally principled basis than the strictures of positivism and was justified through Section 3.2. The details of that sieving process need not be repeated, and in fact to bracket them into an empirical-style formula is tantamount to hypocrisy, since interpretivism rejects any form of “test”. Notwithstanding, this thesis adopts the following schema as a guide for clarity of explanation:

\textit{Pre-interpretive stage:} data comprising rules, practices, precedents and other sources of social normativity are considered to constitute community principles of political morality, which are established within the legal framework of the law. These are identified and held in their best possible light.

\textit{Interpretive stage:} moral principles identified by this process are viewed as coexisting with rules to form law. Judgements of political morality (the “moral lens” or “rational sieve”, as guided by moral responsibility and political integrity – consistency in decision-making) are applied to the pre-interpretive data. Integrity is essential to this process, whereby rights and duties are interpreted through consideration of the core principles of justice, fairness, and due process.

\textit{Post-interpretive stage:} the interpreter views the object of her interpretation in the best moral light to reflect the greatest possible conception of political morality. This permits, even encourages refinement, improvement, consistency, and ultimately an expression of legal rights at their moral zenith.

\textsuperscript{218} Dworkin, \textit{LE} (n 55) 189.
\textsuperscript{220} Dworkin, \textit{TRS} (n 55) 252.
Turning to political morality in adjudication, Dworkin describes imprisonment as an example of a ‘dramatic violation of dignity’,\textsuperscript{221} and torture as ‘the most profound insult to [dignity]’,\textsuperscript{222} where dignity is a vital component of morality. The question of whether solitary confinement is an example of such a violation will be investigated in Chapters VI and VII. Through the framework outlined above, this thesis will argue in the affirmative, and will make the case that such a moral violation gives rise to a constitutional infirmity. For such a conclusion to be met, it is essential that scrutiny of the prevailing sources of political morality in ESD jurisprudence (such as those exposed in Chapter II) is first provided.

\textsuperscript{221} ibid 299. \\
\textsuperscript{222} ibid 337.
CHAPTER IV

MAJORITARIAN STATE COUNTING

4.1 INTRODUCTION

In the previous chapter positivism was shown to contribute an unsatisfactory model for Eighth Amendment interpretation. Instead a ‘fusion of constitutional law and moral philosophy’ was sought, by reference to Dworkin’s theory of interpretivism. Morality, it was explained, is best understood as a combination of core values of human dignity. With respect to legal interpretation, interpreters draw on a form of ‘political morality’, providing them with the tools to dig ‘deeper into the law to find the strongest moral and political principles that could justify an authoritative decision.’ That endeavour is known as reading law as integrity, which understands rights and duties as having been expressed by the community from which they flow, and therefore interpreted through consideration of core principles embedded in that community. Elements of a living constitution and originalism are both demonstrated by this approach, but its overriding character is one of morality.

The principal source of political morality on which the Court has relied in Eighth Amendment jurisprudence manifests as a form of state counting. That source, comprising a nose-count of the fifty state jurisdictions, plus the federal government and the military, forms the subject matter of this chapter. Before analysing state counting, one further theoretical concept must be defined, that of ‘coherence in principle’. Once this has been introduced, Section 4.2 will provide an overview of how the Court has so far relied on state counting, in the pre-interpretive stage of Eighth Amendment analysis. Section 4.3 will then assess the use

1 Ronald Dworkin, Taking Rights Seriously (TRS) (Gerald Duckworth 1977) 149.
2 Ronald Dworkin, Justice for Hedgehogs (Belknap 2011) 62-70.
4 Thomas Simon, Law and Philosophy (McGraw-Hill 2001) 139-140.
5 Ronald Dworkin, Law’s Empire (LE) (Hart 1986) 164-165.
of state counting under interpretivism; whereafter Section 4.4 will provide a conclusion regarding this indicia’s propensity to inform the evolving standards of decency (ESD) underlying the punishments clause. A framework for the use of state counting intended later in this thesis will also be developed in the conclusion to this chapter.

4.1.1 COHERENCE IN PRINCIPLE

Interpretivism describes the way that judges read political morality into law ‘by appealing to an amalgam of practice’, \(^6\) and in combination with principles of integrity. One such principle of particular relevance to this chapter is consistency, or ‘coherence in principle’. \(^7\) Since the American system of democracy provides for one-person-one-vote, \(^8\) for example, it can be argued that interpretivist coherence should extend to state counting, compelling the Court to give equal weighting to all citizens. As a matter of practicality, however, when adjudicating over this one-person-one-vote standard it is unworkable, and it is unsurprising that the Court has never adopted it. \(^9\) Short of a nationwide referendum on every permutation of every issue (in the death penalty context this could include race, gender, age, methods, appeals, intellectual capacity, aggravation, mitigation, to name a few potential considerations) weighting citizens equally in this way is impossible.

The next best alternative could therefore be to gauge the harmony between state legislatures, the elected representatives of the People. That process is reflected by the Constitution’s procedure for legislative ratification of its Amendments, requiring a supermajority (two-thirds) of the votes in both houses of Congress to propose, and three-quarters to approve an Amendment, or an equally burdensome state convention option. \(^10\) In the judicial sphere, specifically with respect to Eighth Amendment interpretation, it is that method, majoritarianism, which has found favour with a majority of the Justices.

\(^6\) Dworkin, TRS (n 1) 36.
\(^7\) Dworkin, LE (n 5) 164-165.
\(^8\) See Reynolds v Sims 377 US 533 (1964).
\(^9\) Justice Scalia has noted this in dissent. Atkins v Virginia 536 US 304 (2002) 346: ‘the fact that 49% of the legislators in a State with a population of 60 million voted against the bill should be more impressive than the fact that 90% of the legislators in a State with a population of 2 million voted for it.’ (Original emphasis).
\(^10\) US Constitution, Article V.
Majoritarianism in this setting manifests as jurisdictional or “state counting”, where the 52 American systems are considered to symbolise national consensus on a given legal issue, for ESD interpretation. As the next section will now show, far less than a supermajority of concurring states has been held sufficient by SCOTUS to justify evolutive interpretation of the Constitution’s punishments clause. In Section 4.3 this thesis will discuss limitations to majoritarian methods, including the counter-majoritarian problem, before arguing that a much more careful use of state counting is required for future adjudication of the punishments clause.

4.2 THE COURT’S USE OF STATE Counting

Stacy notes that, since state-imposed punishment is applied only once guilt has been determined, local sentencing procedures have naturally been followed, and those were set in place by democratic processes at the state level.11 As such, it is reasonable to expect judicial restraint when deferring to states’ legislative consensus, and this section will show this to have been emphasised throughout Eighth Amendment case law. Legislatures, it seems obvious to conclude, are far better placed to make local, socio-politically oriented decisions surrounding their states’ punishment regimes than the federal judiciary is.12 In simple terms, by relying on jurisdictional analyses to inform ‘objective indicia of society’s standards’13 the Court maintains judicial restraint and defers to the majority in its decision-making. In reality, however, the picture is far more complex.

On a theoretical level, this thesis has rejected a majoritarian approach to constitutional interpretation. The mere quotation of statistics about the populace, as measured by state counting, is insufficient for reasons which Section 4.3 will examine. First, a better appreciation of the Court’s treatment of state counting must be developed. It will not be argued that state counting is wholly without merit, but that the way in which the Court has

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12 ibid 522.
dealt with this data is inadequate under an interpretivist assessment. The present section will
demonstrate the inconsistency with which SCOTUS has treated legislative consensus, by
referring to Eighth Amendment jurisprudence in its principal arena, the death penalty. Section
4.3 will then point to some of the immediate interpretivist concerns surrounding state
counting in order to provide a conclusion regarding this method of ESD analysis and its
status as indicative of political morality.

4.2.1 Capital Crimes

In *Coker v Georgia*, the Court reviewed the national picture with respect to crimes punishable by death. Considering
Georgia’s post-*Furman v Georgia* statute once again, the Court focused on the state code’s
provision for death as a punishment for rape. Ehrlich Coker had been charged with escaping
custody, armed robbery, vehicle theft, kidnapping, and rape, and was sentenced to death by
electrocution on only the rape count. Before agreeing with Coker’s contention that death was
too severe as a penalty for the offence of rape, the Court undertook an analysis of nationwide
legislative policies.

Delivering the judgment for a 7-2 majority, Justice White first utilised a simple
majority to frame his consensus argument. White noted that it had been more than half a
century since a ‘majority’ of states, more than 25, had provided for capital punishment in
such circumstances. He supported this statistic with the fact that, by 1971, only 16 states
authorised capital punishment for rape. Bolstering a consensus claim even further, White
referred to the Court’s statement in *Gregg* that the post-*Furman* legislative response had

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26-2001, 26-2201, 26-3301 (1972) was held first constitutional in *Gregg* (n 15).
17 *ibid* § 26-2001: ‘[a] person convicted of rape shall be punished by death or by imprisonment for life, or by
imprisonment for not less than one nor more than 20 years’.
18 *Coker* (n 14) 587.
19 *ibid* 593.
20 *ibid*, citing Raymond Bye, ‘Recent History and Present Status of Capital Punishment in the United States’
21 *Coker* (n 14) 593.
demonstrated a ‘marked indication of society's endorsement’. Similarly, in *Coker*, the Court found it a ‘telling datum’ that none of the pre-*Furman* capital state schemes that had originally excluded rape had altered their post-*Furman* statutes to subsequently provide for it. Furthermore, of those 16 states which had included rape as a capital offence in 1971, in addition to Georgia only two others contained such provisions in their post-*Furman* statutes: North Carolina and Louisiana.

Both of those states saw their entire capital schemes struck down by *Gregg’s* companion cases, and their post-*Gregg* attempts at legislation removed rape as a capital crime. As a consequence, Georgia stood alone in *Coker* as the sole American jurisdiction to permit the execution of adult-rapists in 1977. Concluding, Justice White noted that although there was no demonstration of unanimity among the states, the Court was satisfied that this majoritarian analysis evidenced a very clear rejection of Georgia’s policy. Dissenting, Chief Justice Burger ‘scolded the plurality for employing a narrow timeline in its examination of state capital rape statutes’, claiming that by restricting its focus to the five years since *Furman*, SCOTUS had provided insufficient time for an evaluation of evolving standards among the legislatures. Instead, Burger would have looked to the accepted practice before *Furman*, ‘where more than one-third of American jurisdictions ha[d] consistently provided the death penalty for rape’. Nonetheless, the plurality concluded that the contemporary, post-*Furman* ‘legislative rejection of capital punishment for rape’ was sufficient to evidence that ‘decency’ had evolved beyond accepting death as a proportionate punishment for the rape of adults.

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22 ibid 594, quoting *Gregg* (n 15) 179-180.
23 ibid.
24 Georgia, North Carolina, and Louisiana.
26 ibid.
28 *Coker* (n 14) 614.
29 ibid.
30 ibid 597.
31 ibid 603.
In *Enmund v Florida*, discussed in Chapter II, the Court invoked *Coker* when discussing the proportionality of executing felony murderers who did not themselves ‘kill, attempt to kill, or intend that…lethal force [would] be employed’. In *Enmund* the Court struck down a Floridian provision, under which a non-triggerman accomplice (here a driver) in a double first-degree murder had been sentenced to death. Lending similar weight to state counting as he did in *Coker*, Justice White began his majoritarian analysis by excluding the states that did not provide for similar capital schemes to Florida. In total, only eight US jurisdictions would have sentenced to death a defendant in Enmund’s situation. In nine others an accomplice guilty of felony murder could not receive the death penalty absent aggravating circumstances. Even including these nine in the consensus count, now totalling 17, Justice White concluded that only those states would permit a defendant such as Enmund to be sentenced to death.

Having undertaken the state counting process and concluding that there was concord between ‘most legislatures and juries’, the Court forbade imposition of the death penalty in Enmund’s circumstances, a murderer who did not himself kill or intend to kill. To bolster its judgment the majority included all state jurisdictions in the count, regardless of their capital punishment provision. As a consequence, just 17 of 50, one-third, adopted a scheme similar to Florida’s. This is represented more clearly by Figure 4.2.

The most recent case in which the Court considered the constitutionality of capital punishment for a particular type of crime was *Kennedy v Louisiana*. While *Coker* had barred the death penalty for those convicted of adult-rape, and *Enmund* had removed felony murderers from potential capital charges, *Kennedy* concerned the last non-homicidal bastion
of capital crimes jurisprudence: child-rape. Writing for the *Kennedy* majority, Justice Kennedy extended *Coker*’s deference to majoritarian state counting in ruling that death was unconstitutional when applied to any non-homicidal offence. The Justices, emphasising that the ESD enquiry was not limited to identifying a societal consensus, nonetheless engaged in a lengthy discussion of the majoritarian position among the states.

Tentatively describing any identifiable consensus as having been merely ‘a relevant concern’ in *Coker* and *Enmund*, the majority took the same track in *Kennedy*. The judgment noted the scarcity of capital punishment for child rape, pointing out that the most recent execution of a child-rapist was in Missouri, four decades earlier. Moreover, following *Furman* in 1972, only six states created capital child-rape provisions, all of which had since been invalidated for various procedural errors. Louisiana was the first to re-introduce child rape as a capital offence in the post-*Furman* era, doing so in 1995. Five states followed suit between 1999 and 2007. Instead of focusing on this small minority, Justice Kennedy noted that 44 of 50 states still did not permit the execution of child-rapists. Moreover, while the Federal Death Penalty Act of 1994 had expanded the number of capital crimes available to the national government, in an era of punitiveness described in Chapter II, non-homicidal child-rape was still excluded.

42 ibid 2664-2665.
43 ibid 2650 (Kennedy, J) ‘In these cases the Court has been guided by “objective indicia of society's standards, as expressed in legislative enactments” The inquiry does not end there, however.’ (Quoting *Roper* (n 13) 563).
44 ibid 2651.
45 ibid.
46 *Coker* (n 14) (Georgia); *Woodson* (n 25) (North Carolina); *Roberts* (n 25) (Louisiana); *Collins v State* 550 SW2d 643 (Tenn 1977) (Tennessee); *Buford v State* 403 So.2d 943 (Fla 1981) (Florida); *Leatherwood v State* 548 So 2d 389 (Miss 1989) (Missouri).
49 *Kennedy* (ibid) 2652.
50 (18 USC § 2245).
Despite identifying what Justice Alito described in dissent as ‘a new evolutionary line’\textsuperscript{51} in support of Louisiana’s scheme, the *Kennedy* majority held that such a demonstration was too slow and insignificant to persuade them that such change indicated Eighth Amendment evolution. A consensus prevailed, and while it indicated ‘divided opinion...on balance’\textsuperscript{52} the scales were tipped against the practice. Consequentially, the Court barred the death penalty for all non-homicidal offenders, including child-rapists, further vanishing the death penalty towards an ever-nearing end.

While *Kennedy* represents the penultimate restriction of “capital crimes”, leaving only murder, majoritarian state counting has permeated another principal area of the Eighth Amendment. The classes of “capital offenders” cases to enjoy state counting-informed ESD analysis were introduced in Chapter II, but the details of the Court’s method in those cases was reserved until a theoretical framework had been established in Chapter III. This chapter will now consider how the Court has engaged with majoritarian methodology when restricting the death penalty for more vulnerable offenders.

**4.2.2 CAPITAL OFFENDERS**

In *Ford v Wainwright*,\textsuperscript{53} SCOTUS first expanded Eighth Amendment proportionality review to classes of offenders. The line of cases initiated by *Ford*, considering whether individuals with personal characteristics which lessened their culpability should be executed, will now be considered, further demonstrating how the Court has engaged in majoritarian methodology when narrowing the scope of the national death penalty.

**4.2.2.1 INTELLECTUAL DISABILITY**

In *Ford*, SCOTUS held that the Eighth Amendment prohibits execution of the insane. National consensus formed a small but important part of the holding, with Justice Marshall

\textsuperscript{51} ibid 2669 (Alito, J, dissenting): ‘If, as the Court seems to think, our society is “[e]volving” toward ever higher “standards of decency,” these enactments might represent the beginning of a new evolutionary line.’ (Quoting ibid 2664-2665).
\textsuperscript{52} ibid 2653.
\textsuperscript{53} 477 US 399 (1986).
noting that, since the Court had last discussed the issue of sanity in executions in 1950,\textsuperscript{54} interpretation of the punishments clause had ‘evolved substantially.’\textsuperscript{55}

Noting an originalist ‘ancestral legacy’\textsuperscript{56} against execution of the insane, Justice Marshall’s majority held that this centuries-old legacy had ‘not outlived its time.’\textsuperscript{57} While Ford asked a procedural question regarding the determination of legal insanity, the adequacy of those procedures was dependent on a further, substantive, constitutional question surrounding the state’s power to execute insane defendants. Responding in the negative, the Court held that the Eighth Amendment restricted substantively the state’s ability to execute such prisoners. The majority noted that there was an ‘intuition’ against applying this penalty in such circumstances; that it ‘simply offends humanity.’\textsuperscript{58} Reinforcing the majority’s moral “intuition” was majoritarian data derived from a state legislative consensus, unanimous in its opposition. Concluding, the Court found itself compelled by such widespread condemnation to find that the Constitution prohibited the execution of the insane in all circumstances, another display of judicial deference to majority practices.

The next case where SCOTUS considered the existing landscape of capital mental capacity jurisprudence was Penry v Lynaugh.\textsuperscript{59} A significant holding for its treatment of state consensus under the Eighth Amendment’s ESD principle, the consensus found among state legislatures in Penry painted a very different picture to that in Ford, demonstrating widespread applications of capital punishment against offenders with intellectual disabilities (ID). ID is a form of mental incapacity which often falls short of legal insanity and, therefore, reprieve, but nonetheless reduces understanding and culpability. Penry’s defence claimed he

\textsuperscript{54} Solesbee v Balkom 339 US 9 (1950) 12; noting also that ‘[p]ower of executive clemency in this country undoubtedly derived from the practice as it had existed in England,’ but fixating on the due process question under the Constitution, since the Eighth had not been incorporated. See Geoffrey Hazard Jr and David Louisell, ‘Death, the State, and the Insane’ (1962) 9 ULCA LR 381, 385 fn14.

\textsuperscript{55} Ford (n 53) 405.

\textsuperscript{56} ibid 408; Hazard and Louisell (n 54) (reviewing the common law position).

\textsuperscript{57} ibid.

\textsuperscript{58} ibid 409.

\textsuperscript{59} 492 US 302 (1989).
had ‘the reasoning capacity of a 7-year-old’, yet his sentence had been upheld at every appellate level. First considering the common law position to be ‘well settled’ against execution of the insane, Justice O’Connor noted that offenders who were ‘profoundly or severely retarded and wholly lacking the capacity to appreciate the wrongfulness of their actions’ were ‘not likely to be convicted or face the prospect of punishment’.

Penry, however, had unsuccessfully argued for such (Ford) protection. Justice O’Connor disagreed with Penry’s claim that an ‘emerging national consensus’ prohibited executing offenders with intellectual disabilities under the majoritarian element of the ESD assessment. Instead, she held, only one state limited executions in those circumstances, and another was considering a similar provision that year. The majority agreed that this figure, two states out of 50, did not demonstrate a sufficient national consensus against such executions. The majority opinion did acknowledge that a consensus in favour of Penry’s claim could eventually ‘find expression in legislation’. Indeed, such a change in legislative appetite arrived, perhaps sooner than expected, in 2002 in the form of Atkins v Virginia.

Atkins provided the most striking contemporary example of the Eighth Amendment’s evolution through state counting. Reversing Penry after just 13 years, the Court found an emerging national consensus against the execution of offenders with intellectual disabilities. To evolve the Eighth Amendment away from a consensus settled so recently broke from earlier ESD tradition. In Coker and Ford the statistics had been long-settled. Instead, in Atkins, the Court relied on a high-velocity trend; a ‘recently-reached consensus’. At what point in time a trend is ‘settled’ and to what degree it can be said to be truly stable are both

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60 ibid 328.
61 ibid 331.
62 ibid 333.
63 ibid 329.
64 Georgia (Ga Code Ann §17-7-131(j) (Supp 1988)).
65 Maryland (Md Ann Code, Art 27, §412(f)(1) (1989)).
66 Penry (n 59) 334.
67 ibid 335.
70 ibid.
issues arising from the requirement of a temporal component for consensus-finding, issues that will be returned to in Section 4.3.

Delivering the Atkins judgment, Justice Stevens drew attention to the fact that, although Penry was scarcely over a decade old, much had changed. Following Georgia and Maryland, the only two states which had banned the execution of intellectually disabled inmates in 1989, nine states adopted similar legislation between 1990 and 1995. From 1998 to 2001, a further seven enacted “counter-Penry” legislation. This total, 18 state statutes against the execution of intellectually disabled individuals, or 32 of 50 when including those which provide no death penalty at all, was the lowest consensus thus far required by the Court for ESD evolution: Coker had demonstrated 49 in support of the Court’s conclusion; Enmund, 33; and Kennedy, 44. Nonetheless, the Court found Atkins’s demonstration sufficient to evidence an evolved standard of decency.

Justice Scalia, in dissent, described this demonstration as ‘embarrassingly feeble’. Justice Stevens insisted, however, that the proportion of states was far less significant than the ‘consistency of the direction of change’; in this case, such direction was demonstrated by the legislative shift in favour of Atkins. The Court also noted a complete absence of any states introducing capital punishment for intellectually disabled offenders since Penry, noting that this ‘unquestionably reflect[ed] widespread judgment’ regarding the culpability of intellectually disabled offenders, providing them with constitutional protection against execution.

Atkins had demonstrated that the state counting assessment of ESD had taken on a new, aggressive form. No longer would SCOTUS look to mathematical majorities, but also to the velocity of legislative change, an important addition to the consensus element which

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71 Atkins (n 68) 314.
72 ibid, citing statutes from Arkansas; Colorado; Indiana; Kansas; Kentucky; New Mexico; New York; Tennessee; and Washington.
73 ibid, citing Arizona; Connecticut; Florida; Missouri; Nebraska; North Carolina; South Dakota.
74 ibid 344.
75 ibid 315.
76 ibid 317.
77 ibid 321.
enabled the Court to engage in evolutive interpretation beyond the constraints of strict majoritarianism. In parallel to this reformed approach a number of further sources of ESD were starting to gain steam due to the Court’s renewed activism in the capital sphere. These will be returned to in Chapter V. Age was another characteristic to find favour in the Court’s punishments clause jurisprudence in 1988, where a consideration of the effects of youth would come to the fore.

4.2.2.2 JUVENILES

In addition to its capital guidance in the “intellectual disabilities” category of offenders, SCOTUS has considered the constitutionality of executing young offenders. In Thompson v Oklahoma the Court heard argument in the case of a boy who had, when 15, committed first-degree murder by beating, stabbing, and shooting his victim, eventually throwing them into a river. Despite qualifying as a child under an Oklahoman capital statute, the severity of Thompson’s crime led to his conviction as an adult, and he was sentenced to death.

When his appeal reached the Supreme Court, Thompson’s defence argued that to execute a minor for a murder committed when he was under-16 would violate the punishments clause. Justice Stevens delivered the Court’s judgment, lending significant weight to nationwide legislative consensus in his consideration. Beginning his argument by pointing to ‘complete or near unanimity’ among the states, Stevens noted numerous examples of 15 year olds being treated as minors in a variety of legal issues, such as their nationwide inability to vote, serve on a jury, and, with one exception, drive without parental consent. No clear line, however, had been drawn with regards to the capital punishment question posed by Thompson. Of the states which provided for the death penalty, 36 at the

79 State v Thompson 724 P2d 780 (Okl 1986).
81 Thompson (n 78).
82 ibid 824.
83 ibid 825.
time, only 18 expressed a minimum age for execution. Confining his attention to those 18 states, Stevens found all of them to set the minimum age at 16. In addition, the most recent execution of an under-16 had been in 1948, further demonstrating a societal shift away from such practices. ‘[I]t would offend civilized standards of decency’, and consequently the Constitution, the Court held, to permit the execution of minors.

In a departure from the earlier cases of Coker and Enmund, where SCOTUS had looked to the full national picture when carrying out state counting, not only did the Thompson Court count state laws, it also counted imposition of the death penalty by juries. Moreover, Stevens’s majority narrowed the majoritarian assessment significantly. If taken as a proportion of the 50 states (one-third), the mathematical consensus drawing a line in Thompson is less compelling than Stevens purported: just 18 of 50, or 36%. It is noteworthy that in capital jurisprudence the Court is inconsistent in the way it weighs and measures majoritarianism. As mentioned earlier in this chapter, state counting is clearly not as straightforward as it might at first seem. If it is to form a substantive part of the ESD assessment under the theoretical approach of this thesis, it is becoming clear that more rigour must be applied than merely taking mean averages or 50%+1 majorities, methodological issues to which this chapter will soon return.

After Thompson the Court was soon faced with another age of execution challenge, this time regarding the constitutionality of executing offenders who were juveniles, under-18, at the time of their crimes. In Stanford v Kentucky a majority sided with Justice Scalia, who had dissented in Thompson. Scalia engaged in evolutive analysis despite his originalist predilections, looking to state statutes in a showing of judicial deference. Again counting only the active death penalty states, which by this point totalled 37, Scalia noted that just 15

84 ibid 826-827.
86 ibid 168, 190. SCOTUS also noted that five of the 1,393 offenders sentenced to death between 1982 and 1986 (0.0036%) and 20 during the 20th century were under-16.
87 Thompson (n 78) 830.
89 ibid 370-371
limited executions to under-16s, and only 12 barred under-17s, concluding that the Constitution permitted the execution of juveniles.\textsuperscript{90} When taken as a national count, which the Court conveniently evaded in \textit{Stanford}, the data would show 28 states against executing under-16s, and 25 in the case of under-17s; at least 50\% of state jurisdictions.

Though once again faced with a scarcity of actual impositions of this legislative ‘consensus’,\textsuperscript{91} which could in itself have led to an argument of substantive inactivity among the states, Scalia’s majoritarian argument prevailed. Scalia held that the dearth of juvenile executions reflected not a restriction of such punishment in principle, but an intention to reserve its use for the most deserving of young offenders.\textsuperscript{92} Comparing the figures in this case (15 of 37 active states, or 12 of 37) to the successful 18 of 36 showing in \textit{Thompson} underscores the difficulty of predicting a national consensus solely on the basis of a majoritarian state count. Combining this precedent with that from \textit{Atkins} (where 18 of 36 active states was held sufficient) nods to 50\% or more (a simple majority) of active states as the Court’s accepted tipping-point for state counting based evolution, assisted by reform-velocity. A further demonstration of the fragility and incoherence of the state counting method was provided in 2005, in \textit{Roper v Simmons}.\textsuperscript{93}

In \textit{Roper}, the final case to be considered by this chapter, Justice Kennedy reconsidered \textit{Stanford}. In the same way that a majority had treated \textit{Furman} in \textit{Gregg}, and \textit{Thompson} in \textit{Atkins}, in \textit{Roper} the Court looked to legislative change since its earlier decision upholding the juvenile death penalty. While the bulk of academic commentary arising from \textit{Roper} focuses on the influence of transnational comparativism on the majority’s holding,\textsuperscript{94} an element of ESD discussed in Chapter V, the judgment also demonstrated a concession in

\begin{itemize}
\item \textsuperscript{90} Ibid.
\item \textsuperscript{91} Only 45 of 2,106 death sentences from 1982 to 1988 were imposed on under-18s. Victor Streib, ‘Imposition of Death Sentences For Juvenile Offenses, January 1, 1982, Through April 1, 1989’ [1989] Cleveland-Marshall College of Law 1, 2.
\item \textsuperscript{92} \textit{Stanford} (n 88) 374.
\item \textsuperscript{93} 543 US 551 (2004).
\item \textsuperscript{94} See Roger Alford, ‘\textit{Roper v. Simmons} and Our Constitution in International Eqipoise’ (2005) 53(1) University of California Los Angeles LR 1, 26; an extensive review in Ryan Black, Ryan Owens, Daniel Walters and Jennifer Brookhart, ‘Upending a Global Decline’ (2014) 103(1) Georgetown LJ 1, 10.
\end{itemize}
national state counting terms. Rather than the absolute minimum 50% of states supporting an evolutive direction seemingly established by Eighth Amendment precedent, the Court in *Roper* accepted a lower bar.

Of the 38 active states (those with the death penalty), only 18 set a minimum age for execution,\(^95\) a very similar statistic to those found in *Thompson* and *Atkins*, though there were two subtle differences. First, *Roper*’s 18 of 38 is a slightly more tenuous consensus than the 18 of 36 demonstrated in *Atkins*, given that the proportion in *Roper* drops under half, if half is to be considered convincing at all. Granted, including non-death penalty states provides more weight to the Court’s consensus argument (30 of 50 outright rejecting juvenile executions), but when contrasted with *Enmund, Kennedy, Coker*, and *Ford* (see Figure 4.2) it becomes clear that SCOTUS has lowered the floor for a finding of consensus, whichever way the numbers are cut.

Second, and perhaps more importantly, the rate of change argument which was so convincing to the majority in *Atkins*, where 16 states had legislated in one direction over 13 years, was invoked in *Roper*, despite a less compelling five-state change in 15 years.\(^96\) Justice Scalia was vehement in his dissent, marking the majority opinion as providing ‘a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here’\(^97\) and concluding that the result would ‘crown arbitrariness with chaos.’\(^98\) While the *Roper* decision itself might have expounded the moral component of ESD, something this thesis insists is vital to interpretation of the punishments clause, Scalia’s condemnation of the majoritarian method clearly does have substance. Inconsistency, arbitrary line-drawing, and the other concerns raised by this section will be addressed in the following section, whereby this chapter will attempt to provide a conclusion regarding the providence of state counting in interpretivist adjudication.

\(^{95}\) *Roper* (n 93) 564.
\(^{96}\) ibid 565.
\(^{97}\) ibid 616.
\(^{98}\) ibid 630.
### Figure 4.2: Level of Consensus Established in Capital Evolving Standards Cases

<table>
<thead>
<tr>
<th>Categories &amp; Party Names</th>
<th>State Count</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Capital Crimes</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Coker v Georgia</em> (1977)</td>
<td>49/50* against DP† for rape of an adult</td>
<td>Evolution</td>
</tr>
<tr>
<td><em>Enmund v Florida</em> (1982)</td>
<td>33/50 against DP for felony murder</td>
<td>Evolution</td>
</tr>
<tr>
<td><em>Kennedy v Louisiana</em> (2008)</td>
<td>44/50 against DP for rape of a child</td>
<td>Evolution</td>
</tr>
<tr>
<td><strong>Offenders: Mental Capacity</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Ford v Wainwright</em> (1986)</td>
<td>50/50 against DP for insane offenders</td>
<td>Evolution‡</td>
</tr>
<tr>
<td><em>Penry v Lynaugh</em> (1989)</td>
<td>2/50 against DP for intellectually disabled</td>
<td>No Evolution</td>
</tr>
<tr>
<td><em>Atkins v Virginia</em> (2002)</td>
<td>32/50 against DP for intellectually disabled</td>
<td>Evolution</td>
</tr>
<tr>
<td><strong>Offenders: Juveniles</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Thompson v Oklahoma</em> (1988)</td>
<td>32/50 (18/18αα) against DP of &lt;16s</td>
<td>Evolution</td>
</tr>
<tr>
<td><em>Stanford v Kentucky</em> (1989)</td>
<td>15/37α against DP of &lt;17s 12/37α against DP of &lt;18s</td>
<td>No Evolution</td>
</tr>
<tr>
<td><em>Roper v Simmons</em> (2005)</td>
<td>18/50 against DP for intellectually disabled</td>
<td>Evolution</td>
</tr>
</tbody>
</table>

* States
† Death penalty
‡ Confirmation of existing common law
α Of active DP states
αα Of active DP states which expressed a minimum age
4.3 An Interpretive Assessment

As discussed in Chapter III, Dworkin provided ‘soaring, confrontational celebrations of individual rights as broad antimajoritarian immunities’. In *Freedom’s Law* he maintained that rights override utilitarian policy goals or majority preferences, ‘even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done.’ Under the interpretivist understanding adopted by this thesis, the principle of rights as trumps pervades moral interpretation of the Constitution, and overrides majoritarianism. Such an approach therefore adheres to counter-majoritarian interpretation, where judicial review upholds individual rights on a moral, rather than a popular basis.

This section will demonstrate how the data provided by state counting, without the assistance of a rational ‘sieve’, renders mere statistics of collectivity rather than a rational form of communal will. To identify such communal will the Eighth seeks moral answers to legal questions, achieved when the interpreter (SCOTUS) makes references to community standards and principles which show the law in its best moral light. This section will attempt to apply interpretivism to the discussion, drawing on the shortcomings of the state counting approach in order properly to appreciate how to strengthen such analysis. It will be shown that majoritarian statistics are not without merit, but that care must be taken if they are to provide a moral basis for adjudication.

4.3.1 The Counter-Majoritarian Difficulty

An early proponent of the ‘majoritarian thesis’, that the Court's primary function is to enforce majority views, was Dahl. He noted that ‘the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking...
majorities of the United States.\textsuperscript{106} Prominent supporters of Dahl’s thesis, who identify as “Popular Constitutionalists”, include Friedman, Levinson and Balkin.\textsuperscript{107} They favour majoritarianism as it should result in greater political participation due to direct democratic input by the people’s elected representatives, into local legislation which then feeds into consensus-based interpretation of the federal Constitution, by the Supreme Court. Levinson and Balkin note that the principal method of constitutional change has typically been influenced by political partisanship.\textsuperscript{108} Under a Popular Constitutionalist approach, SCOTUS should pass power from those parties to the People by taking heed of majoritarian concepts of moral and social issues, interpreting legal provisions only in a way which is favoured by the masses, through structured politics. Instead of acting as an elitist arbiter of constitutional change, which could work against the majority’s wishes, a Popular Constitutionalist Court would instead look to collective values, as judged by recourse to majoritarian assessments. The foregoing is an apt description of Eighth Amendment precedent, which favours the state counting approach.

Bickel condemned Dahl’s majoritarian position for not upholding majoritarian views in earnest, as the power of judicial review is in fact granted to unelected federal judges who are far less accountable, once appointed, than political representatives. In addition, judges in such a position are at liberty to usurp the actions of those officials elected into the others branches of government.\textsuperscript{109} Such opposition was termed ‘the counter-majoritarian difficulty’,\textsuperscript{110} by Bickel, described as ‘the central obsession of modern constitutional scholarship’.\textsuperscript{111} The concept has become such a great fixation that, according to Friedman,

\textsuperscript{108} Balkin and Levinson (ibid) 1066 (noting that the influence of political parties is ironic, since the Founders intended to avoid “factions”). Incidentally, this vision collapsed soon after the Constitution’s ratification.
\textsuperscript{109} Alexander Bickel, The Least Dangerous Branch (Yale 1962) 16-23.
\textsuperscript{110} Ibid 16.
‘the proposition hardly requires citation.’\(^\text{112}\) León noted that the principal “difficulty” was the undemocratic nature of unelected federal judges with Constitutional interpretation in their reach.\(^\text{113}\) To the contrary, as this thesis has argued in Chapter III, the nature of constitutional rights is not tied exclusively to this sort of procedural democratic positivism.\(^\text{114}\)

Two points are worth elaborating: First, an interpretivist understands democracy like any principle of political morality, by its substance and not simply its procedure. That substance is inherent in the framework of the community in question. The precise definition of the rights created by democratic procedures can be reached only by recourse to principles of political morality. Those principles are identified by an examination of objective indicia of society’s standards, not merely by mathematical consensus framing. Second, interpretive judges are inherently the best equipped to use all resources at their disposal to purify and perfect rights. Legislators, even those with the best will, cannot carry out the task of an interpretive judge, not least because they are held to account by the majority, the electorate, and are therefore explicitly majoritarian. Interpretivism rises above the ‘tyranny of the majority’\(^\text{115}\) by applying minority rights in the face of raw consensus, where rights trump.

As Chapter III conceded, Hercules is an aspirational figure, and not intended to be a model judge.\(^\text{116}\) Instead he provides a model of adjudication which, while abstract, facilitates a critique of the way in which interpreters identify and scrutinise rights. This thesis will apply the core tenets of Herculean interpretivism in Chapters VI and VII, where solitary confinement will be assessed by the Eighth Amendment’s sources of political morality. For the present assessment, the procedural concerns surrounding state counting must be outlined before a counter-majoritarian alternative is presented.

\(^{112}\) ibid 334, fn1.  
\(^{116}\) Dworkin, *LE* (n 5) 265.
4.3.2 The Risk of Bad Science

As Section 4.2 demonstrated, counting states is not as easy as “1-2-3”. If a simple majority defines national consensus, then 26 out of 50 states would be sufficient for a conclusion which identifies evolving standards and consequentially extends constitutional protection. Even supermajorities, as required for Article V constitutional amendments,117 would offer clear guidance. Again, the issue is far more complex. From the outset, a problem arises. If ESD, even in its positivistic strictures of majoritarianism, is becoming more of an art than a science consistency falls by the wayside, and purported deference to the states is overridden by apparent arbitrariness.

Consensus can be understood to mean the ‘middle ground’118 between set points, or ‘collective opinion’,119 which might be between 25 or 26 states. A judgement that most states agree with,120 or ‘general harmony’121 between legislatures could also be proposed as demonstrations of consensus, along with a significant rate of change,122 though no set point is provided by any of these loose benchmarks. An agreement by “most” states could arguably require a higher standard, more towards an Article V two-thirds or three-quarters supermajority, but far less has been accepted by SCOTUS for Eighth Amendment evolution. Atkins’ amicus Church argued that a state counting consensus could only exist once an ‘overwhelming majority of legislatures condemn a particular punishment or procedure.’123 While this might at first glance present a useful guideline, defining the term “overwhelming” is no less troublesome than the original definitional challenge. The consensus assessment,

117 See (n 10) and accompanying text.
119 ibid.
122 Roderick Hills Jr, ‘Counting States’ (2009) 32 Harvard Journal of Law & Public Policy 17, 22 (arguing that SCOTUS too readily finds a majority with too few states, undermining federalism.)
123 Brief of Amicus Curiae Criminal Justice Legal Foundation (CJLF), Atkins v Virginia, No. 00-8452 (536 US 304 (2002)) 5.
rather than defending objectivity, remains subjective and open to manipulation. Such manipulation can be seen throughout the Court’s capital precedents.  

A further methodological consideration is the issue of inactivity among states. If a statute provides for the death penalty, for example, but that state has not invoked such a sentence for several years, even decades, the Court should at least pause to consider whether that jurisdiction is counted as supporting or rejecting capital punishment. If the Court decides that the jurisdiction in question is “inactive”, in that it does not sentence offenders to death, it could be argued that this state should fall on the “non-death penalty” side of the scales in state counting terms. Take New Hampshire, which provides for the death penalty in certain circumstances but has not executed an inmate since 1939. The state has no execution chamber and no specific protocol for the lethal injection, the two resources on which its capital statute depends. Under examination, what becomes clear is that New Hampshire is an inactive death penalty state, despite providing for the death penalty in a strict, statutory sense. This presents a quandary for the Court, which must decide whether to weigh it as active or inactive when undertaking a state nose-count for evolving standards purposes. Despite a clear demonstration that New Hampshire is inactive, and has been for three-quarters of a century, SCOTUS has held this fact to be irrelevant to its state-counts.

In Roper, for example, an appendix to the Court’s opinion included New Hampshire in its list of ‘states that permit the imposition of the death penalty on juveniles’. Following the argument of this chapter, “permits” might be true on its face. That conclusion is certainly no more indicative of some form of societal acceptance of capital punishment in New Hampshire than another state, such as Connecticut, which has no death penalty at all, but last executed someone in 2005. A residual statute such as that in New Hampshire, it can be

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124 Figure 4.2.
127 Roper (n 93).
128 ibid 579 (Appendix A to the Opinion of the Court), citing a New Hampshire minimum age of 17.
argued, is not a reaffirmation of consensus. Within a footnote in his *Furman* judgment, Justice Brennan had acknowledged this line of argument, noting that New Hampshire ‘made virtually no use’$^{130}$ of the death penalty and that such inactivity could deem a state abolitionist. Regardless, the plurality placed that state on the consensus-forming side of the scales, and continues to do so forty years later. There have also, at the time of writing, been *de facto* moratoriums for at least five years in 13 of the 31 “active” death penalty states;$^{131}$ with 138 of 179 (77%) executions during that time having been carried out by just seven of those states.$^{132}$ Any state count which disregards inactivity treats the consensus assessment as uncontroversial, and as more simplistic than its reality.

There is also a flip-side to this argument. Take Wisconsin, which, as the first state permanently to abolish capital punishment,$^{133}$ legislated itself away from the death penalty 162 years ago. Despite this long and settled consensus in chronological terms, the most recent Wisconsin public opinion poll paints a very different sentiment. That poll, an element of ESD critiqued in Chapter V, found over 55% of voters favouring the re-establishment of capital punishment despite the state’s long history of abolition.$^{134}$ On a raw consensus-framed basis, Wisconsin appears to be a *de jure* inactive state, with a *de facto* retentionist force of public opinion. Clearly, to rely solely on state counting as a method of establishing consensus is accurate only to the extent that state legislation reflects public opinion, it is a naïve presumption.

It cannot be taken for granted that, because a state legislature has acted in one way, this reflects the sentiment of the public majority of the nation, or even of that state. Chemerinsky notes that there have been powerful demonstrations of state legislative action

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130 *Furman* (n 16) 299 fn 53.
131 North Carolina; Arkansas; Indiana; California; Nevada; Tennessee; Nebraska; Montana; Pennsylvania; Kentucky; Oregon; Colorado; Wyoming. DPIC, ‘Death Penalty in Flux’ <http://www.deathpenaltyinfo.org/death-penalty-flux#exe> accessed 1st September 2015.
132 Texas; Oklahoma; Florida; Missouri; Alabama; Georgia; Ohio. DPIC, ‘Number of Executions by State and Region Since 1976’ <www.deathpenaltyinfo.org/number-executions-state-and-region-1976> accessed 1st September 2015.
frequently differing from the opinions of the constituent voting majority of that state.\textsuperscript{135} A number of reasons for this phenomenon arise,\textsuperscript{136} not least that minority interest groups arguably have the greatest impact on politics.\textsuperscript{137} State legislation cannot be presumed to reflect a state-voter consensus if that legislation was influenced by special interest groups, as they represent a loud minority, not a consensus. A degree of engagement might count for something, however, and it would be unwise for any critic to completely reject the participation of special interest groups, especially when the input contains subject-specific experience and expertise. Again, if state counting is to be viewed as a serious contributor to ESD analysis, greater scrutiny than merely asking dichotomous questions must be applied. Any form of expert consensus, whether from an interest group, a professional body, or a collection of knowledgeable contributors, must be viewed in light of integrity. This is returned to in Chapter V, where professional consensus is examined. Without the closer analysis encouraged by this thesis, the data provided by majoritarian collections becomes the mere statistic of collectivity Dworkin warned against.\textsuperscript{138}

A further weighing issue is one identified in Section 4.2, namely the pool of states to which a state policy is compared. The agreement of 16 states, when taken from a total of 50 (32%), for example, is unlikely to convince the Court of an overwhelming consensus. When taken as a proportion of all states with the death penalty (whether “active” or not), however, this would constitute a mathematical majority, 16 of 31, or 52%. This issue was faced in many of the cases outlined by the previous section.\textsuperscript{139} Defining a tipping-point for a

\begin{footnotesize}
\textsuperscript{135} Erwin Chemerinsky, ‘Foreword: The Vanishing Constitution’ (1989) 103 HLR 43, 78: ‘individual legislators often do not vote in accord with the preferences of a majority of their constituents [and] the nature of decision-making by multi-member bodies makes it unlikely that their decisions will actually reflect the preferences of a majority’.
\textsuperscript{136} ibid: ‘[n]o single theory can describe all legislative behavior [but] it cannot be assumed that legislative action is majoritarian.’
\textsuperscript{138} Dworkin, TYO (n 102) 1677.
\textsuperscript{139} Such comparisons were made in Thompson (n 78) and Stanford (n 88).
\end{footnotesize}
majoritarian consensus is clearly far more complex than looking for a majority or a supermajority.

Considering the direction and speed at which a collection of states has altered their legislation provides further means of navigating these issues. Atkins,\(^\text{140}\) which developed the ‘consistency of the direction of change’\(^\text{141}\) part of state counting analysis, was described in dissent as ‘a perilous basis for constitutional adjudication’.\(^\text{142}\) Indeed, when relied on without support from further objective indicia, this thesis agrees with the warnings from that dissent. Rates of change are, again, subjective standards to which interpreters must apply their own meanings, resulting in arbitrary and unpredictable precedents. This in turn offends the interpretivist tenet of coherence,\(^\text{143}\) a point introduced early in this chapter and which will now be addressed.

### 4.3.3 INCOHERENCE IN PRINCIPLE

That judges will have different opinions across a range of cases is a key tenet of the doctrine of precedent. Novel, or ‘hard’\(^\text{144}\) cases require interpreters to look beyond previous jurisprudence when adjudicating over the definition of a right. That does not give interpreters the discretion to diverge from principles, however, and the coherent application of such principles is crucial for an interpretivist reading of rights.

Such coherence has not been evidenced throughout capital jurisprudence. Not only has the Court dabbled with different methods of state counting, noting that the rate of change plays an important role in supporting mathematical shortcomings, but there is a further methodological flaw. The distinction between the Court’s approaches to different types of capital cases outlines this problem. In categorical cases (capital offenders and capital crimes) the Court has undertaken a majoritarian state counting exercise which, while convoluted, is at least relatively consistent. In methods of punishment cases, however, the Court has ignored

\(^{140}\) Atkins (n 68).
\(^{141}\) ibid 315.
\(^{142}\) ibid 345.
\(^{143}\) Dworkin, LE (n 5) 164-165.
\(^{144}\) ibid 37.
state counting, instead looking for ‘unnecessary and wanton infliction of pain’.\(^{145}\) That standard is a different, counter-majoritarian approach from consensus. By this ‘unnecessary and wanton’\(^{146}\) standard the Court has declined to review the merits of consensus when upholding the constitutionality of certain punishments schemes. Such an approach undercuts the coherence in principle required by an interpretive theory of rights.

A case in point is hanging. While, as Chapter II showed, lethal injection has remained the principal and, since 2013, sole method of execution in the US, hanging is retained by two states.\(^{147}\) The last judicial hanging was in Delaware in 1996,\(^{148}\) while the only other two since the Eighth Amendment’s 1962 incorporation\(^{149}\) occurred in Washington in the early 1990s.\(^{150}\) One of those final visitors to the gallows was Charles Campbell. After a lengthy appeals process and twelve years since his conviction for a triple-murder, SCOTUS denied Campbell’s petition for certiorari the day before his execution. A *per curiam* judgment declined to hear his claim that death by hanging was forbidden by the Constitution’s punishments clause.\(^{151}\)

Dissenting from the denial, Justice Blackmun, joined by Justices Stevens and Ginsburg, invoked the Court’s sole majoritarian assessment in the case, noting that ‘[f]orty-six of the forty-eight States that once imposed hanging have rejected that punishment as unnecessarily torturous, brutal, and inhumane’.\(^ {152}\) Blackmun would have granted a stay of execution, but the majority upheld the constitutionality of the method, dismissing Campbell’s appeal without taking account of the majoritarian argument proposed by the dissent,\(^ {153}\)

\(^{145}\) *Gregg* (n 15) 173, (citing *Furman* (n 16) 392-393).

\(^{146}\) ibid.


\(^{150}\) Pamela Nagy, ‘Hang By the Neck Until Dead’ (1994) 26 Pacific LJ 85, 93.

\(^{151}\) *Campbell v Wood* (1994) 511 US 1119 (cert denied).

\(^{152}\) ibid 1123.

\(^{153}\) For an explanation of this case, see Gary Hood, ‘*Campbell v. Wood*’ (1995) 30 Gonzaga LR 163, 178 (arguing that the denial was sensible, with reasoning unnecessary for the present discussion).
despite recent Eighth Amendment precedent to the contrary. If dabbling in the social science of counting states in some areas of Eighth Amendment jurisprudence, coherence in principle mandates that execution cases should also be considered through the same lenses. Without such consistency, a core tenet of interpretivism is denied. The exercise should not be a pick-and-choose endeavour between the objective and the subjective elements of evolving standards. The Court should consider all available indicia of political morality, and the denial of certiorari in *Campbell* removed that opportunity.

Had SCOTUS permitted the review and displayed the same deference towards state counting for its objective analysis as it had done in its categorical capital cases, the decision would have been clear. Hanging would prove contrary to the consensus measure of evolution. While after *Campbell* only one further hanging would have been prevented, the Court’s unwillingness to respect coherence in principle is nonetheless concerning, not least for its seemingly arbitrary selectivity. Criticism does not end with consistency, however, and there is one principal and fundamental critique of the state counting approach to ESD which must be considered. In *The Federalist*, Madison maintained that, ‘[a]mong the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.’

It is that principle of American government, federalism, from which the next area of critique arises.

### 4.3.4 The Laboratories of Democracy

An ideal envisaged by the federalist forefathers was that the independence and diversity of the states would guard against the ‘tyranny of the majority’. Forming a consensus from a crude nose-count is an obtrusive affront to this principle. Judgments that
employ this method are ‘junk social science’, which is often vague and inefficacious. In addition, and more fundamentally, they are reminiscent of Gerrymandering, a term coined in 1812 to describe intentional partisan pioneering of electoral districts. Diversity among state legislatures should be regarded as the raison d’être of the federal system, not as the basis for informing federal constitutional law and subsequently constraining minority states.

Drawing on the metaphor of states-as-laboratories, Jacobi condemns the Court’s use of state counting as entirely antithetical to the ‘federalist ambition’ of states’ sovereignty. Whilst earlier literature ‘scratch[ed] the surface’ of this federalist issue, Jacobi insists that those commentators underestimated the deleteriousness of state counting. The states as laboratories metaphor first appeared in a dissenting opinion by Justice Brandeis, who noted in 1932 that it was ‘one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory’. Gardner has warned against taking this now ubiquitous metaphor too literally, noting that ‘[s]tate courts do what they do, the Supreme Court does what it does, and from time to time some court somewhere may learn something useful by observing what the others have done.’ Under an interpretivist reading, it must also be noted, some lessons are taught by recourse to principles embedded more deeply than in explicit legislative provisions. The Constitution places procedural and substantive limits on state power, and SCOTUS does not require the results of experimentation to find or impose those limits.

159 The district in question was delineated by Massachusetts Governor Elbridge Gerry, drawn in the shape of a salamander, coining ‘Gerrymander’. Davis v Bandemer 478 US 109 (1986) 164, fn3.
160 Jacobi (n 158) 1106.
161 ibid 1099.
162 Matthew Albers, ‘Note, Legislative Deference in Eight Amendment Capital Sentencing Challenges’ (1999) 50 Case Western Reserve LR 467, 468 (characterising the test as ‘little more than a crude poll of state legislatures in favor of or against a particular measure’); Michael O’Connor, ‘Note, What Would Darwin Say?’ (2003) 78 Notre Dame LR 1389, 1403 (arguing that one state should not bind another, as permitted by this doctrine); HLR, ‘Recent Case: Eighth Amendment’ (2004) 117 HLR 2456 (querying whether Eighth Amendment evolution remains binding when objective indicia have changed).
Chapter IV: Majoritarian State Counting

Under federalism states are permitted, even encouraged, to engage in legislative experimentation. Where moral principles of decency come into play, however, such as those contained in the Eighth Amendment, individual rights trump such experimental privileges. Although the states-as-laboratories metaphor is now prolific in discussions of constitutional law, and deference to state power is the jewel in the crown of federalism, states must also be required to uphold the basic principles underlying the Constitution. Schwarz captures this argument well: ‘the laboratory of state experimentation is not a sealed room’. Indeed, where the Court finds an evolution of the Eighth Amendment against a certain practice, or experiment, laboratories in contravention of a constitutional right must be shut down, and future laboratories be prevented from opening.

Since Chief Justice John Marshall’s initiation of judicial review, and Chief Justice Warren’s incorporation revolution, judicial oversight is a rule in the constitutional law setting, not an exception. The Constitution is not an optional protocol, nor a set of guidelines, but a collection of basic minima. Take for example a state, which introduces a punishment not explicitly barred by existing Supreme Court precedent. The long-term intensive solitary confinement of juveniles or inmates with serious mental illnesses provides a good, real example. Any state should, in adherence to the states-as-laboratories metaphor, be free to experiment with such a punitive policy until the judiciary intervenes. The latter stages of this thesis will argue, however, that the principles underlying the Constitution require a different reading, where morality can prevent the onset of an experiment.

165 ibid 475: ‘[n]o contemporary discussion of state constitutional law, it seems, is considered complete without some invocation of the metaphor of “states-as-laboratories.”’
166 Carrie Leonetti, ‘Counting Heads’ (2012) 35 American Journal of Trial Advocacy 317, 350 (arguing that states should not be permitted to experiment where they have not learnt from mistakes).
167 Frederick Schwarz Jr, ‘States and Cities as Laboratories of Democracy’ (1999) 54 The Record 157, 163.
168 See Chapter II, (n 306).
169 William Brennan, ‘State Constitutions and the Protection of Individual Rights’ (1977) 90 HLR 489, 493-495 (reviewing the 1960s incorporation cases, starting with the Eighth Amendment in Robinson (n 149) 678.
4.4 Conclusion

This chapter permits the conclusion that, where state counting is relied on as the principal indicator of society’s standards, the concept of consensus is treated as simplistic, mathematical majoritarianism, at risk of being devoid of morality. Interpretivism requires stricter scrutiny than that, and the assessments carried out in this chapter point to some of the immediate concerns surrounding state counting. On a more abstract level, state counting creates data, which is at risk of providing meagre statistics of collectivity when that information is not sieved rationally. Such moral refinement, it must be concluded, can only be achieved by looking beyond the text, beyond the policies of the elected representatives, and into the framework of the community. That framework, Chapter V will show, is far more multi-faceted than a nose-count suggests.

In Chapters VI and VII specific reference will be made to the solitary confinement concerns alluded to in the foregoing discussion, presenting an opportunity for this research to offer an original contribution to Eighth Amendment scholarship by tying a real-world punishment issue to a theory of interpretation. More broadly, the implications of this analysis of the Eighth’s application to solitary confinement will extend to other areas of academic commentary, including the growing professional consensus literature, and transnational law. By undertaking this research, a conclusion will be reached regarding the limits on state punishment, when the Constitution is approached as being enriched by its moral principles. To make such claims, and to sustain an argument in favour of stricter scrutiny of extreme imprisonment, the next chapter must examine more closely the sources of political morality which inform the Eighth Amendment’s evolving standards of decency principle.
CHAPTER V

FURTHER MEASURES OF EVOLVING STANDARDS

The origin of the constitutional principle of the evolving standards of decency (ESD), *Weems v US,* contains direct reference to public opinion, where Justice McKenna talked of the Eighth Amendment ‘acquir[ing] meaning as public opinion becomes enlightened by a humane justice.’ This notion of collective consciousness is often treated as a straightforward, almost whimsical concept in populist media, but is far from uncontroversial in constitutional interpretation. Battle-lines are drawn over the Supreme Court’s role as an influence on, or even sympathiser with public opinion for interpretive purposes, not only on the national election stage but also in the heavily politicised judicial appointments arena. Remembering that this thesis has already rejected originalism, raw majoritarianism, and recalling the scepticism placed on positivist notions of law as separate from morality, the remaining sources of ESD analysis must be considered carefully. It is acknowledged that accusations of idealism or naïveté are expected in response to a theoretical enquiry that merely condemns the status quo and offers no alternative. As such, this thesis seeks to provide a way ahead; examining the remaining sources of ESD through the same Dworkinian rational sieving process applied to majoritarian state counting. The conclusion to this chapter will subsequently provide a new frame of analysis for Eighth Amendment challenges.

Before arriving at that point, however, this chapter must analyse the remaining fragments of political morality relevant to the ESD enquiry, by applying the first and second

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1 *217 US 349 (1910).*
2 ‘The [punishments] 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 public opinion becomes enlightened by a humane justice.’ ibid 378.
4 See Chapter II Section 2.1.
5 See Chapter III, Section 3.1.
6 See Chapter III generally (outlining a theoretical framework of interpretivist integrity as law).
stages outlined above. Pre-interpretive sources comprise rules, practices, precedents, and other elements of social normativity. Applied in context, this chapter will draw on public opinion polling; penology; transnational law; and professional consensus, definitions and analyses of which will be presented in the respective sections.

By a Dworkinian reading of these sources, they are considered to constitute community principles of political morality, which are intertwined with the legal framework when shown in their best possible light. At the interpretive stage of each section, moral principles will be derived from the data unveiled by these sources. Judgements of political morality (the “rational sieve”, as guided by moral responsibility and political integrity; consistency in decision-making) will be applied to the otherwise “pre-interpretive data” first unearthed. Integrity is essential to this process, and interpretation will depend on respect for core principles of justice, fairness, and due process. What will result is a refined, principled approach to ESD analysis, reading integrity into the Eighth Amendment’s punishments clause.

5.1. Public Opinion Polling

In recent years interest in public attitudes to criminal justice issues has risen, with ‘sample surveys’ or ‘representative surveys’, usually known as “opinion polls”, purporting to provide the principal tool for measurement of attitudes towards a variety of topics. The poll, a quantitative research method, provides an unsurprising link between a prevalent modern practice and democratic decision-making. By taking measurement of opinions straight from the People themselves is arguably to represent societal standards of decency, as sampled at the lowest, most “representative” level. The reality is more complex and opinion

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7 [A] method of drawing inference about the characteristic of a finite population by observing only a part of the population.’ Parimal Mukhopadhyay, *Topics in Survey Sampling* (Springer 2001) 1. This thesis will refer to this sampling technique as “public opinion polling”.

Chapter V: Further Measures of Evolving Standards

polls, sources of pre-interpretive data, must be viewed in light of interpretive principles to establish their providence in interpretivist ESD analysis.

5.1.1 THE PROMISE OF POLLING

Over the last century public opinion polling has flourished the US, growing far beyond its relatively modest roots in British sociology, behavioural psychology, and marketing research. Quantitative surveys have become pervasive tools with the principal aim of identifying representative opinion of the public at large. By this measure consensus is provided with an instrument of empiricism, desirable under the Conventionality thesis of Hartian positivism, which considers legal validity to derive from social convention. Advancing that empirical cause in the 1960s was George Gallup, founder of the poll that bears his name. Gallup declared in 1965, during Warren’s incorporation revolution, that ‘[p]olls can make…a truer democracy.’ Direct participation by citizens in the decision-making process theoretically enables a circumvention of the “middleman”, the elected representative. Asher notes that a similar assumption is held by policymakers, who take for granted that this form of survey is the best method by which to construct a picture of societal acceptance or rejection of a policy. In order to instil faith in the criminal justice system, polling promises to provide a link between public opinion and criminal justice procedures and arrangements, while ensuring ‘moral credibility’ of the system, through its deference to public sentiment.

Turning to the Eighth Amendment, the argument so far points to opinion polls providing constitutional law with a democratic and malleable personality, which is desirable

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9 US citizens are accustomed to ‘a seemingly endless stream of questions’ and are familiar with their common sentiment being measured in this way. Sarah Igo, The Averaged American (HUP 2007) 2.
10 Susan Herbst, Numbered Voices (UCP 1993) 11.
11 ibid 12 & 27.
14 Herbert Asher, Polling and the Public (7th edn, CQ Press 2007) 3.
to proponents of an adaptable constitution and, specifically, to the moral principles of ESD. Whilst this instrument of empiricism might be satisfactory for purposes of discussion, and for legal interpretation when a positivist approach is taken, it will be shown limited when exposed to interpretivist scrutiny. As members of the sole major Western democracy to retain capital punishment, US citizens are regularly polled for their opinion regarding the practice. It is these capital polls and the way they have been utilised by SCOTUS, therefore, which provides the most fertile ground for analysis of public opinion with respect to the Eighth Amendment.

Recalling Dworkin’s theory of interpretive adjudication, which seeks the guidance of moral integrity to ensure that the interpretation of law is principled and inexhaustible, an examination of the prevailing use of opinion polls for Eighth Amendment interpretation must be carried out before conclusions can be drawn. It will be argued that the providence of opinion polling as an objective indicator of ESD is limited, because of practical concerns such as methodological shortcomings, and due to the expense of conducting more effective polls. In addition, on a theoretical basis, while it must be accepted that some data is more useful than no data, poll results are theoretically suspect due to their inability to pass through the interpretivist rational sieve.

Dworkin’s ‘fundamental distinction within political theory’ between policies and principles, with the latter trumping the former, is important at this stage. Policy arguments grounded in polling data might be sufficient to justify a political decision, for example. Principles, however, paint a moral gloss on primary sources of consensus. Opinion polling data can provide relevant support for an evolutive practice, but only if it is based on principles cited or implicit in ‘past political decisions of the right sort.’ The right sort was identified in Chapter III as another problematic concept, which depends on justice,

18 Ronald Dworkin, *Taking Rights Seriously (TRS)* (Gerald Duckworth 1977) 82.
19 ibid 93.
democracy, liberty, and equality, and exemplified by cases such as *Brown v Board of Education* and *Lawrence v Texas*, cases fifty years apart but both demonstrating constitutional evolution in spite of strongly opposing public sentiment.

Without wading too far into the waters of post-interpretive analysis, which is reserved for Chapter VII, this chapter must focus on two present stages of scrutiny. First the practical reality faced by interpreters seeking to rely on opinion polling must be introduced, before theoretical concerns can be addressed.

### 5.1.2 PRACTICAL CONCERNS

In a compendium of discussions relating to ‘popular constitutionalism’, a method by which courts deal with the counter-majoritarian difficulty by basing decisions on popular sentiment, Persily warns of the nature of polling. That nature, he argues, is sometimes sporadic and often constrains the ability of interpreters to track changes in public sentiment by quantitative measures. A degree of acceptance must be presumed when discussing any theoretical enquiry; interpretivist moral adjudication is far more idealistic and aspirational than practical. That said, if opinion polling is shown to be at risk of methodological infirmity from the outset, an interpreter must be wary of including any data produced by polls in ESD analysis. The sticking point is not that poll results cannot be significant, but that the methods of testing are not rigorous, the actual sentiment is malleable and possibly uninformed, and numerous selection biases undermine the chosen results.

Methodological concerns are not dispositive of the discussion. Not all polls are wholly without merit, though the more helpful surveys will naturally incur greater expense.
Chapter V: Further Measures of Evolving Standards

and therefore dissuade pollsters from commissioning them. While strict majoritarianism, such as that exemplified by a state count which produces conclusions from mathematical majorities, was ousted at an early stage in this thesis, polling has provided the steam for a number of Eighth Amendment precedents. Some of the same concerns that arose in the state counting chapter might apply to polls, but the survey’s prevalence warrants a careful examination if it is to be understood properly. Two main enquiries will provide the basis of this critique, at the practical stage: the quality of the sample and the quality of the questions.27

5.1.2.1 Quality of the Sample

A public opinion researcher is first faced by respondent selection, which requires surmounting a number of methodological hurdles. Sampling error is one such hurdle,28 which occurs when a sub-group within a population is included in the survey. For public opinion to represent ‘national consensus’,29 as an indicator of ‘society’s standards’,30 the population implicated is the entire country. Since sub-groups are always relied on in polling, sampling error is invariably a risk.31 One method of inferring the generalisability of samples is to test the significance of the results, using a one sample t-test for example. That test provides interpreters with an inferential statistic which can be used to determine whether there is a significant difference between the average and a hypothesised average, ergo whether the results can be applied to the population at large.

It is acknowledged that some studies show sample size to contribute little to representativeness, but the position generally accepted by the survey literature is that sample sizes must be relatively large in proportion to the population.32 Take for example a poll of 100 respondents, where 55% “Agree” and 45% “Disagree” with a given statement. An

27 Potentially misinformed penal populism will be evaluated in Section 3, where conventional principles of punishment will be considered separately to public opinion polling.
30 ibid.
31 For a full analysis of sampling error and the formulae designed to limits its impact, see Weisberg in Donsbach and Traugott (eds) (n 26).
interpreter seeking to establish whether this sample represents the population might apply the hypothesis “at least 50% of the entire population agrees with the polled statement”, or “H₀: μ>50%” in statistical notation. Running a t-test on these figures provides a significance point of 1.0050. Compared with critical values, by which significance is judged, generates a 70-80% confidence interval that at least 50% of the population will agree with the statement. Applying the same test with the same results to a poll with 1000 respondents, however, provides a significance point of 3.1786, which yields 99.8%-99.9% confidence interval for the hypothesised outcome. Clearly, sample size has a significant impact on the generalisability of data derived from qualitative polls. Significance is limited to the final data, however, and the interpretivist must first have confidence that the data can be relied on as an indicator of political morality, before significance testing can solve the problem of small samples. As such, the present discussion will focus on the shortcomings of data collection, as opposed to the mathematical reliability of poll results.

“Coverage error” may occur when attempting to conduct representative polling. This occurs where members of the targeted sub-group, which has been targeted, are not reached, probably through lack of contact details such as telephone numbers or email addresses. Sampling to represent national consensus, let alone the opinion of a sub-group, is therefore problematic from the outset. “Nonresponse” is another issue, which arises from coverage error. Lynn notes that the principal focus is often placed on survey design when discussing the precision of data, under the assumption that the sample is responsive. He notes that this

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33 μ is the hypothesised mean (0.5)  x̄ is the sample mean or probability (0.55). σ (standard deviation) = √(x̄(1-x̄)) = √(0.55(1-0.55)) = 0.4975. SE = σ/√n = 0.4975/√100 = 0.04975. t = (x̄-μ)/SE = (0.55-0.5)/0.04975 = 1.0050.
35 σ = √(x̄(1-x̄)) = √(0.55(1-0.55)) = 0.4975. SE = σ/√n = 0.4975/√1000 = 0.01573. t = (x̄-μ)/SE = (0.55-0.5)/0.01573 = 3.1786.
36 San Jose University (n 34) n=1000, p=99.8%: 3.098; p=99.9%: 3.300.
is not reflective of reality, with nonresponse affecting even the best-resourced surveys.\textsuperscript{39} Noncontact (which results in nonresponse) can arise within telephone surveys from incorrect or wrongly labelled phone numbers, or by the potential respondent simply refusing to answer the phone, or declining to answer questions when he discovers the purpose of the call. Nonparticipation is easier over the phone than in person due to the lack of interpersonal relationship, another limitation of the method.\textsuperscript{40} This is a particular issue with respect to death penalty opinion, as the bulk of polls are conducted using household telephone surveys.\textsuperscript{41} The prevalence of unsolicited telephone calls has increased in recent decades, and consumers, thus potential respondents, have become even more willing to refuse calls from unknown numbers,\textsuperscript{42} worsening nonresponse. This could lead to accusations that survey results do not provide an objective representation of their sample.

From the nonresponse problem comes another, fundamental limitation of contemporary opinion polling: demographic under-representation. Stoop has observed that the elderly and those with lower socio-economic backgrounds are less likely to respond to telephone surveys,\textsuperscript{43} with Berinsky adding that non-respondents are also likely to be black.\textsuperscript{44} Furthermore, it has been shown that surveys routinely over-represent women,\textsuperscript{45} painting a skewed picture with respect to average public support for punitive policy. This is a particular issue since an overwhelming majority of incarcerated Americans is male.\textsuperscript{46}

Further research has shown differing demographic groups to provide wildly different opinions on criminal justice issues;\textsuperscript{47} a further display of the potentially ungeneralisability of...

\textsuperscript{39} ibid.
\textsuperscript{40} ibid 40, 42-44. Lynn notes that refusals constitute a large proportion of nonresponses.
\textsuperscript{41} This is drawn on in Section 2.3.
\textsuperscript{42} Peter Miller, ‘The Authority and Limitations of Polls’ in Jeff Manza, Fay Cook and Benjamin Page (eds) \textit{Navigating Public Opinion} (OUP 2002) 227.
\textsuperscript{44} Adam Berinsky, ‘Survey Non-Response’ in Donsbach and Traugott (eds) (n 26) 311.
\textsuperscript{45} Robert Groves and Mick Couper, \textit{Nonresponse in Household Interview Surveys} (Wiley 1998)
\textsuperscript{46} When considering the proportion of women facing capital sentences their representation plummets further.
polling data. This critique could itself be caught by the same net cast by this chapter’s analytical framework, but divergent results from multiple sources demonstrate that demographic-misrepresentation is at least questionable, if not decisive. Constitutional law must rest on firmer ground than that. Roberts et al note that large-scale surveys are often factored out due to resource constraints, so samples may be selected for their convenience rather than their reliability. The student population is one example of this economical approach, confounding the problem of generalisation. Despite this group’s obvious differences from the population at large, both in terms of age and socio-economic background, students are often relied on for easy-access, affordable sampling.

It is patent that consensus on any given issue is built on very shaky foundations if the initial representativeness of a sample is questionable. Regardless of a researcher’s good intentions, using polls as a quantifier of public opinion, it seems, could constitute ignorance of the pluralistic nature of public sentiment and oversimplifies the challenge.

One final issue regarding the quality of the sample relates to “non-attitudes” which, unlike non-responses, describes a respondent’s state of mind, which is genuinely indifferent towards a subject. Non-attitudes are often difficult to reveal as respondents are at liberty to invent their answers with little difficulty, thus affecting the true nature of the eventual results. Shuman and Presser assessed the impact of including “No Opinion” or “Don’t Know” (DK) options in polls, aimed to counter the problem of non-attitudes. They concluded that there

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48 Cf John Brehm, The Phantom Respondents (UMP 1993) Chapter 8 (arguing that representativeness is not a statistically significant contributor to results alteration).
49 Roberts et al in Gadd et al (eds) (n 8) 288.
50 ibid.
52 This issue was first uncovered and defined by Philip Converse, ‘The nature of belief systems in mass publics’ in David Apter (ed) Ideology and discontent (New York Free Press 1964) 206-261.
exists no short-term solution beyond offering DK as an alternative. While these DK opinions might evidence genuine public opinion – or apathy – such responses provide unsatisfactory gaps in the otherwise adversarial challenges brought before SCOTUS.

“Don’t know” or “don’t care” provides little by way of public opinion measurement for constitutional law purposes, beyond displaying ambivalence or highlighting a need for clearer, more carefully constructed information. This might warrant wider social concern, but for present purposes it is destructive to any defensible reliance on polling data. Apathetic or uncertain respondents do not demonstrate evolving standards, or even any standards. Nonetheless, DK options must be accepted for what they are, ubiquitous in criminal justice polling.

While the size and the quality of the sample might provide significant hurdles for any interpretivist to overcome, the data-collection is also hindered at an early stage if the question design is not rigorous. The principal question form in criminal justice polls, especially those concerning capital punishment, is dichotomous: “Yes” or “No”; “Agree” or “Disagree”. Respondents are therefore faced with quantitative negative or affirmative choices, without the opportunity to provide a rationale or a measure of strength for their opinions, which might be provided by a qualitative interview. Since quantitative research forms the bulk of polling, question quality is a vital consideration for any critique.

5.1.2.2 QUALITY OF THE QUESTIONS

Unnever et al note that attitudes about such fundamental and often controversial topics such as the death penalty are seldom ambivalent, with Roberts et al insisting that these attitudes are ‘far more nuanced and complex’ than the simple “Yes” or “No” dichotomy of the prevailing quantitative research would suggest. One alternative is the deliberative poll, where respondents are given more opportunity to respond to a set of

54 Schuman and Presser ibid 1224.
55 See generally James Unnever, Francis Cullen and Julian Roberts, ‘Not everyone strongly supports the death penalty’ (2005) 29 American Journal of Criminal Justice 187 (arguing throughout that opinions about topics such as this are often strongly-held).
56 Roberts et al in in Gadd et al (eds) (n 8) 293.
questions, rather than simply filling dichotomous boxes. This method is thought to ‘provide a clearer picture of the informed public will that is less susceptible to distortion and selective interpretation.’\textsuperscript{57} What is more, Green noted that most regular polls provide no means of distinguishing between volatile, ‘mushy’\textsuperscript{58} opinions that change with time, or stable and durable opinions.

As it has been shown, quantitative polling encourages rigid expression of opinion. In addition, the “public” nature of opinion has been decayed, with surveys intentionally made closed and private, and with no forum for discussion between respondents or even between the respondent and researcher, the territory of qualitative research.\textsuperscript{59} Simple, closed questions ignore ‘the complexity with which members of the public view criminal justice issues.’\textsuperscript{60} Payne et al placed greater emphasis on this criticism, arguing that research design itself can provide a source for sentencing attitudes, rather than simply a measure.\textsuperscript{61} Their study concluded that closed-questions provided insufficient data to extrapolate from their sample to generalise “public opinion” on types of punishment.\textsuperscript{62} There is a flip side to this argument, however: that the risk of complex questions in fact worsens the reliability of the results. One such instance is with ‘roll-off’,\textsuperscript{63} where respondents only fill out a portion and return an incomplete survey. This is demonstrably more frequent when question-wording features obscure legalese or complex language, which is difficult for the average respondent to

\textsuperscript{58} ibid 133.
\textsuperscript{59} Herbst (n 10) 65-67, describing polls as ‘dominant’ in modern politics.
\textsuperscript{62} ibid 204.
\textsuperscript{63} Shauna Reilly and Sean Richey, ‘Ballot Question Readability and Roll-Off’ (2011) 64 Political Research Quarterly 59.
In a similar vein to the caution of roll-off, survey literature typically advises avoiding obscure terminology and complicated word order.

A further consideration with respect to the quality of polling questions relates to the human urge of acquiescence: a type of response bias where respondents are compelled by the ‘natural desire’ to portray themselves in a favourable light. Answer-distortion is effected in two ways here: either the affected respondent answers as they think they should answer, morally, or as they think they are expected to answer, socially. Without the researcher delving into answer rationales, it is impossible to determine which bias has the greater impact on a given respondent. Moreover, respondents have been found to shift their responses to satisfy the researcher, a process known as ‘satisficing’.

In a comprehensive review of survey methods conducted by Biemer et al it was demonstrated that structured interviews with personalised cues, such as in telephone surveys, have been shown by an abundance of literature to encourage further acquiescence. This would indicate that polls conducted without such an element of personalisation are less vulnerable to the same extent of acquiescence effects, and are therefore more reliable by that measure. Clearly, where poll results are taken at face value there is a lack of checks and balances on the potential psychological force of satisficing.

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64 ibid.
65 Norman Bradburn, Seymour Sudman and Brian Wansink, *Asking Questions* (Jossey-Bass 2004). Context is also relevant to the understanding of respondents and to their willingness to answer: for example it has been shown that cover-letters can influence respondents to attempt to make relevant their answers according to the researcher’s affiliation. Ara Norenzayan and Norbert Schwarz, ‘Telling what they want to know’ (1999) 29 European Journal of Social Psychology 1011.
69 ibid.
70 An example of this can be found in the comparison between web polls and telephone polls conducted during the Bill Clinton impeachment imbroglio, where the telephone version yielded consistently more positive views towards the President than the online equivalent. Evan Wilt, ‘Vote Early and Often’ [1998] American Demographics 23.
71 Biemer et al (n 68) 387-390.
There is a great deal of further psychometric literature to demonstrate that “agree” or “disagree” surveys forgo the methodological rigour provided by other forms of question-construction and qualitative survey methods. Alternatives which have been shown to yield richer results include analogue categorical methods, where a respondent has the choice of a scale of opinion (very strongly for to very strong against, with points in between, for example); ranking different choices; and tick all that apply options. This latter form of data provides the opportunity for interpreters to code responses and apply goodness of fit tests, where sample data can be analysed before it is extrapolated to the whole population. In order to determine whether the measured sample frequencies differ significantly from the overall expected population frequencies, for example, the sample data is tested and the resultant probability is compared to a significance level to determine whether it is generalisable, with a similar method to the t-test introduced in Section 5.1.2.1.

Accepting that polls play an important role as ‘useful indicators of social discourse’ and as instigators of public debate, this thesis makes the claim that public opinion polls generate data which is insufficiently rigorous as a source of morality. Statistical tests can examine in more detail the mathematical significance of purported results, and can provide a degree of clarity to interpreters of data, but the substance of those polls and selection biases remain issues. Interpretivism requires more than quotations of scientific proof, regardless of statistical significance, if the generated data is unreliable. Before this claim is elaborated, the precedent for the use of polls in Eighth Amendment adjudication must briefly be outlined to facilitate an understanding of Court’s use of this indicia in ESD jurisprudence.

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72 For a review of some of the core studies, see Groves et al (n 37) 234.
73 Krosnick et al showed through a review of numerous similar studies that the highest reliability was found with 7 scale points in bipolar answer-forms. Validity was highest with 5-9 scale points. Jon Krosnick and Leandre Fabrigar, ‘Designing rating scales for effective measurement in surveys’ in Lyberg et al (n 66).
74 Groves et al (n 37) 234-235.
5.1.3 THE COURT, POLLING, AND THE EIGHTH AMENDMENT

In considering the Supreme Court’s precedent for using polls in ESD jurisprudence, *Furman v Georgia* provides a natural starting point.\(^{76}\) Since the Eighth’s incorporation the Court had not considered objective indicia of ESD. Amsterdam’s oral argument for the LDF provided an opportunity to do so,\(^{77}\) giving rise to the first judicial discussion of polls in a punishments clause context.

5.1.3.1 *Furman*

In *Furman* Justice Marshall cautioned against the use of polls, condemning the ‘shocks the conscience’\(^{78}\) test, one which relies on the public’s sense of justice when informing societal decency.\(^{79}\) He warned that this test failed to provide a true representation of decency, which should instead be measured on the basis of ‘whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.’\(^{80}\) This standard, one of three statements which have become known as the Marshall Hypotheses, is noted in Section 5.2 in the context of penological goals and principles of sentencing.

As shown in previous chapters, the several authors of the fragmented *Furman* judgment explicitly mistrusted polls when finding that the death penalty was, as practiced at the time, unconstitutional under the Eighth Amendment.\(^{81}\) In concurrence, Justice Brennan concluded that ‘contemporary society views this punishment with substantial doubt’,\(^{82}\) after making general reference to opinion polls, without offering specific sources.\(^{83}\) Chief Justice

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\(^{76}\) 408 US 238 (1972).


\(^{78}\) *Rochin v California* 342 US 165 (1952) 172.

\(^{79}\) *Furman* (n 76) 361.

\(^{80}\) ibid 362. Justice Marshall cited results but did not base his opinion on them, acknowledging that ‘the polls have shown great fluctuation.’ ibid 361 fn44.

\(^{81}\) *Furman* (n 76) 240. For a helpful analysis of the fragmented plurality, see *Lockett v Ohio* 438 US 586 (1978) 598-599.

\(^{82}\) *Furman* (ibid) 299-300.

\(^{83}\) Justice Brennan referred to polls which, in the abstract, underscore ‘the extent to which our society has in fact rejected [capital] punishment.’ ibid 300.
Burger wrote one of the four separate dissents and attempted to caveat the Court’s use of polls: ‘[w]ithout assessing the reliability of such polls, or intimating that any judicial reliance could ever be placed on them’. Burger, however, implied that they were adequate indicators of societal decency. Recalling non-attitudes and the methodological pitfalls arising from dichotomous question design outlined in Section 5.1.2, it is worth considering the specific polls selected by Burger in Furman.

Burger relied on two Gallup polls, in claiming that favour for the death penalty rose from 42% in 1966 to 51% in 1969. Respondents in both polls faced the closed question: ‘Are you in favor of the death penalty for persons convicted of murder?’ Answers were confined to ‘For’, ‘Against’, or ‘No Opinion’. On its face, a net-increase of 9% was demonstrated by Burger’s comparison of the 1966 and 1969 polls; a compelling shift in public sentiment. Closer examination, however, reveals imperfections. Demographic breakdowns of the poll results cited by Burger were provided by Gallup, but omitted from the Chief Justice’s opinion. Take, for example, the percentage of women in favour of capital punishment for murderers: just 38% in 1966 (rather than 42% overall, as cited in Furman) and 44% in 1969 (rather than 51%): far from the majority indicated by Burger’s footnote. Absent, too, was any attempt to analyse the statistics to determine whether there was a significant inference to be drawn from the results, such as via the t-test introduced in Section 5.1.2.1.

Alongside the Gallup poll cited by Burger in Furman was a Harris poll, published in the same edition of Public Opinion Quarterly, and purporting to measure opinion using the

84 ibid 385.
85 ibid 386: ‘legislatures in general have lost touch with current social values.’
87 Furman (n 76) 385 fn9.
88 Erskine (n 86) 291.
89 ibid.
90 ibid 292.
91 Other demographics such as income bracket and education were reported, though not included in the judgment. ibid 291-294; Cf Furman (n 76) 385 fn9.
same methods as Gallup.92 Overall death penalty support according to the Harris poll was a mere 38%, significantly lower than Gallup’s 51%. Without justification, the Chief Justice did not select the Harris poll, again falling short of the rigour encouraged by survey literature and by any call for objectivity. For an interpretivist analysis, Burger should at least have cited the varying results. Interpreters cannot be expected to act as Hercules would,93 with all available information, but a patent and silent disregard for one result in favour of another is nothing short of unprincipled cherry picking.

Justice Rehnquist, dissenting, made similar remarks to the effect that the judiciary’s relationship with popular sentiment was ‘remote at best’,94 though he declined to cite specific evidence or explain whether he referred to polling here. Justice Powell’s concurrence made reference to opinion polls, describing them as having ‘little probative relevance’,95 but commenting that capital punishment opinion was “‘fairly divided.’”96 To reach this conclusion, Justice Powell selected just three polls from the 1960s to demonstrate a visible change in opinion regarding the death penalty during this decade. Powell compared a 1960 national poll demonstrating 51% favour for the execution of murderers,97 with the same Gallup polls cited by Burger (1966: 42%; 1969: 51%), collated by Goldberg and Dershowitz.98 Each poll asked the same closed question regarding support for executing murderers, with “Yes”, “No” and DK (or equivalent) options.99 Again, Powell ignored the 1969 Harris poll showing just 38% favour in 1969,100 and also failed to mention, in a similar

92 Erskine (n 86) 295.
93 Dworkin, TRS (n 18) 105-130; Ronald Dworkin, Justice for Hedgehogs (Belknap 2011) (JfH) 265.
94 Furman (n 76) 468.
95 ibid 441 fn36.
96 ibid, quoting Louisiana ex rel Francis v Resweber 329 US 459 (1947) 470.
97 Keesing's Systems, ‘Polls’ (1967) 2 International Review on Public Opinion 84. This poll was first relied upon in Witherspoon v Illinois 391 US 510 (1968) 520 fn16.
99 Brief for Amicus Curiae American Association on Mental Retardation et al, McCarver v North Carolina, No 00-8727 (533 US 975 (2001)) refiled for Atkins v Virginia, No 00-8452 (536 US 304 (2002)) (Atkins AAMR brief) Appendix B.
100 Erskine (n 86) 295.
vein to the Chief Justice’s demonstration of selectivity, that Goldberg and Dershowitz had also displayed favour as low as 42% in 1958.101

Such demonstrations of selectivity among the Justices reveals a problem with the use of polls, but not necessarily with polling itself. This thesis makes the case for very careful consideration of public sentiment. If polls are to be accepted as indicative of that sentiment, one form of consensus which is instructive to the interpretivist challenge, their selection must be based on clear principles. The principles of justice, fairness, and due process for example require interpreters to make justified selections and to apply rigour when generalising from poll results. Justifications ensure transparency and quell accusations of cherry picking, while rigour, in the form of a statistical significance test, provides a more accurate inference of consensus. While Justices will always seek to inform their opinions with supporting evidence, picking polls merely in support of a personal value judgement, without a justified exclusion of competing results, undermines the integrity of the process of political morality. Integrity is inherently objective and relies on consistency in decision-making,102 and the objective arm of ESD requires a more considered approach than the Court considered in Furman, one which this thesis will attempt to carry out in Chapter VII.

5.1.3.2 AtkInS

An opportunity for SCOTUS to review the seemingly noncommittal and unprincipled use of opinion polling for ESD interpretation demonstrated in Furman appeared three decades later, in Atkins v Virginia.103 In that case, analysed fully in Chapter II, the six-Justice majority evolved the Eighth Amendment’s punishments clause to exclude the execution of intellectually disabled offenders.104 In Atkins SCOTUS cited a national consensus against this practice, expressly incorporating into its analysis polling data, which the majority claimed to show ‘a widespread consensus among Americans, even those who support the death penalty,

102 Dworkin, JfH (n 93) 37-39.
104 ibid 321.
that executing the mentally retarded is wrong.'\textsuperscript{105} The cited data comprised all national polls known by the \textit{amici}.\textsuperscript{106} Delivering the Court’s opinion in \textit{Atkins}, Justice Stevens conceded that these factors were ‘by no means dispositive’,\textsuperscript{107} but maintained that ‘their consistency with the legislative evidence’ and international opinion ‘lends further support to our conclusion that there is a consensus’.\textsuperscript{108}

Typically,\textsuperscript{109} questions asked by the polls cited in \textit{Atkins} were restricted to simple, closed answers.\textsuperscript{110} Only one poll cited by the Court provided for a more open response, giving respondents the opportunity to explain how, if deliberating over the punishment for a defendant convicted of murder, their choices would be affected.\textsuperscript{111} Response choices were not restricted to the uncomplex closed answers among the other polls, but to the broader: ‘much less likely’, ‘somewhat less likely’, ‘no difference’, or ‘not sure’.\textsuperscript{112} Opposition to the execution of intellectually disabled defendants varied from 56%\textsuperscript{113} to 83%\textsuperscript{114}, demonstrating ‘contingent[,] malleable’\textsuperscript{115} and inconsistent public opinion across the country. All polls provided for a DK option.\textsuperscript{116}

Recalling the issues with sampling and question-design, all but one of the cited polls utilised uncomplex, dichotomous methods, predominantly through household telephone sampling.\textsuperscript{117} As explained, this simplistic integration of polling data with constitutional interpretation underestimates the complexity of sampling and forgoes the methodological rigour provided for by other, multi-dimensional forms of question-construction.\textsuperscript{118} A number of such criticisms were raised in the \textit{Atkins} dissent, with Chief Justice Rehnquist warning that

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\textsuperscript{105} ibid 316-317 fn21.
\textsuperscript{106} \textit{Atkins} AAMR brief (n 99) Appendix B.
\textsuperscript{107} \textit{Atkins} (n 103) 317 fn21.
\textsuperscript{108} ibid.
\textsuperscript{109} This applies to 23 of the 24 polls (of a total 27 cited) which provided information regarding question-design.
\textsuperscript{110} \textit{Atkins} AAMR brief (n 99).
\textsuperscript{112} ibid.
\textsuperscript{113} The Tarrance Group, ‘Death Penalty Poll’ (March 1993) q9.
\textsuperscript{115} Wood and Gannon (eds) (n 15) 91.
\textsuperscript{116} \textit{Atkins} AAMR brief (n 99). This included “undecided”; “unsure”; “no opinion”.
\textsuperscript{117} ibid.
\textsuperscript{118} Groves et al (n 37) 234.
\end{footnotesize}
\end{flushleft}
reliance on polls for ESD purposes was misguided and that SCOTUS lacked ‘sufficient information to conclude that the surveys were...capable of supporting valid empirical inferences’.

Whilst this thesis acknowledges that opinion polls play an important role in contributing to contemporary debate, they are insufficiently informative for constitutional interpretation, including ESD analysis. It should be recognised that the Justices who cited polls in *Furman* did not explicitly purport to demonstrate public consensus merely through the use of such evidence. That said, the Court’s selectivity demonstrated early on a weak link in the chain between opinion polling and Eighth Amendment adjudication. This weakness was redisplayed in *Atkins*, where ‘blind faith credence’ in potentially unreliable polls was accorded by the majority. If interpreters of ESD are able, and seemingly willing, to base their decision-making on subjective values devoid of moral scrutiny and determined by cherry-picked polls, the moral legitimacy of this unbridled value-judging is called into question. That claim must now be considered in light of an interpretivist framework.

### 5.1.4 INTERPRETIVISM

Developing the methodological concerns shown to pervade the Court’s use of opinion polls, this subsection will attempt to sieve rationally that indicator of ESD. The selectivity of polls seen in *Furman* and *Atkins* undermines the integrity of their inclusion in constitutional interpretation. If polls are able to provide any form of objective measurement, which is itself at least questionable, cherry picking adds a layer of unbridled discretion, which discredits the idea of an interpretivist judge. On the theoretical level, cutting into the providence of polls for constitutional interpretation of the Eighth Amendment, the claim will be made that judges should be guided by background principles of political morality which are not found through a merely positivistic emphasis on empirical poll results.

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119 *Atkins* (n 103) 322.
120 ibid 326.
Chapter V: Further Measures of Evolving Standards

The cherry picking of poll resources in *Atkins*, an act described in strong terms by Raeker-Jordan as ‘potential fudging of the numbers’, suggests a selection of those numbers by the Justices to achieve consistency with the direction of their opinions. The obvious desire of the majority to exempt a class of defendants from execution in *Atkins* was complemented, not coincidentally, by the calculated references to polls demonstrating results, which cohered with that desire. The debate over ‘whether these sorts of evidence should inform the analysis’ of the Eighth Amendment is informed by Dworkinian interpretivism which rejects pre-interpretive data such as that provided by poll results, whether methodologically sound or otherwise. The empirical use of polling is characteristic of positivism, which provides an example of something Dworkin described as an austere statistic of collectivity, rather than a rational use of moral communal will. The Eighth Amendment’s ESD seeks moral answers to legal questions and the Court must make principled references to the community standards that show the law in its best moral light. When selected in such an unprincipled and seemingly arbitrary empirical fashion as that showcased in *Furman* and *Atkins*, polling data is not sieved rationally in the way interpretivism understands political morality. When cited in constitutional interpretation, the poll is a methodologically unsound measure of consensus, given the complexity of public opinion, and pays even less respect to the existence of principles of morality in law.

‘Sensationalism sells’, often to the detriment of disseminating accurate information, over-representing a ‘crime master narrative’, first referred to in the English system as

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122 See generally *Atkins* AAMR brief (n 99) and *Atkins* (n 103).
123 Raeker-Jordan (n 121) 115.
124 Dworkin, *LE* (n 5) 67-68.
126 Dworkin, *LE* (n 5) 189.
127 ibid 256. Argued in Section 5.1.
128 See *Furman* (n 76) and *Atkins* (n 103) in Subsection 2.3.
129 Dworkin requires that community understandings and principles are read through a ‘rational sieve’. Dworkin, *TRS* (n 18) 252.
130 As identified by the analysis of survey methodology in Subsection 2.2.
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‘penal populism’. The potential effects of this phenomenon on opinion polling results could include a skewing of responses to attitudes about sentencing, an ill-conceived notion of crime trends and the impact of crime, and an under-justified insistence on more punitive practices. Those opinions might be strongly held, and might be accurate, but if social narrative generates penal populism, and its onset plays a role in changing attitudes, then poll results cannot be viewed simply as measuring opinion. Instead, they should be viewed in the context of their setting.

The functionality of public opinion polling data as an indicator of ESD is redolent of a Hartian pedigree test, rejected by the core of interpretivism. Such a pessimistically dismissive approach to the inclusion of morality in interpretation undercuts the concepts of communal will and public sentiment, and therefore the evolving standards of decency of a maturing society by which the Eighth Amendment is guided. Moreover, the ‘tyranny of the majority’, against which the Federalist papers sought to safeguard, is captured by an unguided use of the ‘bad science’ provided for by contemporary polls. Morality plays no role in the majoritarian ‘effects of occasional ill humors in the society’ such as that contained in penal populism, if in fact these ill humours are provided with citation by the Supreme Court.

132 The American public has ‘been exposed to countless hours of consistent media stereotypes about the nature of violent crime, the kind of person who supposedly commits it, and why.’ Craig Haney, ‘Evolving Standards of Decency’ (2008) 36 Hofstra LR 835, 837.
133 The term ‘populist punitiveness’ was first coined by Anthony Bottoms, ‘Philosophy and Politics of Punishment and Sentencing’ in Chris Clarkson and Rod Morgan (eds) The Politics of Sentencing Reform (Clarendon Press 1995) 15, further developed by John Pratt, Penal Populism (Routledge 2007); David Garland, The Culture of Control (OUP 2001) 142, claiming that there has been a ‘punitive turn’, promoting ‘[h]arsher sentencing and increased use of imprisonment’.
134 Hart (n 12) 79-99. Cf Dworkin, TRS (n 18) 59-64 where any kind of “test” is rejected.
136 Wood and Gannon (eds) (n 15) 75.
137 See Subsection 2.2.
138 Ball (ed) (n 135) No 78, Hamilton.
5.1.5 CONCLUSION: LESSONS FROM BROWN AND GREGG

Stinneford has warned that, if relying upon polling as indicative of moral standards, the Eighth Amendment ‘provides little protection when public opinion becomes enflamed’. Even if, for the sake of analysis, polls are presumed at least somewhat representative of the public sentiment they purport to quantify, they still fail to provide the sound moral footing called for by interpretivist adjudication when they are selected in an unguided way. One remedy for the shortcomings of current polling selectivity is, therefore, for Justices to ensure the transparency of their opinions by justifying survey choices. In addition, recourse to greater precision, in the form of a statistical significance test including a calculation of standard error, would ground the use of polls in principles of justice, fairness, and due process. Loveland poses the question: ‘is it for the Court to lead or to follow the views of America’s citizens?’ SCOTUS adopted the former option in Brown, endorsed in Chapter III as a paragon of the interpretivist tenet of principles trumping policies, demonstrating that positivism’s exhaustible approach to law is enlightened by moral guidance. A citizenry, as measured by polls, may support a policy, but the ultimate moral question faced by the interpreter is one of principle, which is counter-majoritarian in nature.

The majority opinion in Gregg v Georgia, which reignited the American death penalty in response to post-Furman reforms, provides a satisfactory mid-way for the inclusion of polls in constitutional adjudication. The Eighth Amendment assessment, concluded the majority in Gregg, finds relevance in ‘objective indicia that reflect the public attitude towards a given sanction.’ That attitude, however, is not conclusive. Sanctions ‘also must accord with “the dignity of man,” which is the “basic concept underlying the

141 Brown (n 21).
142 See Chapter III, Section 3.2.
144 ibid 173.
Eighth Amendment.\footnote{ibid, citing \textit{Trop v Dulles} 356 US 86 (1958) 100.} With this basic concept of dignity in mind, the remainder of this chapter seeks out the sources that can provide clear examples of the morality-driven element of the ESD assessment. Penology, the philosophy of punishment and the goals that drive its imposition, is one such example.

### 5.2 Penology

Just as the Supreme Court announced that the Eighth Amendment’s punishments clause must comport with evolving standards of decency,\footnote{ibid 173.} the \textit{Gregg} majority also stipulated constitutional requirements of dignity,\footnote{ibid, quoting \textit{Trop} (n 145) 100.} and proportionate punishment.\footnote{ibid.} These criteria require that punishments do not ‘involve the unnecessary and wanton infliction of pain’,\footnote{ibid 173, citing \textit{Furman} (n 76) 392-393 (Burger, CJ, dissenting).} and are not excessive in comparison to the wrongful conduct.\footnote{‘Second, the punishment must not be grossly out of proportion to the severity of the crime.’ \textit{Gregg} (ibid) 173, citing \textit{Trop} (n 145) 100; \textit{Weems} (n 1) 367.} Aarons notes that, while these other formulations of the Eighth Amendment assessment were presented in \textit{Gregg}, the Court’s subsequent focus has been squarely on a majoritarian ESD element.\footnote{ibid 173, citing \textit{Furman} (n 76) 392-393 (Burger, CJ, dissenting).} It can be argued that, in order properly to understand the ESD of the Eighth Amendment, respect must be paid to the basic concepts announced in \textit{Gregg}: dignity and proportionality.\footnote{Dwight Aarons, ‘The Abolitionist’s Dilemma’ (2008) 6 Pierce LR 441, 444. Furthermore, see the precedent outlined in Chapter II where the ESD assessment was shown to be the Court’s principal focus in evolving the punishments clause.} The \textit{Gregg}-standard ties in with Dworkin’s emphasis on ‘moral responsibility’\footnote{ibid 225.} and ‘political integrity’,\footnote{Ronald Dworkin, ‘Hard Cases’ (1975) 88 HLR 1057.} fulfilling the principle of consistency in decision-making and therefore fairness and justice.\footnote{ibid 173, citing \textit{Trop} (n 145) 100; \textit{Weems} (n 1) 367 where the idea of Eighth Amendment proportionality was first introduced.} Under interpretivism, ESD can be viewed as complementary to, not in competition with, dignitarian and proportionality assessments.\footnote{ibid 173, citing \textit{Furman} (n 76) 392-393 (Burger, CJ, dissenting).} On that basis it will be argued that, when penological principles are analysed in their best...
light, aided by the same sieving process employed previously, they can contribute meaningful analysis to the interpretivist ESD assessment.

This section will argue that sentencing rationales, which are policy goals, are only relevant to the executive and legislative branches. Crime control and other questions of policy, for example, are dealt with under the heading of “sentencing rationales”, “justifications”, or “purposes”. In judicial adjudication, however, the Eighth Amendment’s non-empirical evolutive doctrine aligns best with principles of just sentencing, rather than rationales. Proportionality and individualisation, found throughout modern Eighth Amendment jurisprudence, will provide a Dworkian integrity-driven approach to the inclusion of penology in ESD interpretation. Before this argument can be developed fully, an introduction to the history of penological development prior to the Court’s Eighth Amendment activism is necessary.

5.2.1 HISTORY AND CONTEXT

Beccaria’s declaration in 1764 that every punishment must first be necessary, and second lenient, influenced countless Enlightenment philosophers including Blackstone and Bentham. Bessler notes that Beccaria’s writing had a ‘special influence’ on Enlightenment figure Voltaire, with whom American founders Franklin and Rush had frequent contact, and both are said to have been influenced by Beccaria’s conceptions of proportionality. Furthermore, it has been argued that Beccaria even influenced Jefferson, the architect of the Declaration of Independence. Described as a ‘revolutionary

158 ibid 63.
160 ibid 200 fn51.
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principle which to this day underlies the Western democratic criminal justice process, Beccaria’s theory of proportionality laid the foundations for both principal tenets in punishment jurisprudence: consequentialism and deontology. Ferrajoli, who has described Beccaria as ‘the father of modern criminal law’, uses the example of the USA PATRIOT Act to show that

‘[t]here has never been a moment when Beccaria’s teaching, and the example he offered as a civically engaged philosopher, ceased to be topical in standing up to these horrors [of] violent methods...the useless amplification of criminal norms, from excessive punishment to the obscurity of the laws.’

Beccaria’s idea that ‘the greatest happiness shared among the greatest number’ should provide the objective for rational legislation, was adopted by Bentham in 1776. Although Bentham adopted this principle from a philosophy strongly concerned with dignity, and therefore deontological, the English philosopher, adopting a consequentialist approach where outcomes were most relevant, considered that everything could be determined by weighing and balancing the two human vices: pleasure and pain. In the punishment setting, Bentham’s consequentialism is described as ‘penal utilitarianism’ and justifies sanctions insofar as they balance against the level of pain caused by the relevant offence, again appealing to methodical assessment of aggregate benefits and costs. Beccaria’s appeal to humanity was ‘subsumed by Bentham’s insistence on logic’, driven by a typical post-Enlightenment drive to measure everything empirically, through reason. Hart, himself a legal

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165 ibid 502.
166 ibid 512 (reordered). USA PATRIOT Act of 2001 HR 3162 (107th Cong).
167 Beccaria (n 157) 7.
positivist, described Bentham’s utilitarianism as having ‘an almost inhuman flavour’;\(^{172}\) one which neglected the moral virtues of safeguarding against excessive governmental power. According to Hart, Bentham opened an ‘epoch which is now closing’;\(^{173}\) and still is, due in part to Dworkin’s influence on legal philosophy and to the shift towards a more humanity-led approach to sentencing.

While Beccaria’s work was first observed as providing the foundations for Bentham’s strictly utility-driven approach to penology,\(^{174}\) an alternative explanation has been observed more recently. Young, for example, observes that Beccaria was far more concerned with justice beyond mere utility than many critics have claimed, and that ‘he was at least as much a retributivist as a utilitarian.’\(^{175}\) By re-examining his work, Beccaria’s statement that ‘[t]here is no freedom when the laws permit a man in some cases to cease to be a person and to become a thing’\(^{176}\) can be found embedded in Kant’s conception of deontological ethics,\(^{177}\) which views law in contradiction to utilitarianism. Kant’s response to penal consequentialism through deontology argued that governments had the duty to act in such a way that they ‘always treat humanity...never simply as a means, but always at the same time as an end’.\(^{178}\)

The “means”, which refers to the practical utility of punishment with goals such as reformation of character, something that would later become rehabilitation; deterrence; or incapacitation,\(^{179}\) is that with which Bentham was concerned.\(^{180}\) The “end”, according to

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\(^{173}\) ibid 53.

\(^{174}\) Adam Sitze, ‘Capital Punishment as a Problem for the Philosophy of Law’ (2009) 9 The New Centennial Review 221, 228: ‘Contemporary readings of Kant’s critique of Beccaria...often proceed in reified and sterile terms, retroactively construing Beccaria as a “utilitarian”’.


\(^{176}\) Beccaria (n 157) 50.

\(^{177}\) Immanuel Kant, *Metaphysics of Morals* (1797) (Mary Gregor (ed) CUP 1996) 209: ‘For a human being can never be treated merely as a means to the purposes of another’; ‘[i]t is just in this that his dignity (personality) consists’.


\(^{179}\) See an evaluation of this and a much more comprehensive definition in Mary Sigler, ‘Contradiction, Coherence, and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence’ (2003) 40 American Criminal LR 1151, 1156 fn28.

\(^{180}\) For an analysis of these goals, or rationales, see generally Thom Brooks, *Punishment* (Routledge 2014).
Kant, was just as important, and led him to argue for deserved punishment; just deserts, where retribution provided for everyone to ‘realize the desert of his deeds’.\(^{181}\)

One of the best known paragraphs of the Holy Bible contains the principle of *lex talionis*, retaliation, framed within Exodus as ‘[e]ye for eye, tooth for tooth, hand for hand, foot for foot’.\(^{182}\) Commentators have referred to such Old Testament quotes as this and Genesis 9:6: ‘[w]hosoever sheddeth man’s blood, by man shall his blood be shed’,\(^{183}\) in concluding that the Bible supports retributive justice.\(^{184}\) While this may in fact not be the case,\(^{185}\) as shown by the law of the New Testament, which condemned the old principle of eye for eye,\(^{186}\) a strong foundation for public retributivism\(^{187}\) is grounded in Old Testament teaching. Therefore, whilst Kant’s 18\textsuperscript{th} Century work certainly did not create retributivism, its conceptualisation of duty ethics as requiring just deserts can be seen to contain a revival of Biblical retributivism, divisive in an era when religion was abandoned in favour of empiricism.

Kant’s deontology was unconcerned with practical consequences, instead occupying itself ‘with ensuring that every criminal violator receives his or her just desert’.\(^{188}\) Kant’s penological ethic resembles more closely the human aspect of Beccaria’s charge that ‘[e]very punishment which is not derived from absolute necessity is tyrannous’.\(^{189}\) Beccaria’s necessity principle is now explained through modern conceptions of proportionality review: offenders must be punished in a way, which is justified; they must receive their just deserts.\(^{190}\) Pronounced alongside the ESD principle in *Weems*,\(^{191}\) the basic ‘precept of


\(^{183}\) ibid Genesis 9:6.

\(^{184}\) Brooks (n 180) 158.

\(^{185}\) ‘Ye have heard that it hath been said, An eye for an eye’, Matthew says in the New Testament, but ‘whosoever shall smite thee on thy right cheek, turn to him the other also.’ KJV (n 182) Matthew 5:38-59.

\(^{186}\) ibid and ibid Matthew 7:3; John 8:7.

\(^{187}\) This thesis refers to all retributive justice as “public”, meaning imposed by proper channels. Personal, vigilante-style retribution is simply vengeance, which is not a penological goal.

\(^{188}\) Steven Gey, ‘Justice Scalia’s Death Penalty’ (1992) 20 Florida State ULR 67, 105-106.

\(^{189}\) Beccaria (n 157) 10 (attributing this to ‘the great Montesquieu’).

\(^{190}\) Steven Gey, ‘Justice Scalia’s Death Penalty’ (1992) 20 Florida State ULR 67, 106.

\(^{191}\) *Weems* (n 1) 367: ‘punishment for crime should be graduated and proportioned to offense (sic)’.
justice\(^\text{192}\) of sentencing proportionality first requires offenders to be punished with similar severity to their crimes.\(^\text{193}\) That assessment is applied in Eighth Amendment jurisprudence as the ‘objective\(^\text{194}\) arm of the excessiveness inquiry.\(^\text{195}\) The Court’s non-lethal capital offending jurisprudence provides a rich example of such an assessment. In *Kennedy v Louisiana* SCOTUS held the death penalty disproportionate when applied to defendants who had committed non-lethal rape, regardless of the victim’s age.\(^\text{196}\) In so holding, the majority looked to objective proportionality when concluding that rape caused far less ‘moral depravity’\(^\text{197}\) than murder, due to its lower cause of ‘injury to the person and to the public’.*\(^\text{198}\)

Next, contemporary applications of proportionality in retributivism also require a comparative reading of sentences with those of other crimes in the trial court’s jurisdiction, ‘ordinal proportionality’,\(^\text{199}\) and the same crime in other jurisdictions.\(^\text{200}\) This arm of the proportionality assessment, the ‘subjective\(^\text{201}\) element, also demonstrated in *Kennedy*,\(^\text{202}\) contributes equal treatment to the goal of just deserts, where an offender should receive a punishment which is ‘exactly as much as he deserves, no more, no less.’\(^\text{203}\) Dworkin defends the importance of equality throughout his work,\(^\text{204}\) a principle respected at the interpretive stage of analysis. By applying the interpretivist tenet of political integrity to this discussion,\(^\text{205}\) consistency in decision-making is championed by subjective proportionality.

Principles such as justice and fairness trump policies at every stage, and in the penology setting those principles manifest as an ordinal reflection on punishment. Political integrity, a

\(^{192}\) ibid.


\(^{194}\) *Coker v Georgia* 433 US 584 (1977) 613.

\(^{195}\) This is applied throughout Eighth Amendment jurisprudence: *Weems* (n 1) 367; *Atkins* (n 103) 311; *Roper* (n 29) 560.


\(^{197}\) *Kennedy* (n 196) 423, quoting *Coker* (ibid) 598.

\(^{198}\) ibid.


\(^{200}\) *Coker* (n 194) 613; *Kennedy* (n 196) 424-426.

\(^{201}\) *Coker* (ibid) 613.

\(^{202}\) *Kennedy* (n 196) 424-426: ‘We conclude on the basis of this review that there is no clear indication that state legislatures have misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional.’

\(^{203}\) Norval Morris and Michael Tonry, *Between Prison and Probation* (OUP 1990) 84.

\(^{204}\) Ronald Dworkin, *A Matter of Principle* (OUP 1985) 190; Dworkin, TRS (n 18) 272-278.

\(^{205}\) Dworkin, *LE* (n 17) 165.
form of moral responsibility, provides the gap between morality and law, which Dworkin seeks to fill.

Turning to the past century, Western societies have generally, within a jurisdiction, become more pacifistic and orderly in their sentencing practices than in Kant’s day, and Garland notes that the ‘emergence of cultural practices embodying civilized and humanitarian sensibilities have softened state power’. This “softening”, combined with a loss of confidence in social institutions arising out of the 1960s and 70s political turmoil; the struggle for civil rights; and soaring crime rates, led to the realisation that utilitarian sentencing policies such as deterrence were failing to deliver. Another aspect of consequentialism, the ‘rehabilitative ideal’, also reached its peak. Martinson would declare in 1974 that ‘nothing works’, evidencing that rehabilitative and deterrent efforts ‘had no appreciable effect on recidivism’. These findings would provide the ‘foundation for what was to become one of the most significant shifts in modern American corrections.’ Again, penology was shown to be a product of its context. The re-revival of retributivism would provide an alternative punishment theory resulting from the widespread disillusionment with consequentialist policies.

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207 Travis Pratt, Jacinta Gau and Travis Franklin, *Key Ideas in Criminology and Criminal Justice* (SAGE 2011) 78-79; Garland (ibid) 209.
210 Anthony Bottoms, ‘An introduction to “The coming crisis”’ in Anthony Bottoms and Ronald Preston (eds) *The coming penal crisis* (Scottish Academic Press 1980) 20: ‘The rehabilitative ethic, and perhaps still more the liberal reformism which preceded it, was an ethic of coercive caring, but at least there was caring.’
211 Sigler (n 179) 1161 (noting that this ideal was witnessed ‘throughout much of the twentieth century’); Messinger (n 209) 1176 (pointing to 1959 as the height of rehabilitation’s ‘dominance over recommendations for research on penal treatment’).
214 Pratt et al (n 207) 83.
215 This thesis treats Kant’s deontology as the first revival, following Biblical foundations.
Chapter V: Further Measures of Evolving Standards

It will be proposed that, following Martinson’s rejection of utilitarian policy objectives which continues to find reaffirmation in contemporary literature,\textsuperscript{216} the principles embodied by just sentencing provide an integrity-driven approach for the future inclusion of penology in ESD interpretation. To that end, this thesis adopts Beccaria’s foundational principles of limited punishment, as read through a contemporaneously applicable form of proportionality, to cater for the rational sieve required by an interpretivist reading. Before finalising this chapter’s inclusion of penological principles in ESD analysis, a review of the Court’s treatment of that indicator will provide a better understanding of the Court’s precedent in this area.

5.2.2 The Approach of the Supreme Court

Before reflecting on the inclusion of penology by SCOTUS in Eighth Amendment jurisprudence, these decisions must first be viewed in context. During a period when the rehabilitative ideal had given way to cynicism and fatigue,\textsuperscript{217} and shortly following a declaration that the punishments clause contained an ESD standard,\textsuperscript{218} the late 1960s saw the creation of a Model Penal Code (MPC)\textsuperscript{219} by the American Law Institute.\textsuperscript{220} The MPC, described as ‘one of the great intellectual accomplishments of American legal scholarship of the mid-twentieth century’,\textsuperscript{221} coincided with a period of low confidence in public institutions and disquiet regarding punishment rationales.\textsuperscript{222} At its root, the Code, which serves as the framework for around two-thirds of US state criminal codes,\textsuperscript{223} identified five penological principles:

\begin{itemize}
  \item Even the most authoritative research findings on deterrence conclude miniscule deterrent effects “so small and uncertain, and so dependent on conditions that are seldom met, that they cannot serve as adequate bases for policy making.” Daniel Nagin, ‘Deterrence in the 21st Century’ in Michael Tonry (ed) Crime and Justice in America: 1975-2025 (UCP 2013) Chapter 5.
  \item See Trop (n 145) and the assessment of related cases in Chapter II.
  \item Model Penal Code and Commentaries (Official Draft and Revised Comments) (1985 edn) (MPC).
  \item For a detailed assessment of the history of American criminal codification see Sanford Kadish, ‘Codifiers of the Criminal Law’ in Sandford Kadish (ed) Blame and Punishment (Macmillan 1987) 205.
  \item Kadish in Kadish (ed) (n 220) 246.
\end{itemize}
tenets, namely prevention; rehabilitation; individualised sentencing; general deterrence; and safeguarding against excessive, disproportionate, or arbitrary punishment.\(^{224}\)

The Code’s eclectic mix of utilitarian sentencing rationales and principles has since been refined with a renewed focus on retributivism,\(^{225}\) arguably in order to serve the social function of preventing vigilantante-style private retribution, placing that power with legitimate state actors.\(^{226}\) With this in mind, and given that the emphasis of this thesis is on adjudication, the remainder of this section will shift the attention back to the Eighth Amendment’s judicial evolution. In the wake of the MPC’s introduction and the Warren Court’s extensive revolution of due process,\(^{227}\) the punishments clause was to experience a more refined penological assessment during the 1970s.

While the 1972 decision in *Furman* was notably fractured, one of the few points on which the concurring Justices agreed was penology; every opinion addressed ‘deterrence’ and ‘retributivism’.\(^{228}\) Radelet and Borg note that,\(^{229}\) despite the public’s general lack of appetite for utilitarian sentencing rationales, the deterrent effect of capital punishment was widely accepted, following a prominent 1975 study\(^{230}\) purporting to show that during the 1950s and 1960s one execution could deter up to eight murders.\(^{231}\) Despite a declaration by the dissentients in *Furman* that deterrence was an area best left to state legislatures, which ‘can act far more effectively than courts’,\(^{232}\) the majority upheld it as a legitimate goal to inform ESD analysis.\(^{233}\) Reversing the constitutional ruling in *Furman*, *Gregg* nonetheless

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\(^{224}\) MPC (n 219) § 1.02(2)(a)-(e).

\(^{225}\) See Michael Marcus, ‘Limiting Retributivism’ (2007) 29 Whittier LR 295, where Marcus argues at length with Reitz and Morris regarding the shift in focus. See specifically 295-296 fn2 for an assessment of the 2002-2007 proposals, which were eventually adopted.

\(^{226}\) ibid 308-309.

\(^{227}\) This was outlined in Chapter II and will be returned to, in the context of solitary confinement, in Chapter VI.

\(^{228}\) *Furman* (n 76) 240, Douglas, J; 257, Brennan, J; 306, Stewart, J; 310, White, J; 314, Marshall, J.


\(^{232}\) *Furman* (n 76) 403, Burger, CJ.

\(^{233}\) See generally the concurrences in *Furman* (ibid) and specifically 301, Brennan, J.
reaffirmed this commitment to deterrence as a legitimate objective, in the face of this utilitarian goal’s empirical complexity and uncertain moral footing.  

5.2.2.1 Deterrence

Unconvinced by the promise of deterrence, critics would heavily criticise this principle. A Commission formed by the National Academy of Scientists in 1978 with authors claiming to prove or disprove the controversial results of the 1975 study. Radelet and Akers claim that an abundance of conflicting outcomes from that battling results in a ‘net gain of zero’. Moreover, Radelet’s own study observed 83.6% of expert criminologists feeling that their careers’ worth of experience led them to believe that there was no proven deterrent effect of the death penalty. In practice, ‘individual deterrence’ has a number of failings. Many people are undeterred and therefore reoffend, due either to ignorance of the potential sentences they might face, a lack of confidence in the penal system (or perhaps confidence in their ability to escape arrest or punishment), other motivations for crime such as necessity, or a combination of all these factors. In the case of capital punishment, clearly individual deterrence plays no part. An executed criminal is not deterred, he is dead.

In addition deterrent effect, even if it has been successful, is nonetheless extremely difficult to measure. Proving a negative, demonstrating that less crime has been committed because of deterrence rather than a host of other socio-economic or political factors, is only

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234 ‘Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view.’ _Gregg_ (n 143) 185.
236 ‘The new deterrence studies analyze data that spans the entire period since the resumption of executions in the US following the 1973 [sic] decision in _Furman_.’ Jeffrey Fagan, Testimony to the New York State Assembly Standing Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction (January 21, 2005).
238 ibid 7-10.
239 Ashworth (n 200) 78.
240 As deterrence assumes awareness, Brooks gives the example of arson to illustrate the logical fallacy of this assumption, asking the reader to consider whether he or she knows the maximum penalty for arson in their jurisdiction. The likelihood that they will answer successfully is low, he contends. _Brooks_ (n 180) 46.
measurable in terms of individual deterrence, by interviewing each offender. Even then, issues prevail surrounding similar participant biases as those found with opinion polling. Nonetheless, Ashworth points to a strong general deterrent effect as evidenced empirically. He notes that the existence of a penalty for the criminalisation of drink-driving, for example, causes desistence. While this may not be the case with the existence of the death penalty, deterrence clearly has some merit with regards its effect on potential offenders.

Despite the shortcomings of deterrence, especially in the capital sphere, SCOTUS has, in ESD analysis, cited deterrence continually. As noted above, in Gregg the Court renewed its commitment to deterrence, providing a point of departure for this thesis. Deterrence, like all policy-goals, is an example of descriptive positivism. Morality, more readily found in Kant’s deontological reading of Beccaria, is not given even a minor role in utilitarian penology; this falls short of interpretivism’s ‘law as integrity’. Dworkin’s interpretivism requires policies to be trumped by principles, and this thesis argues that studies which purport to quantify deterrent effect support only policy goals, which are best left to the other branches of government. ESD analysis is required by this thesis to be informed not only by collectivity but by background principles of morality. Having departed from the Court’s reliance on deterrence, measured by a Dworkinian yardstick, consideration of the second rationale of penology regularly cited by SCOTUS, retributivism, must now be considered.

5.2.2.2 RETRIBUTIVISM

Kant’s revolutionary deontology occupied itself in the punishment context with ‘just deserts’; resembling Beccaria’s proportionality principle more closely than the Old

241 Andrew Ashworth, ‘Deterrence’ in von Hirsch and Ashworth (eds) (n 191) 51.
242 See also Geraldine Mackenzie, How Judges Sentence (Federation Press 2005) 101-106.
243 Ehrlich (nn 230-231).
244 SCOTUS has held that punishment must promote this goal to a ‘significant’ or ‘measurable’ degree. Coker (n 194) 592, affirmed by Roper (n 29) 571; Farman (n 76) 342-59, Marshall, J (arguing that death as punishment was excessive because it failed to serve the goals of deterrence or retribution).
245 Gregg (n 143) 185.
246 Dworkin, LE (n 17) 189.
247 Ibid 225.
248 Dworkin, TYO (n 125) 1677; Dworkin, TRS (n 18) 194-195.
249 Gey (n 190) 106.
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Testament’s punitive charge of ‘eye for eye’, \( \textit{lex talionis} \). This chapter has explained the bridge between traditional, Kantian deontology and modern proportionality review.\(^{251}\) As a summary, just deserts is a punishment which is deserved.\(^{252}\) The principle requires offenders first to be punished with similar severity to that of their crimes.\(^{253}\) Second, a contemporary understanding of retributivism requires a comparative reading of sentences with those of other crimes in the trial court’s jurisdiction, ‘ordinal proportionality’,\(^{254}\) and the same crime in other jurisdictions.\(^{255}\) These criteria ensure that any state-imposed retributivism is proportionate and adheres to just deserts, rather than an emotionally-motivated display of personal vengeance.

In Eighth Amendment precedent, however, numerous Justices have regularly, and wrongly, conflated state retributivism with personal vengeance, including Justice Brennan’s concurrences in \textit{Furman} and \textit{Trop}\.\(^{256}\) Justice Marshall made the same mistake in \textit{Furman}, agreeing with Brennan that ‘[r]etaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.’\(^{257}\) Marshall made explicit reference to Beccaria in reproving ‘[p]unishment as retribution [which] has been condemned by scholars for centuries’.\(^{258}\) Sigler has noted that this misunderstanding of ‘retribution-as-vengeance’,\(^{259}\) referring to the conflation between state retributivism and personal vengeance, has been cited and followed in an abundance of subsequent punishments clause jurisprudence.\(^{260}\)

\(^{250}\) Cf Beccaria (n 157) 10, 63; \textit{KJV} (n 182) Exodus 21:24.
\(^{251}\) See (nn 177-184).
\(^{252}\) \textit{Weems} (n 1) 367: ‘punishment for crime should be graduated and proportioned to offense’.
\(^{253}\) \textit{Kant} (1996 ed) (n 177) 141; Hegel (n 193) 129; von Hirsch and Ashworth (n 191) 68-70; \textit{Weems} (ibid) 367; \textit{Atkins} (n 103) 311; \textit{Roper} (n 29) 560.
\(^{254}\) von Hirsch and Ashworth, (eds) (ibid) 68-70.
\(^{255}\) \textit{Coker} (n 194) 613; \textit{Kennedy} (n 196) 424-426.
\(^{256}\) \textit{Furman} (n 76) 304: ‘criminals are put to death because they deserve it’ quoting his own concurrence in \textit{Trop} (n 145) 112: ‘But I cannot see that this is anything other than forcing retribution from the offender - naked vengeance.’
\(^{257}\) \textit{Furman} (ibid) 343.
\(^{259}\) Sigler (n 179) 1182.
\(^{260}\) In addition to \textit{Furman} (n 76), \textit{Gregg} (n 143), and the subsequent cases which make direct citation of those judgments - and which are therefore founded on this misunderstanding of retributivism - other Supreme Court
A review of jurisprudence outside the Eighth Amendment sphere shows that this misunderstanding permeates the Court’s precedents from much earlier than *Furman*, with the 1952 holding in *Morissette v US* making the same mistaken retribution-as-vengeance conflation.\(^{261}\) Additionally, the majority in *Kennedy v Mendoza-Martinez*,\(^{262}\) a 1963 Fifth and Sixth Amendments case which has since been cited widely by the Court,\(^{263}\) described ‘an exaction of retribution’ as ‘naked vengeance’,\(^{264}\) the same terms witnessed in *Trop*.\(^{265}\) It seems that *Furman* simply perpetuated this mistake by bringing it to the punishments clause, demonstrating that a majority of SCOTUS has persistently considered state retributivism as personal vengeance, not in its Beccarian-Kantian proportionate form which this thesis adopts.

### 5.2.3 **INTERPRETIVISM**

As explained both in Chapter III and in Section 5.1 to this chapter, interpretivism lends moral readings into background principles of the law to interpretation of the Eighth Amendment’s ESD.\(^{266}\) The retribution-as-vengeance conflation demonstrated throughout generations of Supreme Court jurisprudence stalls such a consideration, as it foregoes the moral scrutiny of just deserts. This thesis argues, along with the Court,\(^{267}\) that personal vengeance is an archaic,\(^{268}\) illegitimate penological goal, and claims that a moral reading of that goal views it as unacceptable in modern, principled penology.\(^{269}\) The recent fixation on

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\(^{261}\) 342 US 246 (1952) 251.

\(^{262}\) 372 US 144 (1963).

\(^{263}\) For some notable examples see *Kansas* (n 260) 394; *Hudson* (n 260) 111; *Seling v Young* 531 US 250 (2001) 272 fn3 & 273; *Hamdi v Rumsfeld* 542 US 507 (2004) 532.

\(^{264}\) *Kennedy* (n 196) 168.

\(^{265}\) *Trop* (n 145) 112.

\(^{266}\) Dworkin, *LE* (n 17) 256.

\(^{267}\) This thesis accepts the rejection of vengeance but vitally, not its wrongful conflation with retribution.

\(^{268}\) For prehistoric man, self-preservation was vital and ‘revenge bulked large in the mind of the savage.’ Julian Alexander, ‘Philosophy of Punishment’ (1922) 13 Journal of Criminal Law and Criminology 235. Gluckman has traced the origin of the feud, where tribes formed clans during conflict, with their own rules for measured revenge. Max Gluckman, ‘The Peace in the Feud’ (1955) 8 Past & Present 1, 13.

\(^{269}\) Extensive research has been carried out to analyse a theory proposed by Justice Marshall in *Furman* (n 76) 362-363, that members of the public would be less punitive regarding the death penalty if they had been properly informed. Supported early on in 1974 (Neil Vidmar and Phoebe Ellsworth, ‘Public opinion and the death penalty’ (1974) 26 Stanford LR 1245, 1248) and 1976 (Neil Vidmar and Austin Sarat, ‘Public Opinion, the Death Penalty, and the Eighth Amendment’ (1976) 1 Wisconsin LR 171), Marshall’s hypothesis has since been approved by a consensus of 19 studies carried out between 1976 and 2007. Gavin Lee, ‘Death Penalty
“law and order” introduced in the discussion of polling may lead an observer to argue that vengeance is in fact a legitimate popular goal, with mass media and politics proliferating this rhetoric.\textsuperscript{270}

In a vein that resembles Federalist No 10’s warning against tyrannical majorities,\textsuperscript{271} von Hirsch has cautioned that the principle of proportionality could become jettisoned by penal populism.\textsuperscript{272} The Californian three strikes law introduced in Chapter II is one such example of US political appeasement of the punitive populace leading to disproportionate sentencing schemes. For ESD adjudication, at least, interpretation should be guided by an approach which defers to moral principles, one for which a fixation on law and order for its own sake cannot adequately cater.

Instead, the model refined by Kant and refined further by Robinson as ‘deontological desert’\textsuperscript{273} is adopted by this thesis for the purposes of including such principled penology for assessments of ESD. While Kant’s retributivism was ‘sketchy’\textsuperscript{274} in that it did not expand on the reasons for his preference of just deserts over utility, Robinson’s framework embodies a clearer ‘set of principles derived from fundamental values, principles of right and good’.\textsuperscript{275} The principle of just desert, including proportionality and individualisation, can be relied on to ensure a moral approach to the inclusion of penology in ESD adjudication. The side-lined Gregg conditions of dignity\textsuperscript{276} and non-excessive punishment\textsuperscript{277} are also championed by this approach, something that is so far lacking in the Eighth Amendment jurisprudence.\textsuperscript{278}


\textsuperscript{271} Ball (ed) (n 135) No 10.

\textsuperscript{272} von Hirsch in Tonry and Frase (eds) (n 253) 413.


\textsuperscript{274} von Hirsch (n 169) 65.

\textsuperscript{275} ibid.

\textsuperscript{276} ‘A penalty also must accord with “the dignity of man”’. Gregg (n 143) 173, quoting Trop (n 145) 100.

\textsuperscript{277} ibid.

\textsuperscript{278} Aarons (n 151) 444.
of focusing on utilitarian deterrence, as the Court has done on occasion, deontological desert leaves policy goals to the other branches of government, by squaring the judiciary’s focus on constitutional interpretation of background principles of morality. This theory of penology, adopted by Robinson, aligns with interpretivism, by seeking aspirational answers through an appeal to ‘an amalgam of practice’ and by championing principles of morality over policy objectives.

Before concluding this section, a claim that Eighth Amendment principles cannot be reconciled with one another must be addressed. It has been stated that consistency, derived from the holdings in Furman and Gregg, and individualisation, required by the Lockett and Eddings doctrines, cannot be reconciled. Sigler explains that the Furman-Eddings line of jurisprudence might have led to ‘a system of guided discretion that yields sentences that are neither entirely consistent nor fully individualized.’ Under the interpretivist reading propagated throughout this thesis, a claim of contradiction collapses. Constitutional values are not ‘all-or-nothing propositions’, and nor are penological rationales. Through a rational sieve, values of the Constitution are cast as principles informing the interpreter. For example the strong discretion afforded by Lockett and Eddings permits open-ended mitigation, while Furman and Gregg channel that discretion through the principle of restraint. This channelling function upholds interpretivist principles and allows for individualisation to co-exist with consistency. Such argument aligns with the classical, deontological, review of

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279 Or other utilitarian rationales such as rehabilitation, incapacitation, and restoration. See Brooks (n 180).
280 Paul Robinson, ‘Hybrid Principles for the Distribution of Criminal Sanctions’ (1987) 82 Northwestern LR 19. (Explaining that gross deviations from proportionality are never permitted under an approach to desert which is led by moral consistency).
281 Dworkin, TRS (n 18) 36.
282 ibid 194-195.
283 Furman (n 76); Gregg (n 143).
284 Lockett (n 81); Eddings v Oklahoma 455 US 104 (1982), which require a narrow-proportionality presumption in non-capital cases.
286 Sigler (n 179) 1168.
287 ibid. See Dworkin, TRS (n 18) 25.
288 See Woodson v North Carolina 428 US 280 (1976) 304, where it is made clear that SCOTUS considers these values to be principles.
just deserts by incorporating subjective, ordinal, and intra-jurisdictional elements of proportionality into the excessiveness assessment.

_Harmelin v Michigan_ is the controlling precedent for terms-of-years proportionality,\(^{289}\) where sentences are assessed according to their objective severity. Torti has noted, however, that very few _Harmelin_-disproportionality claims have been successful;\(^{290}\) leading some authors to conclude that the Eighth Amendment’s proportionality principle is a dead letter.\(^{291}\) On the contrary, this thesis argues that the proportionality principle of the Eighth Amendment is very much alive, but has not been given recent expression. The overabundance of capital challenges has a large role to play in casting a shadow over the non-capital docket, creating a sense that these cases are less important to the Court’s Eighth Amendment analysis. To bolster the claim that proportionality review is fundamental to the assessment of solitary confinement, _Graham v Florida_ exists as recent precedent suggesting that subjective severity is an important consideration.\(^{292}\) In _Graham_ the Court concluded that the defendant’s age is an important factor to take into account when assessing severity,\(^ {293}\) holding mandatory life imprisonment without parole (LWOP) unconstitutional when imposed on juveniles.\(^ {294}\) While _Graham_ concerned sentence length rather than conditions, Ristroph argues that the case paves the way for confinement conditions to feature in future proportionality assessments.\(^ {295}\) That consideration of subjective severity was certainly hinted at in _Brown v Plata_,\(^ {296}\) where SCOTUS applied the Eighth Amendment, to condemn the conditions and lack of psychiatric care in California’s prison


\(^{292}\) 560 US 48 (2010).

\(^{293}\) ibid.

\(^{294}\) _Miller v Alabama_ 132 S Ct 2455 (2012) later expanded _Graham_ (n 365) to discretionary juvenile LWOP.


\(^{296}\) 131 S Ct 1910 (2011).
system, and Chapters VI and VII will seek to extend this rationale to solitary confinement scrutiny.

By reproving the Court’s reliance on utilitarian rationales such as deterrence, and its conflation of vengeance with retributivism, this thesis places the highest value on principles of deontological desert for the purpose of informing ESD adjudication.\(^{297}\) Having dealt with penology in practical and theoretical terms, this chapter must now consider two further elements of the ESD principle. Transnational sources of law will first be considered, before professional consensus, an extra-legal principle that has received recent support from the Court, is introduced.

### 5.3 Transnational Sources of Law

In addition to its introduction of the ‘evolving standards of decency’\(^ {298}\) principle to the Eighth Amendment assessment, two further points from Chief Justice Warren’s opinion in *Trop* warrant reflection at this stage. First he noted that, ‘in an enlightened democracy such as ours’,\(^ {299}\) it should have been expected that the punishments clause had rarely required definition. Second, he cited a United Nations (UN) survey,\(^ {300}\) indicating that, with the exception of the Philippines and Turkey,\(^ {301}\) ‘[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime’.\(^ {302}\) The first statement has already been addressed by previous chapters, which showed that Warren’s optimism, perhaps imperialism,\(^ {303}\) in *Trop* was followed by half a century of judicial engagement with and delineation of the Amendment. While such optimism, activism, and subsequently evolutive interpretation of ESD shown by this line of jurisprudence must be commended, a consideration of the further controversy surrounding Warren’s statement in support of transnational constitutionalism is inescapable.

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\(^{297}\) Robinson (n 273) 151. Such as proportionality, individualisation, humanity, and parsimony.

\(^{298}\) *Trop* (n 145) 101.

\(^{299}\) Ibid 100.

\(^{300}\) *Trop* (n 145) 102 fn37, UN Laws Concerning Nationality, (1954) UN Doc ST/LEG SER B/4.

\(^{301}\) Ibid 379 (Philippines) and 461 (Turkey).

\(^{302}\) *Trop* (n 145) 102.

\(^{303}\) See Chapter II, Section 2.2.
On the framework outlined in Section 5.1, Dworkin’s theory of interpretivist adjudication provides that principles of morality and law should be established by appealing to ‘a whole set of shifting, developing and interacting standards’\(^{304}\). By employing a Dworkinian rational sieve, this section will make the claim that transnational law makes valuable contributions to that set of standards for ESD adjudication.

5.3.1 TRANSNATIONAL CONSTITUTIONAL COMPARATIVISM

The term “transnational constitutional comparativism” incorporates the comparison of varying sources of law from outside the US, both legislative and constitutional. “Transnational law” as a single term has become accepted to include a greater variety of legal sources than the categories “international” and “foreign” law.\(^{305}\) Transnational law also includes rules or agreements, which transcend domestic boundaries but might not have been formally adopted by states, such as customs.\(^{306}\)

First, transnational law includes international law, or strictly “public international law” (PIL).\(^{307}\) Formerly ‘the Law of Nations’, PIL is now accepted to unite *jus inter gentes* (treaty law),\(^{309}\) which constitutes multilateral or bilateral agreements between states, with *jus gentium* (customary law).\(^{310}\) Custom in this sense is derived by the International Court of Justice (ICJ) from the collective practice of states, traditionally evidenced by a behavioural element (what a state does)\(^{311}\) and a psychological element (what a state believes it must do, through a constant and uniform usage).\(^{311}\)

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\(^{304}\) Dworkin, *TRS* (n 18) 40.

\(^{305}\) Ryan Black, Ryan Owens, Daniel Walters and Jennifer Brookhart, ‘Upending a Global Decline’ (2014) 103(1) Georgetown LJ 1, 16 fn64.


\(^{309}\) Statute of the International Court of Justice (ICJ Statute) (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat 1031; UNTS 993, Article 38(1)(a).

\(^{310}\) Ibid Article 38(1)(b).

\(^{311}\) To gain acknowledgement as law this behaviour must be in accordance with a ‘constant and uniform usage’. *Asylum Case (Colombia v Perú)* (judgment of 20 November 1950) [1950] ICJ Rep 266, 277.
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opinio juris). The ICJ has expanded this doctrine, holding that the existence of widely adopted treaties may demonstrate elements of customary law in their own right, regardless of the signatory status of a given state. As such, the US could be bound at international law by a treaty-created custom (or ‘norm’) despite not having signed that particular treaty. This area of international law is itself a source of great controversy, but not one with which the remainder of this thesis is concerned. The inclusion of PIL, along with other forms of transnational law, in US (Eighth Amendment) constitutional law by its own Supreme Court is the topic of the present discussion.

As noted, the concept of transnational law includes “foreign law”, which relates to legal sources from third-party states, for example national constitutions and regional agreements outside the US. Unlike international law, where binding effect occurs through self-execution when agreed by Congress, foreign law does not have the same impact on the US, unless the judiciary integrates it with constitutional doctrine. Transnational constitutional comparison therefore includes a variety of sources of law and norms, which transcend state boundaries and were created without the approval of the US legislature. It is this category of law that provides the focus for inclusion in ESD analysis.

One of the last opinions of Chief Justice Marshall resorted ‘to the great principles of reason and justice...The decisions of the Courts of every country [which] will be received, not as authority, but with respect.’ Marshall’s call for such respect will be honoured by the

312 Rebecca Wallace and Olga Martin-Ortega, International Law (7th edn, Sweet & Maxwell 2013) 9-10.
313 The ICJ held in 1969 that they regarded certain treaty provisions ‘as reflecting, or as crystallizing, received or at least emergent rules of customary international law’. North Sea Continental Shelf Cases (Germany v Denmark; Germany v Netherlands) (judgment of 20 February 1969) [1969] ICJ Rep 4, 40.
315 Roozbeh (Rudy) Baker, ‘Customary International Law in the 21st Century’ (2010) 21 European Journal of International Law 173, 174 (arguing that the long-established sources of custom are no longer held in such high regard); Anthony D’Amato, ‘The Concept of Human Rights in International Law’, 82 Columbia L Rev (1982) 1110, fn99 (‘the articulation of the norm in the treaty constitutes an articulation of the rule for the purposes of customary law determination’).
316 International law is capable of self-execution in US law, when Congress ratifies treaties, giving them the status of domestic law without the need for further legislative effort. This concept is not itself immune to controversy, with various doctrines expounded in numerous research articles. See Carlos Vázquez, ‘The Four Doctrines of Self-Executing Treaties’ (1995) 89 Americal Journal of International Law 695, nn 1-4. Thirty Hogsheads of Sugar v Boyle 13 US (9 Cranch) 191 (1815) 198.
remainder of this section, which will call for a degree of the same reverence in interpretivist approaches to ESD.

5.3.2 The Court’s Use of External Legal Perspectives

Reviving Marshall’s call, in a landmark decision which considered anti-sodomy laws existing in several states across the US, the Court in *Lawrence* cited the approach taken by the European Court of Human Rights (ECtHR) to determine what restrictions on personal conduct were ‘necessary in a democratic society’. Toobin has described Justice Kennedy’s idea ‘of law as a transmitter of society’s values’ as ‘central to his identity’. Part of that identity clearly includes a predilection for transnational comparativism, as Kennedy reflected on ‘values we share with a wider civilization’ when condemning the Texan restriction on homosexual intimacy in *Lawrence*. His majority opinion coalesced with the ECtHR’s and concluded that the state statute offended substantive due process, as protected by the federal Constitution’s Fourteenth Amendment.

The decision triggered severe criticism from the dissentients, with Justice Scalia scolding the majority for bringing a constitutional entitlement into existence ‘because foreign nations decriminalize conduct’. Scalia cited an unrelated denial of certiorari where Justice Thomas warned against imposing ‘foreign moods, fads, or fashions on Americans’. Furthermore, Scalia hinted in *Lawrence* at cherry picking, lamenting the Court’s discussion

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318 The test case challenged Tex Penal Code § 21.06(a) (2003).
319 *Lawrence* (n 22).
320 *Dudgeon v United Kingdom* (1981) 4 EHRR 149, [36], quoting Article 8 ECHR: ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society’.
321 Toobin (n 3) 213.
322 ibid 213-214 (noting Kennedy’s annual trips to Europe and advice he gave to post-USSR nations to establish new constitutions).
323 *Lawrence* (n 22) 576. At oral argument in *Roper* (n 29) Kennedy had alluded to a similar sentiment, asking ‘do we ever take the position that what we do here should influence what people think elsewhere?’ *Roper v Simmons* No 03-633 (2003) oral argument.
324 *Lawrence* (ibid) 578-579.
325 US Const, Amend XIV: ‘nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws’.
326 *Lawrence* (n 22) 598.
of transnational law for ‘ignoring, of course, the many countries that have retained criminal
prohibitions on sodomy’.\(^{328}\) In addition to Scalia’s and Thomas’s suspicions and overriding
hesitance to include transnational comparisons in their domestic constitutional interpretation,
this comparative area of law has attracted a great degree of extra-judicial and academic
discussion. Before the themes of such discussions are described (in Section 5.3.3), a
refutation of one criticism in particular is compelling: that of unprecedented decision-making.

As indicated, a major criticism of \(\text{Lawrence}\) revolved around \textit{stare decisis}, with one
commentator describing the Court’s use of transnational comparisons for domestic
interpretation as ‘unprecedented’.\(^{329}\) That particular comment, strongly rooted in positivistic,
historical originalism,\(^{330}\) deviates from the trajectory intended by this section, which seeks
moral analysis of transnational comparisons.\(^{331}\) Nonetheless, exposing the Court’s use of
transnational comparativism, both before \(\text{Lawrence}\) was decided, and more recently can make
an important addition to the foregoing discussion. An explanation of this jurisprudence will
reveal the Court’s reliance on transnational law to be far from unprecedented. In addition, it
will be shown that transnational comparativism is inherent in the framework of law.

Black et al claim that the Constitution should be read according to ‘legal positivism-
influenced dualism’,\(^{332}\) requiring the formal incorporation of international law into domestic
law by the legislature, not the judiciary. Such formality is provided for by the Constitution’s
Treaty Clause in Article II.\(^{333}\) In \textit{SS Lotus} international law was described by the Permanent
Court of International Justice (PCIJ),\(^{334}\) the precursor to the ICJ, as: ‘\[t]\he rules of law
binding upon States’ which ‘emanate from their own free will as expressed in conventions or

\(^{328}\) \textit{ibid.}

\(^{329}\) Julie Payne, ‘Comment: Abundant Dulcibus Vitiis, Justice Kennedy: In \textit{Lawrence v. Texas}, an Eloquent and
Overdue Vindication of Civil Rights Inadvertently Reveals What Is Wrong with the Way the Rehnquist Court

\(^{330}\) See Hart (n 12) and the originalist tendencies of Scalia (n 161) and Bork (n 161), antithetical to the concept
of an evolutive Constitution and an interpretivist approach to ESD.

\(^{331}\) Rather than positivist sources of rules, such as constitutional amendments and domestic doctrine in this
setting, rejected by Dworkin for being too austere. Dworkin, \textit{TYO} (n 125) 1677.

\(^{332}\) Black et al (n 305) 10.

\(^{333}\) US Const, Section 2, Clause 2: ‘Power, by and with the Advice and Consent of the Senate, to make Treaties’.

\(^{334}\) \textit{SS Lotus (France v Turkey)} (judgment of 7 September 1927) [1927] PCIJ Ser A 10.
by usages generally accepted as expressing principles of law'. 335 On the same lines as Black et al’s endorsement of dualism, Delahunty and Yoo argue that to use foreign law as an interpretive tool is to override and therefore undo formal, dualistic, domestic law. 336

Black et al remark that, given the strength of Delahunty and Yoo’s positivism-laden charge, it is unsurprising that scholars have responded in similar language, resorting to originalist tenets of interpretation to defend transnational constitutionalism. 337 Such responses look to the Declaration of Independence, 338 the Federalist papers, 339 and Chief Justice John Marshall’s opinions in support. 340 By recognising that the Framers and early Supreme Court Justices respected and anticipated the use of transnational law, originalist claims against constitutional comparativism fall flat. Murray v Schooner Charming Betsy is one such example, 341 wherein Chief Justice Marshall declared that an act of Congress should never be construed to violate the Law of Nations, creating what has become known as the ‘Charming Betsy canon’. 342 Later Marshall would also cite English law, 343 European codes, 344 and the foreign climate of opinion. 345 Foreign law was also cited in Reynolds v US, 346 where Justice Gray assured that the Court’s commitment in this area had not weakened over the century, declaring in The Paquette Habana that ‘international law is part of our law’. 347 These opinions therefore serve as early and enduring indications that SCOTUS, granted with power

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335 ibid [44].
337 Black et al (n 305) 10.
339 Ball (ed) (n 135) No 3 (John Jay); No 42 (James Madison); No 83 (Alexander Hamilton).
341 6 US (2 Cranch) (1804).
343 See Rose v Himley 8 US (4 Cranch) 241 (1808), applying post-1776 English law.
344 M’Coul v Lekamp’s Administratrix: 15 US (2 Wheat) 111 (1817) 117: ‘Whatever might have been the doctrine of the civil, or Roman law, on this subject, it is certain that by the codes of the nations of the European continent [are] evidence against those with whom they deal.’
345 The Antelope 23 US (10 Wheat) 66 (1825). “Opinion” was derived from the actions of states.
346 98 US 145 (1878) 164 (‘Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people’); ibid 165-167 (citing historical and contemporaneous English law at length).
347 175 US 677 (1900) 700.
by Marbury v Madison, also held the power to take into account international law, and that this commitment strengthened over the century following Charming Betsy.

It could be contended that these early references to transnational law served simply as guides for the historical underpinnings of the American system and the development of SCOTUS in its maiden century. Owing to the roots of American common law in the English system, the use of transnational law was arguably as much for originalist, historicist purposes as it was for comparativism in and of itself. That said, the originalist argument only stands up if further precedent wavers and the record demonstrates nationalism prospering. Closer inspection shows that this is not the case, as demonstrated in a lengthy rebuttal by Calabresi and Zimdahl. They track the last two hundred years of Supreme Court practice with respect to comparative constitutionalism, citing numerous supporting cases and demonstrating that Payne’s description of this source of interpretation as ‘unprecedented’ has no substance. Transnationalism has been viewed by many judges as an integral part of the Constitution’s political morality.

In light of the interpretivist framework applied by this chapter, it is vital to return to an assessment of the Court’s more recent jurisprudence in the punishment sphere. Around ten years ago SCOTUS decided a duo of Eighth Amendment cases, which were placed on the docket either side of Lawrence, with both decisions citing transnational comparisons to varying degrees of significance. Debating the juvenile death penalty in Roper, the majority

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348 Marbury (n 348) 177.
349 Steven Calabresi and Stephanie Zimdahl, ‘The Supreme Court and Foreign Sources of Law’ (2005) 47 William and Mary LR 743.
350 Payne (n 329) 1004.
352 A positivist approach would require further analysis of the Framers’ intentions and the historical decisions following the inception of SCOTUS. This thesis rejects that approach. Instead, recent precedent is introduced before interpretivist analysis.
353 Lawrence (n 22).
354 Roper (n 29).
looked to the UN Convention on the Rights of the Child (UNCRC),\textsuperscript{355} despite the US existing as only one of two UN member states, alongside Somalia,\textsuperscript{356} not to ratify the Convention. The Court also cited relevant articles of the American Convention on Human Rights (ACHR),\textsuperscript{357} again not ratified by the US, in addition to the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{358} which the US has ratified, with reservations.\textsuperscript{359} Notably, the second of these reservations retains the right of the US to impose capital punishment on juveniles.\textsuperscript{360}

Nevertheless, the Court disregarded Congress’s non-ratification or reservation of these treaties and, fortified by a review of all UN states,\textsuperscript{361} concluded that, ‘[i]n sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty’.\textsuperscript{362}

Following Justice Kennedy’s transnational law-laden majority opinions in \textit{Roper} and \textit{Lawrence}, SCOTUS embarked on further evolution of the Eighth Amendment’s ESD in \textit{Atkins}, this time placing more relevance on opinion polls, as discussed in Section 5.1.3. Confining its reference to transnational law within a footnote, the Court paid respect to ‘the world community’\textsuperscript{363} and quoted from a European Union brief,\textsuperscript{364} again demonstrating a willingness to invoke transnational comparisons to inform domestic constitutional decency.

Bringing the analysis to the present day, the most recent ESD assessment citing transnational

\footnotesize{\textsuperscript{355} ibid 575-578. Article 37: ‘Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age’.
\textsuperscript{356} South Sudan, which gained statehood after \textit{Roper}, has also yet to ratify the UNCRC.
\textsuperscript{357} Article 4(5): ‘Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.’
\textsuperscript{358} Article 6(5): ‘Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.’
\textsuperscript{360} ibid R2: [T]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person...including...persons below eighteen years of age’; R3, which attempts to reserve the US definition of ‘cruel, inhuman or degrading treatment or punishment’ (Article 7 ICCPR) to mean the same protection as the Eighth.
\textsuperscript{361} \textit{Roper} (n 29) 577: ‘only seven countries other than the United States have executed juvenile offenders since 1990...[s]ince then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice.’
\textsuperscript{362} ibid.
\textsuperscript{363} \textit{Atkins} (n 103) 317 fn21.
\textsuperscript{364} ibid.
law was handed down in 2010. In *Graham v Florida* the majority, again led by Justice Kennedy, reflected on a ‘sentencing practice rejected the world over’, namely the infliction of Life Without Parole (LWOP) sentences on juveniles convicted of non-homicide offences. The Court, caveating that the consensus among other nations was ‘not dispositive as to the meaning of the Eighth Amendment’, held the ‘climate of international opinion’ against such a practice to be of growing relevance. Once more citing Article 37 UNCRC, in addition to an academic review demonstrating ‘global consensus’, the majority concluded that transnational comparisons were fundamental to the ESD assessment. This recent commitment to comparative law, with eight of the nine sitting Justices incumbent at the time of writing, provides a contemporary display of the Court’s potential approach to transnational constitutionalism in future cases, bolstering the interpretivist argument that this element of interpretation is vital to the Constitution’s moral character.

Clearly, cases decided both historically and contemporaneously with *Lawrence*, have made direct reference to transnational comparisons when seeking to establish the Eighth Amendment’s ESD. This finding supports one claim of the present thesis, that any strictly originalist principle is rebutted. Nonetheless, subsequent to Calabresi and Zimdahl’s jurisprudential review, Zaring found the Supreme Court’s constitutional cases, which made

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366 ibid.
368 *Graham* (n 365) 2033.
369 *Enmund* 458 US 782 fn 22 citing Michelle Leighton and Connie de la Vega, ‘Sentencing Our Children to Die in Prison: Global Law and Practice’ (2007) 42 University of San Francisco LR 983 (which concluded that only two nations were actively imposing LWOP on juvenile offenders).
370 ibid.
371 Justice Elena Kagan replaced John Paul Stevens in the term following *Graham*. Kagan has shown similar commitment to transnational comparison, though not inside the Eighth Amendment sphere. Kagan was understandably (given the heat surrounding this topic) cagey when probed at confirmation, but indicated that she would be willing to ‘look to foreign or international law to resolve the parties’ claims’ in certain, limited circumstances. SCOTUSBlog, ‘Senator John Cornyn Questions for the Record Elena Kagan, Nominee, Supreme Court of the United States’ <http://www.scotusblog.com/wp-content/uploads/2010/07/Written_Cornyn.pdf> accessed 27 February 2015.
372 As well as the assessments in this Subsection, further examples can be found in *Coker* (n 194) 596 fn10 (‘It is…not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue’); *Thompson v Oklahoma* 487 US 815 (1988) 830 (considering the views of ‘other nations that share our Anglo-American heritage, and by the leading members of the Western European community’).
reference to transnational law to be rare.\textsuperscript{373} Black et al agreed, labelling ‘the highly salient “troika”’ of \textit{Roper, Lawrence} and \textit{Atkins} as ‘rare and unrepresentative.’\textsuperscript{374} Nonetheless, precedent clearly exists, and steering away from questions of exactly \textit{how, when, and to what extent} SCOTUS cites transnational law, the case for a rebuttal of the positivist argument has been made. The normative question of whether such citations to transnational law are appropriate as interpretive tools in ESD adjudication must now be visited, with the remainder of the chapter arguing in the affirmative.

\textbf{5.3.3 REFUTING THE LEADING CRITICISMS}

A number of ways exist to split the arguments for and against transnational constitutionalism, the method of informing domestic constitutional interpretation by reflecting on transnational sources. McClosky admitted that there was no consensus on defining “ideology”, but that there was widespread acceptance that the term related to ‘systems of belief that are elaborate, integrated, and coherent, [and] that justify the exercise of power.’\textsuperscript{375} Ideology helps to identify right and wrong and to ‘set forth the interconnections (causal and moral) between politics and other spheres of activity’.\textsuperscript{376} While this definition still holds true, the modern employment of the term ideology holds far broader implications than merely to political philosophy, now communicating ‘a broad, abstract concept’.\textsuperscript{377} In the context of political philosophy, ideology provides the first criticism of transnational constitutionalism for reasons which will now be discussed.

\textsuperscript{374} Black et al (n 305) 19.
\textsuperscript{375} Herbert McClosky, ‘Consensus and Ideology in American Politics’ (1964) 58 APSR 361, 362.
\textsuperscript{376} ibid.
5.3.3.1 **Political Philosophy**

Political philosophy is often over-emphasised with respect to the citation of transnational law.\(^{378}\) Far from the ‘myth’\(^{379}\) of Supreme Court Justices’ fidelity to the Constitution above all else, it is accepted that they operate with an underlying positioning on an ideological spectrum.\(^{380}\) Epstein et al refute this, demonstrating that ideologies can shift over a judge’s tenure.\(^{381}\) One of the most notable examples on the Supreme Court was Justice Blackmun, whose ideological history was tracked at length by Greenhouse, concluding that Blackmun’s ideology shifted significantly from its starting position as strongly conservative, far towards the liberal left.\(^{382}\)

Debates surrounding the impact of those ideologies on decisions are wide-ranging,\(^{383}\) but it is now accepted that judge ideologies do exist and can be measured.\(^{384}\) With respect to the current discussion of transnational law, however, the effect of ideology is often overstated.\(^{385}\) Black et al claim that, following their assessment of SCOTUS decisions that cite transnational law, ‘the assumption that citing foreign law is a principled disagreement between judicial ideologies is a red herring’.\(^{386}\) It has been shown that all Justices, regardless of their positioning on any type of ideological spectrum, seek to support their opinions with a

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\(^{378}\) See generally Black et al (n 305) who use empirical analysis to refute the argument that those who are more ‘left, liberal’ are more likely to cite transnational comparisons than ‘right, conservative’ Justices. Note Justice Scalia’s opinion in *Schriro v Summerlin* 542 US 348 (2004) 356, where he saw fit to consult foreign law.


\(^{380}\) Lee Epstein, Andrew Martin, Kevin Quinn and Jeffrey Segal, ‘Ideological Drift among Supreme Court Justices’ (2007) 101(4) Northwestern ULR 1, discussed in Chapter II, Subsection 2.4.5.2.

\(^{381}\) ibid.


\(^{383}\) One pool of commentators argues that political ideology is corrosive to the democratic nature of an independent judicial branch. These commentators were especially vociferous following *Bush v Gore* 531 US 98 (2000), with accusations that SCOTUS collapsed ‘the boundary between law and politics’ and ‘uncomfortably confused and improperly mingled the special and constrained form of politics called constitutional law with the more general and unconstrained forms of politics in partisan political struggle.’ Jack Balkin, ‘*Bush v. Gore* and the Boundary between Law and Politics’ (2001) 110 Y LJ 1407, 1443, 1458; Alan Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000* (OUP 2003) 174 (describing *Bush* as ‘the single most corrupt decision in Supreme Court history, because it is the only one…where the majority justices decided as they did because of the personal identity and political affiliation of the litigants.’)

\(^{384}\) Discussed in Chapter II, Subsection 2.4.5.2.

\(^{385}\) Proven via extensive statistical analysis by Black et al (n 305).

\(^{386}\) ibid 7.
variety of sources, including transnational law.\textsuperscript{387} As such, ideology does not provide a clear line for how a judge will treat transnational legal sources. Moreover, it is a reflection on when Justices might cite transnational law, rather than the present assessment: whether, normatively, these sources should be included in analysis. The next criticism resembles a traditionally nationalist ideology,\textsuperscript{388} namely exceptionalism.

\textbf{5.3.3.2 \textit{American Exceptionalism}}

The idea of America as ‘quite exceptional’\textsuperscript{389} featured prominently in de Tocqueville’s writing on America in the mid-19th Century. Quigley notes that the Western rise of democracy, exemplified by the American and French revolutions away from hereditary monarchy and towards republican government, was tied to an evolution of a sense of ‘modern nationalism and citizenship’.\textsuperscript{390} Such sense of nationalism is easily conflated with emotional “patriotism” or “loyalty”, which Barrington distinguishes, noting that nationalism also encompasses a strong, formal sense of a state’s territorial and legal sovereignty.\textsuperscript{391} The reinforced unity and statehood which followed the Revolutionary War built on Madison’s early ideal that, ‘[w]ith a union of its citizens, a government thus identified with the nation, may be considered as the strongest in the world’.\textsuperscript{392} Such a perception of strength is prevalent in American political discourse, representing a sense of ‘grave responsibility’\textsuperscript{393} to share the nation’s success, in spite of the hypocrisy underlying its exclusionary background.\textsuperscript{394}

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\textsuperscript{387} ibid, generally.

\textsuperscript{388} Quigley traces American nationalism to a strengthened sense of territory, loyalty and nationality following Independence and the Revolutionary War of the latter half of the 19th Century. See generally Paul Quigley, \textit{Shifting Grounds} (OUP 2011).

\textsuperscript{389} Alexis de Tocqueville, \textit{Democracy in America: Part 2} (Henry Reeve (trans), Saunders and Otley 1840) 36.

\textsuperscript{390} Quigley (n 388) 22.

\textsuperscript{391} Lowell Barrington, ‘Nationalism and Independence’ in Lowell Barrington (ed) \textit{After Independence} (University of Michigan Press 2006) 29 fn73. Orwell was somewhat more critical, describing nationalism as ‘power-hunger tempered by self-deception’. George Orwell, ‘Notes on Nationalism’ (1945) 1 Polemic 1.

\textsuperscript{392} James Madison, ‘To the Republican Meeting of Cecil County, Maryland March 5th, 1810’ (Founders Online) <http://founders.archives.gov/documents/Madison/03-02-02-0321> accessed 18th November 2014.

\textsuperscript{393} Quigley (n 388) 23.

\textsuperscript{394} Race: In addition to slavery, see ‘Three-Fifths Compromise’ embodied in the original Constitution (US Const, Article I, Section 2, Paragraph 3); \textit{Dred Scott v Sandford} 60 US 393 (1857) (holding African Americans incapable of becoming US citizens); Michelle Alexander, \textit{The New Jim Crow} (The New Press 2012) (arguing that strong racial-exclusion continues). Gender: ‘when the true history of the anti-slavery cause shall be written, women will occupy a large space in its pages.’ (Frederick Douglass, \textit{Autobiographies} (Literary Classics 1994) 907). ‘[V]ery remarkable that abolitionists who felt so keenly the wrongs of the slave should be so oblivious to
Nationalist ideology is predominantly aligned with positivist originalism, where the Constitution’s raison d’être is to uphold the sovereignty of the American people and to protect their rights, only insofar as originally intended by the Framers. Within constitutional law, American exceptionalism can be exemplified by the enhanced protection of the right to bear arms and the right to free speech enforced by the US Supreme Court. While numerous examples of charges against transnational comparisons arise from academe, John Yoo is a leading figure. Writing with Delahunty in 2005, Yoo noted the main reasons for avoiding the use of foreign and international law ‘to decide questions of constitutional interpretation.’ Yoo first invoked Marbury to argue that the Constitution is the highest form of law in the US because it stems from the People. Further, he relied on originalism when quoting verbatim the Supremacy Clause, noting that it makes no mention of “transnational” law when describing ‘the supreme law of the land’. Finally, Yoo claimed that allegiance to the Constitution compelled the conclusion that transnational sources cannot be applied, due to the divergence in socio-political, governmental and historical differences between the US and the rest of the world.

This convoluted set of caveats and hedges takes exceptionalism literally, in a similar vein to Lessig’s description of Dworkin as an ‘infidel’ for seeking to perfect the law at the cost of traditionally originalist principles. As Chapter II sought to clarify, Fleming’s...
‘originalist premise’ that the only method of fidelity to the Constitution is originalism is rejected, as is Lessig’s reliance on that false premise. Dworkin’s moral reading upholds fidelity to the core values underlying the Constitution, which he views as interlaced throughout the framework of rights. In the face of accusations of infidelity to tradition, Dworkin’s theory of interpretation in fact encourages a review of history and precedent, and embraces the text of the Constitution, including the Supremacy Clause, simply clarifying the interpreter’s view of the sources of law by recourse to moral principles. The present discussion has adopted, through Chapter III, an understanding of law as informed by morality, which was a fundamental part of the framing and amending process. Consequently, fidelity and supremacy are not undermined if morality is sought by recourse to wider human values supported by transnational legal sources, since those sources were inherent in the political morality of the community. Exceptionalism should not serve as an excuse for immorality, regardless of tyrannous, ill-humoured majority.

Whilst this chapter has focused on theoretical assessments, rather than the applications of ESD, which will be introduced in Chapter VI, an overview of comparative statistics aids the present discussion. At the time of writing, around 2.29 million Americans are being held in confinement; 70,000 are juveniles. These figures translate to 743 per 100,000 of the national population; a 500% rise over the past thirty years, ensuring the US retains its position as the leader in mass incarceration. China imprisons at a rate of 122 per 100,000, with England and Wales at 153. Likewise, the leadership of a Northern European

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404 Adams (n 135) 291, relied on in Ball (ed) (n 135) No 10, 71.
405 Ball (ed) (ibid) No 78.
409 ibid.
bloc demonstrates positive moral exceptionalism, that which is consistent with principles of proportionality and humanity, Sweden (78); Denmark (74); Norway (73); and Finland (59). Writing in what he described as ‘an era of penal excess’ in 2008, Pratt described Scandinavian imprisonment as exceptional, reflecting not simply on low levels of imprisonment, but also humane prison conditions. From this reflection it becomes obvious that the US is no longer “exceptional” in the positive sense that the word connotes. Rather, the US is exceptionally poor in terms of its excessive rate of imprisonment, a record which is condemnatory rather than celebratory. Further information about this situation, making specific reference to the US addiction to solitary confinement, its related conditions and human consequences, will be introduced throughout Chapter VI.

In addition to their refutable claims of American exceptionalism, Delahunty and Yoo argue that the use of transnational comparativism has ‘the potential to turn into a standard of deference’ which would erode the separation and the democratic bases for law making in the US. This line of argument appeals to the checks and balances envisaged by the three-branch system, which would be circumvented by appealing to transnational law, a serious claim that must next be redressed if this thesis is to argue strongly for transnationalism.

5.3.3.3 The Separation of Powers

A principal issue before SCOTUS is the separation of powers, considered a fundamental part of the framework of American government and observed since its founding. As noted, international law is traditionally incorporated into US law by the

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411 ibid 132-135.
412 ibid 120-126.
413 Delahunty and Yoo (n 336) 298.
414 US Const, Article I Section I (Congressional power); Section 9 (actions prohibited for Congress); Article II (‘The Executive Power shall be vested in a President’); Article III (Judicial power).
415 Charles-Louis, Second Baron of Brède and Montesquieu, The Spirit of Laws (1748) (Kitchener ed 2001) 173: ‘there is no liberty, if the judiciary power be not separated from the legislative and executive’; Ball (ed) (n 135) No 51: ‘separate and distinct exercise of the different powers of government…is admitted on all hands to be essential to the preservation of liberty’.

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express consent of the elected legislative branch, Congress.\textsuperscript{416} The judiciary’s reliance on un-incorporated international law, as seen in \textit{Roper},\textsuperscript{417} therefore creates a potential competence creep. By recognising an element of the ICCPR in domestic law, the Court in \textit{Roper} can be argued to have legislated from the bench and usurped Congress’s role. The enraged dissent is therefore understandable,\textsuperscript{418} given this perceived over-step. Reading law as integrity,\textsuperscript{419} however, points to support for the \textit{Roper} majority, due to its commitment to interpreting the morality fundamental to law; observing principles inherent in the Eighth Amendment and upholding a commitment to decency by protecting juveniles from execution. It can be also be claimed that the Rule of Law, another integral tenet of the US Constitution, is in fact strengthened by the increased transparency provided by the Court in cases such as \textit{Roper} and \textit{Lawrence}. By clearer articulation of constitutional principles, each of the Kennedy opinions in those cases has ameliorated any weakness in this area, by committing to transparent decision-making through transnational constitutionalism.\textsuperscript{420} Such increased transparency provides a strong footing for the elected branches to constrain this element of judicial activism, the use of transnational law in constitutional interpretation.

Indeed, there have been attempts to suffocate that practice more directly, both at the federal and state levels.\textsuperscript{421} Following \textit{Lawrence}, members of Congress attempted to pass the Constitution Restoration Act (CRA),\textsuperscript{422} recommending that, ‘[s]hould the Supreme Court resort to the law of foreign nations or the European Court of Human Rights for authority, impeachment and removal from office are appropriate remedies.’\textsuperscript{423} Tushnet highlighted the

\textsuperscript{416} See (n 316).
\textsuperscript{417} \textit{Roper} (n 29) 566-568 (citing an element of the ICCPR which Congress had reserved from US law).
\textsuperscript{418} ibid 622-623, Scalia, J (dissenting).
\textsuperscript{419} Dworkin, \textit{LE} (n 17) 225.
\textsuperscript{420} See Jiunn-Rong Yeh and Wen-Chen Chang, ‘The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions’ (2008) 27 Penn State International LR 89, 114.
\textsuperscript{422} Constitution Restoration Act of 2005 S520, HR1070 (109th Cong).
Act’s potential unconstitutionality,\textsuperscript{424} noting that its success in Congress was highly unlikely and that the statute was ‘purely symbolic’.\textsuperscript{425} Ultimately, Tushnet’s suspicions proved true and the CRA languished early in Congress. Ten further years have passed without proposal of a similar bill or constitutional amendment.\textsuperscript{426} Turning to the state level, the only legislature to have successfully amended its constitution to restrict in absolute terms the judiciary’s use of foreign law was Oklahoma in 2010. The \textit{Save Our State} Amendment provided that Oklahoma courts ‘shall not look to the legal precepts of other nations or cultures’,\textsuperscript{427} and passed with 70\% approval in a state-wide referendum.\textsuperscript{428} Because of its direct reference to sharia law,\textsuperscript{429} however, the amendment was struck down as discriminatory by the Tenth Circuit and permanently enjoined in 2012.\textsuperscript{430}

Other states have attempted unsuccessfully to enact similar amendments,\textsuperscript{431} with the 2004 \textit{American Laws for American Courts} (ALAC) Bill model providing a less restrictive and so far more successful alternative to constitutional amendments.\textsuperscript{432} ALAC provisions restrain the use of foreign legal sources where a less protective outcome than that provided by domestic law would be delivered.\textsuperscript{433} Despite its textual base appearing nationalistic, elements of the ALAC approach may align with this thesis, since its position also encourages greater use of transnational perspectives when community standards can be shown in a better moral light.\textsuperscript{434}

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\textsuperscript{424} Mark Tushnet, ‘The “Constitution Restoration Act” and Judicial Independence’ (2006) 56 Case Western LR 1071, 1079 fn44: ‘[a] litigant might claim that reference to non-US law is essential to [his] success on the merits, and that precluding such reference is unconstitutional.’

\textsuperscript{425} ibid 1071.

\textsuperscript{426} The year before a similarly unsuccessful attempt was made in the form of the American Justice for American Citizens Act of 2004 HR4118 (108\textsuperscript{th} Cong).

\textsuperscript{427} Oklahoma Const, Art VII §1(C).

\textsuperscript{428} For an analysis of the amendment and its subsequent legal challenges, see John Parry, ‘Oklahoma’s Save Our State Amendment’ (2012) 64 Oklahoma LR 161.

\textsuperscript{429} ‘Specifically, the courts shall not consider international law or Sharia Law.’ Oklahoma Const, Art VII §1(C).

\textsuperscript{430} \textit{Awad v Ziriax} 670 F.3d 1111 (10\textsuperscript{th} Cir 2012).

\textsuperscript{431} Alabama, Arizona, Missouri, New Mexico, South Carolina, Texas, and Wyoming. See Volokh (n 395) 235 fn67.

\textsuperscript{432} ibid 238. Oklahoma and Kansas, for example.

\textsuperscript{433} ibid 237, 236-243.

\textsuperscript{434} Dworkin, \textit{LE} (n 17) 256.
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liberty, and equality.\footnote{435} These principles provide a solid footing for a Dworkinian interpreter to make the moral assessment required by ALAC: whether the outcome is the most favourable; the best fit.\footnote{436}

Judges, in the real, non-Herculean sense,\footnote{437} make mistakes. Racusin provides \textit{Dred Scott} as the pre-eminent example of an ‘unfortunate’\footnote{438} case of the Court’s transnational citation. The majority in \textit{Dred Scott} reflected on the world’s agreement with the inferiority of the ‘negro race’.\footnote{439} Under an interpretivist reading, legal adjudication must uphold the treatment of people as equals,\footnote{440} and political integrity, which seeks consistency in decision-making.\footnote{441} \textit{Dred Scott} contains an example of neglect for those principles, and a particular demonstration of the discretion judges are afforded when choosing tools for interpretation, transnational or otherwise. This concern, judicial selectivity, was dealt with when discussing state counting, and is considered next with respect to transnationalism.

\subsection*{5.3.3.4 Judicial Selectivity}

One further criticism surrounding the Court’s use of transnational sources arises from what Posner has termed ‘promiscuous opportunities’;\footnote{442} situations where Justices simply pick and choose outsourced authority which supports their conclusions. In political science this is referred to as ‘confirmation bias’\footnote{443} but can be less favourably referred to as “cherry-picking”, or ‘looking over a crowd and picking out your friends.’\footnote{444} Dixon and Moon studied...
with whom the US is most likely to trade,445 finding that relationships with democratic regimes provide the least risk for the US, thus the most profitable enterprises. This economics-centred logic can be applied to the citation of foreign law, since the Justices feed on legitimacy, something which can be derived from public support for comparisons with allies or similar states.446 Black et al support this, noting that, ‘if Justices seek to bolster their opinions with additional logic and support, looking to the most respected foreign countries simply makes the most sense.’447 The presumption of picking respected countries can be applied to states with similar (common law) legal systems, where concepts of precedent and incremental constitutional change are acknowledged, and major English-speaking states.448 Dzehtsiarou argues that courts can uphold legitimacy if they do not exercise bias when selecting transnational sources.449 Inherent bias might be impossible to avoid, but its effects can be curtailed by a form of weak discretion, encouraged by interpretivism, where decision-making is channelled by integrity.450

While the objective use of penology as an indicator of ESD is guided by proportionality,451 integrity in the context of transnational sources ensures coherence in decision-making and transparent reasoning. Mere selectivity of sources for a stated (or unstated) goal does not adhere to interpretivism’s aspirations; the right choices must be made according to the right sources, a tricky yet achievable goal. Essentially, the selective citation of transnational sources is a practical reality; judges will naturally select interpretive support

445 William Dixon and Bruce Moon, ‘Political Similarity and American Foreign Trade Patterns’ (1993) 46 Political Research Quarterly 5, 6 (discussing how countries with shared experiences are more likely to trade and to find the resultant transaction costs to be diminished).
446 There is no one definition of “legitimacy”, but this thesis accepts Dzehtsiarou’s notion that certain situations, such as is low public confidence, are sure to undermine such a concept. Kanstantsin Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights (CUP 2015); James Gibson, Gregory Caldeira and Vanessa Baird, ‘On the Legitimacy of National High Courts’ (1998) 92 APSR 343 (1998): ‘Not even the most powerful courts in the world have the power of the “purse” or “sword”...courts are therefore uncommonly dependent upon the goodwill of their constituents’.
448 ibid 26-27, 43. In addition, if a democratically elected ‘leader decides to renge on an international agreement, the leader will suffer potentially heavy domestic political costs because such an action will likely be out of step with domestic political opinion’, Brian Lai and Dan Reiter, ‘Democracy, Political Similarity, and International Alliances, 1816–1992’ (2000) 44 Journal of Conflict Resolution 203, 206.
449 Dzehtsiarou (n 446).
450 Dworkin, TRS (n 18) 31-39.
451 See von Hirsch in Tonry and Frase (eds) (n 253) 410-415 and Coker (n 194) 613.
for their decisions.\textsuperscript{452} The discussion must now refocus on the normative question of the inclusion of these sources, to establish how best to measure transnational guidance, when put through an interpretivist ‘rational sieve’.\textsuperscript{453}

\textbf{5.3.4 Transnational Constitutionalism as a Measure of Political Morality}

Dworkin described positivism as providing a pessimistically restrictive approach to the inclusion of morality, being preoccupied by constructing law from teleological rules and policies.\textsuperscript{454} Selectivity of sources, such as comparative law, without any consideration of morality results in an unprincipled collection of pre-interpretive statistics about collectivity,\textsuperscript{455} rather than communal will. Selectivity is inoffensive under interpretivism, however, if those seeking guidance from transnational sources read the sources in light of moral principles.\textsuperscript{456} The interpreter must instead unearth background principles of political morality with the aspiration of providing principled answers ‘by appealing to an amalgam of practice’,\textsuperscript{457} among other community understandings which must be read through a ‘rational sieve’.\textsuperscript{458}

In \textit{Law’s Empire} Dworkin clarified that a judge must interpret binding principles with reference to community standards, which show the principle in its best moral light.\textsuperscript{459} The framework for this endeavour was established in Chapter II and summarised at the start of the current chapter. Applying that framework to this section, it will be concluded that such “moral light” can be generated by reference to transnational comparativism, not as a binding source of law in and of itself, but as a font of guiding principles.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{452} This reality can be applied to textualist jurisprudence, too. Bradford Mank, ‘Legal Context’ (2002) 34 Arizona State LJ 815, 829: ‘Textualism is a flawed method of interpretation because it selectively weighs external information related to the meaning of words in the text, but rejects sources of information that are sometimes more pertinent to understanding’.
\item\textsuperscript{453} Dworkin, \textit{TRS} (n 18) 252.
\item\textsuperscript{454} ibid 194-195.
\item\textsuperscript{455} Rejected under interpretivism by Dworkin, \textit{LE} (n 17) 189.
\item\textsuperscript{456} Dworkin, \textit{TRS} (n 18) 31-39; 194-195.
\item\textsuperscript{457} ibid 36.
\item\textsuperscript{458} ibid 252.
\item\textsuperscript{459} Dworkin, \textit{LE} (n 17) 256.
\end{itemize}
\end{footnotesize}
Yeh and Chang define this practice as follows: ‘By making normative links across national borders, courts are actually constructing a constitutional regime under which generally accepted norms, regardless of their...origin, may become the supreme law of the land.’ These norms might be viewed as ‘transcending politics into a high moral normative order’, though this will not always be the case due to the prevalence of compromises at the international level. By utilising all the sources at its disposal, the Court makes ‘the sturdiest, best-reasoned decision possible’, and the effects of partisan forces should to a great extent be diluted by overarching moral principles.

Notwithstanding the shortcomings of the comparative approach highlighted by Section 5.3.3, it is accepted that transnational law can provide a guide for interpreters seeking to define principles of political morality. Such morality transcends boundaries and sovereignty. Restraints for the use of moral guidance are guaranteed when interpreters use a version of weak discretion, channelled by integrity. That channelling appears in the form of reasoned opinions, objective decision-making, and the portrayal of community standards in the best light, which reflects integrity. Integrity in this sense ensures principles of due process, equal treatment, and justice. If this framework is followed, issues of democratic deficit should fall by the wayside along with the originalist notions outlined above.

As such, the dignitarian assessment called for by the ESD principle can be informed by the ‘accumulated legal wisdom of mankind’. Waldron argues that this accumulated wisdom should be considered a ‘latterday ius gentium’, a ‘set of principles’ that represents ‘a sort of consensus among judges, jurists, and lawmakers around the world’. Murkens expands this position, noting that, when adjudicating over moral aspects of constitutional

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460 Yeh and Chang (n 420) 96.
461 ibid 108.
462 Racusin (n 438) 939.
463 Dworkin, TRS (n 18) 31-39.
466 Waldron (n 464) 132.
interpretation, the Court should ‘feel compelled to consult widely’.\textsuperscript{467} Scalia’s objections to transnationalism are easily criticised under interpretivism but, as noted by Murkens, this leaves an interpretive gap not so easily filled.\textsuperscript{468} It is the continuing aim to fill that gap with interpretivism. Michelman and Kahn provide further support for this endeavour, claiming that comparative analysis clarifies ‘our picture of ourselves’,\textsuperscript{469} and helps Americans ‘to understand who [they] are’.\textsuperscript{470} Naturally, there are various self-reflections to understand: internal, external, relative. The only understanding sought by interpretivism is that which provides the right, moral answer. By gaining a clearer picture of the political morality underpinning the Constitution, interpreters are able to decide hard cases in the best way, which is their duty.

The ESD assessment asks a ‘human question, and the Americans are human – and so is everybody else’,\textsuperscript{471} including the Justices who make interpretive choices. Fundamental interests and rights can be interpreted in light of their associated normative and moral values. This section concludes that these values cannot fully be appreciated when restricted to domestic assessments. Instead, ‘the evolving standards of decency which mark the progress of a maturing society’\textsuperscript{472} are enriched by transnational comparativism. Chapter VI will establish the transnational comparisons, which can inform an ESD assessment of solitary confinement’s constitutionality under the Eighth Amendment. However, one final objective indicator of ESD must be dealt with under interpretivism. This criterion, professional consensus, emerges from the most recent Supreme Court decision to evolve the Eighth Amendment, handed down in 2014.\textsuperscript{473}

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{467} Murkens (n 465) 15.
\item\textsuperscript{468} ibid.
\item\textsuperscript{469} Frank Michelman, ‘Reflection’ (2004) 82 Texas LR 1737, 1758-1759.
\item\textsuperscript{470} Paul Kahn, ‘Comparative Constitutionalism in a New Key’ (2003) 101 Michigan LR 2677, 2679.
\item\textsuperscript{471} Norman Dorsen, ‘The relevance of foreign legal materials in US constitutional cases’ (2005) 3 International Journal of Constitutional Law 519. Unsurprisingly Justice Scalia refuted this, in line with his general refusal to accept evolutive interpretation at all.
\item\textsuperscript{472} Trop (n 145) 101.
\item\textsuperscript{473} Hall v Florida 134 S Ct 1986 (2014).
\end{enumerate}
\end{footnotesize}
5.4 Professional Consensus

The final consideration for Eighth Amendment analysis is one which, until recently, largely escaped the Court’s attention. Throughout the last forty years of Eighth Amendment jurisprudence SCOTUS has measured the ‘consensus’ pertaining to punishments clause evolution by reference to legislative communities, the broader national community, and the even broader transnational community. The final community to be considered in the ESD assessment, is ‘epistemic’. Epistemic communities are those which pool knowledge by bringing together scientists and other experts, working with rigorous peer-review processes, shared normative and principled beliefs, and common notions of validity and best practice. Such communities are dynamic, ‘they differentiate, shift and transform’. Haas sees the product of consensus from these groups not as raw, proven data, but ‘the centrality of agreed knowledge’.

The ‘agreed knowledge’ accepted by epistemic communities has been referred to in recent ESD jurisprudence as ‘professional consensus’. When the Court re-ignited the death penalty and stipulated the rather abstractly termed ‘objective indicia that reflect the public attitude toward a given sanction’ it made no mention of professional consensus. This position has shifted, however, and incorporation of epistemic knowledge into general constitutional interpretation has undergone something of a revolution since Gregg. This

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474 Roper (n 29) 572.
475 As assessed through the consideration of state counting in Chapter IV.
476 By opinion polls and other empirical surveys, discussed in Section 5.1.
477 See Black et al (n 305) 16 fn64 (discussing the use of ‘transnational’ in a modern context) and see Section 5.3.
478 Trop (n 145) 101.
480 This concept was first introduced by Bukart Holzner, Reality Construction in Society (Schenkman 1968), but more recently revitalised by Peter Haas, ‘Introduction: epistemic communities and international policy coordination’ (1992) 46(1) International Organization 1, 3.
481 Meyer and Molyneux-Hodgson (n 479).
483 ibid.
484 Hall (n 473) 2000.
485 Gregg (n 143) 173.
revolution, its contribution specifically to Eighth Amendment evolution, and the suitability of professional consensus as a further objective indicator of ESD for interpretivism, are topics which will each be discussed in this section.

5.4.1 AMICI CURIAE AND THE SUPREME COURT

Interest groups have been described as a ‘mainstay in American politics’,
486 their definition extending to virtually any non-governmental organisation seeking to effect changes in public policy,
487 including professional bodies, which can be extended to incorporate epistemic communities.
488 Such groups have made significant contributions, in the judicial field, to the electoral process,
489 and to health politics.
490 The predominant form of their participation in the judicial sphere is through amicus curiae briefs, friends of the Court who are invited to provide expert knowledge or interested insights to a case. This subsection will draw on a recent shift towards a greater inclusion of these briefs, both in the Court’s decision-making process and within its judgments. It will be maintained that the inclusion of professional consensus in amicus briefs is the most likely route for its sustained impact in constitutional adjudication.
491 Before assessing the viability and indeed desirability of such an inclusion, an overview of Supreme Court precedent is vital.

Green v Biddle saw the first acceptance of amicus curiae by the US Supreme Court.
492 Representing Kentucky in a land dispute with Virginia,
493 statesman Henry Clay

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488 Meyer and Molyneux-Hodgson (n 479). This thesis equates these communities with professional bodies.
489 Franz has provided an extensive review of the impact of interest groups on the American political process, revolutionised following the Federal Election Campaign Act of 1971, and discusses various methods of funding which have arisen over the last half-century, seeking to establish the strategic plans undertaken by interest groups to affect electoral outcomes. Michael Franz, Choices and Changes (Temple UP 2008).
490 The extensive public debate and lobbying by interest groups following Roe (n 351) provides a significant contribution to this area of study. While outside of the scope of the foregoing discussion, see an extensive assessment in Linda Greenhouse and Reva Siegel, ‘Before (and After) Roe v. Wade’ (2011) 120 YLJ 2028.
491 Amici curiae presenting scientific or technical expertise have become known as ‘Brandeis briefs’ after the first presentation of such contents in a brief by future Associate Justice Louis Brandeis in Muller v Oregon 208 US 412 (1908). See Alison Larsen, ‘The Trouble with Amicus Facts’ (2014) 100 Virginia LR (forthcoming) 1, 12. This type of brief arrived during the significant shift in jurisprudence towards fact-finding positivism.
492 21 US (8 Wheat) 1 (1823).
undertook the traditional role of amicus curiae, a friend of the court, and combined it with the role of an advocate. Lowman has remarked that ‘Green perhaps presented the most opportune time for the amicus curiae to emerge in the federal courts’, after SCOTUS derived significant benefit from Clay’s intervention in that case, drawing on his expertise in defining complex land patents which had clashed for decades. In the centuries following Green the use of amicus briefs proliferated significantly, with Kearney and Merrill remarking that the 10% minority of Supreme Court cases in receipt of amicus briefs in the early-20th Century burgeoned to over 85% by the 21st Century. Notably, amicus briefs contributed a significant impact to the Civil Rights Movement in the mid-20th Century. Brown provides a stark example, where Chief Justice Warren’s ‘footnote eleven’ included a dossier of psychological scientific authority, supporting the Court’s opinion that the “separate but equal” doctrine was repugnant to the Constitution and prevailing professional consensus.

Amicus briefs, according to Supreme Court Rule 37, which governs their inclusion, ‘may be of considerable help to the Court’, due to the expertise of the authors, and to anchor the Court’s judgments with a sense of their real-world impact. A brief analysis of recent usage statistics reveals the true extent of the assistance provided by amici. The 2012-13 term saw an unprecedented 1,001 amicus briefs submitted for consideration in the 73 cases decided by the Supreme Court, a record average of 14 per case. Significant cases Hollingsworth v Perry (Proposition 8, same-sex marriage) and Fisher v University of Texas

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493 ‘Green was the largest land case of the time, culminating decades of confusion resulting from conflicting land patents’ from the two states. Michael Lowman, ‘The Litigating Amicus Curiae’ (1992) 41 American ULR 1243, 1255 fn70.
494 ibid.
497 Brown (n 21).
498 This footnote was followed by significant analysis. For an apt summary, see Michael Heise, ‘Brown v. Board Of Education, Footnote 11, and Multidisciplinarity’ (2005) 90 Cornell LR 279.
499 ibid (n 21) 494 fn11.
500 ibid 494-495, overturning Plessy v Ferguson 163 US 537 (1896).
503 133 S Ct 2652 (2013).
(affirmative action in university admissions)\textsuperscript{504} garnered many more, with 96 and 92 \textit{amicus} briefs submitted respectively.\textsuperscript{505} Overall, the term saw a record 96\% of cases receiving at least one \textit{amicus} brief,\textsuperscript{506} with SCOTUS citing briefs in 53\% of its judgments. In contrast, \textit{Brown}, considered a high watermark for \textit{amicus} briefs at the time, received six.\textsuperscript{507}

The most recent term for which finalised records are available is 2013-14, where the Supreme Court received 805 briefs, another significant dossier,\textsuperscript{508} one higher than any records prior to 2012.\textsuperscript{509} A conclusion derived from these figures that the trend towards greater \textit{amici} involvement is declining is misdirected, since the citation rate was in fact higher than ever in 2013-14, with the Court citing \textit{amicus} briefs in 60\% of its decisions.\textsuperscript{510} The likelihood of citations rose significantly when the Court was split, with 80\% of 5-4 holdings citing briefs, contrasted to 54\% in 9-0 holdings.\textsuperscript{511} From this consideration of figures it becomes clear that the submission and citation of \textit{amicus} briefs is now the rule rather than the exception. Narrowing the assessment to Eighth Amendment precedent, the Supreme Court has a chequered record with respect to \textit{amicus} citation. As noted in the introduction to this section, the \textit{Gregg} majority provided no view of professional consensus, merely stipulating that the ESD assessment must be ‘objective’.\textsuperscript{512} More recent cases show that the Court’s position has evolved to consider extra-legal, epistemic knowledge.

The majority judgments in \textit{Thompson} and \textit{Stanford}\textsuperscript{513} both made notable references to professional consensus in assessing the Eighth Amendment’s evolution with respect to the age of executable offenders.\textsuperscript{514} Restricting capital punishment to offenders aged over 16 due

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\textsuperscript{504} \textit{133 S Ct 2411} (2013).
\textsuperscript{505} ABA Journal, ‘Supreme Court Report: It was another big term for amicus curiae briefs at the high court’ 1 September 2013 <https://tinyurl.com/nu4jeu6> accessed 1\textsuperscript{st} September 2015.
\textsuperscript{506} 70 out of 73. ibid.
\textsuperscript{507} ibid.
\textsuperscript{508} NLJ 2013 (n 502).
\textsuperscript{509} National LJ, ‘Supreme Court Brief: Justices Are Paying More Attention to Amicus Briefs’ (NLJ 2014) 3 September 2014 <https://tinyurl.com/my9y7q5> accessed 1\textsuperscript{st} September 2015.
\textsuperscript{510} The previous highest figures were seen in 2011-12 (715) and 2010-11 (687). NLJ 2013 (n 502).
\textsuperscript{511} ibid.
\textsuperscript{512} \textit{Gregg} (n 143) 173.
\textsuperscript{513} \textit{Thompson} (n 372) and \textit{Stanford v Kentucky} 492 US 361 (1989).
\textsuperscript{514} Chapter II, Section 6.1.
to ‘civilized standards of decency’, the *Thompson* majority felt that its decision was ‘consistent with the views that have been expressed by respected professional organizations’. Such views were seen as irrelevant in *Stanford*, however, where SCOTUS reasoned that the Eighth Amendment should not protect 16 and 17 year-olds from execution and rejected the relevance of interest groups and professional associations for ESD purposes. Justice Brennan dissented from the Court’s rejection of professional consensus, noting that expert organisations have greater proficiency than the Court ever could and that ‘there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards.’ *Roper* reversed the Court’s position and brought it in line with Brennan’s *Stanford* dissent, with the majority in *Roper* placing as much reliance on professional consensus as it did on international standards and state head-counting.

Although the term “professional consensus” would not feature in the Court’s judgments until later, *Roper* represented a shift towards respect for epistemic knowledge in informing ESD assessments. SCOTUS noted that ‘youth is more than a chronological fact’ and that expert psychologists have difficulty differentiating ‘between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ Similar reliance on accumulated professional

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515 *Thompson* (n 372) 830.
516 ibid; ibid 835, showing that ‘less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult’ and 835 fn42, where citation was made to D Lewis, J Pincus, B Bard, E Richardson, L Prichep, M Feldman and C Yeager (*sic*), ‘Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States’ (1987) 145 American Journal of Psychiatry 584.
517 *Stanford* (n 513).
518 ibid 377.
519 ibid 388; 384, Brennan, J (dissenting): ‘The views of organizations with expertise in relevant fields…also merit our attention as indicators whether a punishment is acceptable in a civilized society.’
520 *Roper* (n 29) discussed in Chapter II, Subsection 3.1.
521 ibid 567, citing the ICCPR.
522 ibid 568.
knowledge can be found in the majority judgment in Atkins.\textsuperscript{525} Whereas most respect was paid to other measures of consensus,\textsuperscript{526} the Court in Atkins noted that the views of ‘several organizations with germane expertise’\textsuperscript{527} were complementary to other objective indicia,\textsuperscript{528} ‘reflect[ing] a much broader social and professional consensus.’\textsuperscript{529} These organisations, including the American Psychological Association (APA) and the American Association on Mental Retardation (AAMR) participated as \textit{amici curiae} in Atkins,\textsuperscript{530} providing a comprehensive demonstration of consensus, which was eventually adopted by the majority.

5.4.1.1 \textbf{PSYCHIATRIC DEFINITIONS OF INTELLECTUAL DISABILITY}

Intellectual disability (ID) is defined by the APA’s Diagnostic and Statistical Manual (DSM-5) as a disorder ‘that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains.’\textsuperscript{531} Specifically, it stipulates three essential features for a manifestation of ID: general objective deficits in mental ability (Criterion A); subjective (case-by-case judgement of) impairment in adaptive functioning (Criterion B); and developmental (pre-maturity) onset (Criterion C).\textsuperscript{532} Psychometric tests such as those which assess an individual’s Intelligence Quotient (IQ) are properly relied on in assessing Criterion A. When developing IQ tests, the median score taken from the norming sample is defined as 100 IQ points, with scores each standard deviation from 100 defined as ±15 IQ points.\textsuperscript{533} By this definition, two-thirds of the American population scores between 85 and 115 IQ points.

\textsuperscript{525} Atkins (n 103) 316 fn21.
\textsuperscript{526} Atkins placed significant weight on state counting, opinion polls, and international standards, discussed in previous chapters. See Chapter II, Subsection 4.2.
\textsuperscript{527} Atkins (n 103) 316 fn21.
\textsuperscript{528} ibid: ‘Although these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.’
\textsuperscript{529} ibid.
\textsuperscript{530} Atkins AAMR brief (n 99).
\textsuperscript{532} ibid 37.
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points. Individuals who score approximately two standard deviations or more below 100 on these tests, specifically 70±5, or 65 to 75, are defined as having ID under Criterion A. DSM-5 cautions against reliance on IQ tests alone, ‘because it is adaptive functioning, that determines the level of supports required.’ Criterion B, ‘impairment in everyday adaptive functioning’, is therefore a vital factor in establishing strong evidence of ID.

In addition to citing the DSM, the Atkins majority relied on the AAMR’s 10th edition Manual. The Association, known since January 2007 as the American Association on Intellectual and Developmental Disabilities (AAIDD) ‘is generally regarded as the leading authority in defining [ID]’. Whereas the APA’s DSM defines over 300 disorders, the AAIDD Manual has focused solely on ID for over a century, placing the Manual as the Bible of psychiatric diagnoses and standard-setting for ID. The Manual uses different language to the DSM, but has been described by the APA Council as ‘conceptually equivalent.’ Like the DSM, the Manual requires not only significant limitations in functioning, but also adaptive behavioural limitations arising before the age of 18 years. With similar concern to that emphasised within the DSM, the AAIDD Manual also cautions against bright-line limits, describing IQ scores as ‘flexible’.

While accepting these definitions and referring prudently to an ID-indicative IQ as below ‘approximately 70’ in Atkins, Justice Stevens’s majority later made reference to only five states, which have executed individuals ‘possessing a known IQ less than 70 since we

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534 ibid.
535 DSM-5 (n 531) 37.
536 ibid.
537 ibid 33.
538 Gottfredson in Phelps (ed) (n 533) 31-32.
539 In its fourth, text-revised (IV-TR) edition at the time.
542 ibid.
544 10th AAMR Manual (n 540) 8.
545 ibid 14.
546 Atkins (n 103) 309 (quoting DSM-IV-TR (n 524) 42-43).
decided *Penry*.\(^{547}\) This explicit mention of bright-line IQ cut-offs (“less than X”), while intended to support the decision with an element of state counting, backtracked on the earlier conclusion that IQ was approximate and not independent of behavioural criteria. Indeed, this misguided portion of the judgment would stoke the flames for state legislative disagreement about ID assessment in the years after *Atkins*. Against this backdrop, by far the most compelling demonstration of the Supreme Court’s willingness to engage in an assessment of professional consensus for Eighth Amendment ESD interpretation arrived in a judgment handed down in May 2014. *Hall v Florida*,\(^ {548}\) which raised a procedural question surrounding ID assessments, would provide a vehicle for further evolutive interpretation. Importantly, the Court referred explicitly to ‘professional consensus’,\(^ {549}\) adopting this indicator of ESD for the first time.

5.4.2 *Hall v Florida*: Transforming ESD Analysis

The most contentious appeals citing *Atkins* in support invariably arise from those appeals brought by offenders with IQ scores in the low 70s or high 60s, the tide-mark deposited by Justice Stevens.\(^ {550}\) Chafetz and Biondolillo have noted that, in light of the inevitability of the lower courts following only the IQ portion of Stevens’s judgment, other elements of the ID assessment become vital in assessing competence for lawful execution.\(^ {551}\)

An opportunity to review the legislative discord presented itself in *Hall*, where the Justices considered the death sentence imposed on a Floridian man convicted of murder.

5.4.2.1 Background

In February 1978 Freddie Lee Hall kidnapped, raped and murdered a pregnant woman before killing a police officer who attempted to apprehend him.\(^ {552}\) Tried and convicted for the double murder, Hall was sentenced to death on both counts in 1981. On appeal, Hall’s capital

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\(^{547}\) *Atkins* (n 103) 316.

\(^{548}\) 134 S Ct 1986 (2014).

\(^{549}\) ibid 2000.

\(^{550}\) *Atkins* (n 103) 316.


\(^{552}\) *Hall* (n 473) 1990.
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sentence on the first count was upheld.\footnote{Hall v Florida 403 So.2d 1319 (Fla 1981) 1321.} His sentence was handed down well before the holding in \textit{Atkins}, and before the Supreme Court had even considered the imposition of capital punishment on intellectually disabled offenders in \textit{Penry v Lynaugh}.\footnote{492 US 302 (1989).} After a decade of post-sentencing review, which aligns with the average stays on death row in the US,\footnote{Angela April Sun, ““Killing Time” in the Valley of the Shadow of Death” (2013) 113 Columbia LR 1585.} Hall was resentenced in 1993 so that adequate consideration of mitigation could be taken into account,\footnote{Hall v Florida 614 So.2d 473 (Fla 1993).} following the Court’s instructions to that effect in \textit{Hitchcock v Dugger}.\footnote{481 US 393 (1987) 198-199.}

\textit{Atkins} provided Hall’s counsel with the impetus to introduce psychometric evidence on his behalf and, at resentencing; a significant amount of evidence purported to demonstrate ID. Information regarding Hall’s upbringing was introduced, noting that his mother would ‘strap him to his bed at night, with a rope thrown over a rafter [and] awaken Hall by hoisting him up and whipping him’,\footnote{Hall (1993) (n 556) 480 (Barkett CJ, dissenting).} among reports of even more serious physical abuse.\footnote{ibid.} School reports described Hall as ‘[m]entally retarded’;\footnote{ibid (n 473) 1990-1991.} a defence lawyer testified that he could not understand anything Hall was saying;\footnote{ibid.} and a number of medical professionals described him as significantly mentally impaired, with levels of cognition observed ‘typically with toddlers’.\footnote{ibid 1991.} Nevertheless, the resentencing jury found no substantial evidence that he was intellectually disabled to the extent that his sentence would be disproportionate to his crime.\footnote{Hall (1993) (n 556) 478.} Following the curtailment of the death penalty for intellectually disabled offenders in \textit{Atkins}, Hall’s sentence was reconsidered once more, this time by the Florida Supreme Court, 34 years after his original offence.

Nine IQ evaluations over four decades had scored Hall at varying points between 60 and 80. After the (re-re)sentencing court excluded, on legitimate evidentiary grounds, the two
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tests below 70, Hall’s lowest result was 71.\textsuperscript{564} Citing \textit{Cherry v State} as state-level precedent for Florida’s definition of ID, the Florida Supreme Court rejected Hall’s appeal, holding that, ‘under the law, if an [IQ] is above 70, a person is not mentally retarded’.\textsuperscript{565} Restricting the definition even further, SCOTUS interpreted the state statute categorically to prohibit a defendant with an IQ score of above 70 from introducing \textit{any} evidence of Criterion B, adaptive disability.\textsuperscript{566} The Florida Supreme Court weakened the protection afforded to intellectually disabled offenders by raising the bar arbitrarily above a psychometrically-naïve minimum. The Supreme Court finally granted certiorari to consider the constitutionality of Hall’s case in 2013, providing a platform for the clarification of \textit{Atkins} and the intended scope of its Eighth Amendment protection.

5.4.2.2 THE SUPREME COURT

Through lengthy recitals to detailed \textit{amici}, again provided by the APA and AAIDD, a 5-4 majority discovered an evolving standard of decency in the Eighth Amendment. Florida’s bright-line rule neglected consideration of the medical and behavioural history of offenders, which could determine that individuals with IQs above 70 on the standard scale were in fact intellectually disabled.\textsuperscript{567} The professional consensus identified by SCOTUS to represent an evolving standard of decency in \textit{Hall} was borne out of two principal \textit{amici curiae}, each containing empirical, peer-reviewed literature from a variety of scientific journals.\textsuperscript{568}

Determining that the Court’s assessment required a consideration of ‘psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores’,\textsuperscript{569} the majority noted that it should be unsurprising ‘[t]hat this Court, state courts, and state legislatures

\textsuperscript{564} \textit{Hall v State} 109 So.3d 704 (Fla 2012) 707.
\textsuperscript{565} ibid 707-708 (citing \textit{Cherry v State} 959 So.2d 707 (Fla 2007) 712-713).
\textsuperscript{566} \textit{Hall} (2012) (n 564) 709.
\textsuperscript{567} \textit{Hall} (n 473) 1994.
\textsuperscript{569} \textit{Hall} (n 473) 1993.
consult and are informed by the work of medical experts’. The crux of this medical consensus determined two main points. First, Florida’s rule abandoned the medical and behavioural history of offenders, focusing unduly on IQ scores, and giving rise to wrongful diagnoses. Second, the Floridian statute under which Hall had been sentenced to death failed to account for a ‘standard error of measurement’, a preeminent statistical measure similar to that introduced in the discussion of polling. In essence, the professional consensus surrounding IQ measurement is that scores should be read as a range, not bright-lines: ‘Intellectual disability is a condition, not a number.’

The main criticism of the majority’s reliance on professional consensus came, unsurprisingly, from the dissent in that case. The dissentents criticised this approach as ‘a new and most unwise turn in our Eighth Amendment case law’, providing three main practical concerns arising from this precedent, namely that professional consensus can change or be rescinded; that the judiciary must now follow or judge the validity of such changes; and that the majority had provided no interpretive guidance for the selection of professional authorities. The next section of this chapter will next address those issues, with a view to analysing the interpretivist potential of professional consensus as an adjudicative tool of the Eighth Amendment’s ESD.

5.4.3 CONCERNS ARISING FROM HALL

For an extra-legal source of political morality to form part of an interpretivist assessment, its shortcomings and limitations must be acknowledged and addressed. As with other objective indicia, professional consensus is not immune to criticism, both from inside

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570 ibid.
571 ibid 1994; 2000, quoting DSM-5 (updated version since DSM-IV was cited by Roper (n 29) 574). DSM-IV (n 524) 37: ‘IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks.’
572 Hall (n 473) 1994.
573 ibid 2000, citing Michael Furr and Verne Bacharach, Psychometrics (2nd edn, SAGE 2013) 118. For the discussion of statistical rigour with respect to polling, see Section 5.1.2.1.
574 Hall (ibid) 2001.
576 ibid 2002.
577 ibid 2006.
and outside the Court. Procedural and substantive concerns will first be outlined in this subsection, before a conclusion can be made regarding the use of professional consensus as an adjudicative tool.

5.4.3.1 PROCEDURAL CONCERNS

The principal procedural concerns surrounding the use of professional consensus for constitutional interpretation include issues identified by earlier subsections. Recall that, when assessing transnational comparativism in Section 5.3, flagged concerns included the impact of political ideologies on judicial selectivity, and of selectivity in itself. Political ideology was highlighted as an unavoidable practical fact, but one that is often overstated when used to condemn the choice of transnational interpretive sources. The same conclusion applies to professional consensus.

Collins examined the Court’s citations to amicus briefs and revealed that an increase in the number of ideologically similar briefs has a marginal impact on the judgment’s ideological direction. Whilst Collins concludes that pressure groups have some success in persuading courts, he acknowledges a flaw in deriving conclusions regarding ideological swing (extrapolating decisions based on the ideology of amicus submissions). The Supreme Court’s prospective ideological direction in a case is often predicted and publicised by Court-watchers and political science publications well before oral arguments and, subsequently, a professional organisation’s decision to participate as amicus is likely to be affected. Members of the group will seek support for their cause and publicity for the group itself when they are more confident that SCOTUS will cite their brief. As such, correlating the proportion of

579 Black et al (n 305).
580 Paul Collins, ‘Lobbyists Before the US Supreme Court’ (2007) 60 Political Research Quarterly 55, 63. Collins uses the ideological scale predominant in political science literature, Martin and Quinn (n 578) and concludes that, when the number of “liberal” briefs to a case rises from 1 to 3, SCOTUS is just 5% more likely to hand down a “liberal” decision (3.5% for the same assessment with “conservative” briefs and equivalent opinions).
581 ibid 65.
582 ibid 64.
“liberal” or “conservative” briefs submitted in a case with the ideological direction of the outcome is unwise.\textsuperscript{583}

A further issue dealt with in previous sections was the selectivity of sources as a criticism in itself. Cherry picking, as concluded with respect to transnational law, stems from the inevitable tendency of legal interpreters to seek real-world bases for their decisions,\textsuperscript{584} and for advocates to base their arguments on similar lines. Justice Holmes declared in 1880 that ‘the life of the law has not been logic: it has been experience’,\textsuperscript{585} a statement described as ‘the central … truth of American legal thought’.\textsuperscript{586} Holmes’s decree reflected the Legal Realist movement of the late-19\textsuperscript{th} and early-20\textsuperscript{th} Centuries, where legal reasoning began to take heed of the tangible impacts of court decisions, and Realists sought to tie adjudication to sociology. The movement declined, but its impact on legal teaching continues. Judges will inevitably look at bases for their arguments, since that is what modern lawyers are taught to do. To use cherry picking as an attack on the objectivity of interpreters is therefore to misunderstand how lawyers operate. Instead of rejecting selectivity, under interpretivism discretion is channelled by integrity, to ensure that moral principles are read into abstract rights when source-selection takes place.

Given the Realist backdrop of legal education, it is unsurprising that much of the literature on amicus briefs avoids a normative approach. As such, relevant discussions can be found in political science journals and focus on, \textit{inter alia}, frequency of citations to briefs, which Justices cited them, when, and in what circumstances.\textsuperscript{587} The normative question of how interpreters should make the best use of professional consensus sources is one for the

\textsuperscript{583} Paul Collins, Pamela Corley and Jesse Hamner, ‘The Influence of Amicus Curiae Briefs on US Supreme Court Opinion Content’ (annual meeting of the American Political Science Association, Chicago, August 2013) (analysing 2000 briefs with plagiarism-detection, concluding that Justices incorporate more language from briefs into their opinions, when the briefs correspond more closely with their own ideologies.) This is unsurprising, but does not undermine the existence and citation of demonstrable professional consensus, which is likely to find its best expression in briefs submitted to SCOTUS.

\textsuperscript{584} The concept of reliability refers to sources which will maintain legitimacy. See Dzehtsiarou (n 446) XXX for an assessment of legitimacy and the impact of the public’s opinion, something he terms ‘diffused support’.

\textsuperscript{585} Oliver Wendell Holmes, Jr [writing anonymously], ‘Book Notices’ (1880) 14 American LR 233, 234.

\textsuperscript{586} Thomas Grey, ‘Holmes and Legal Pragmatism’ (1989) 41 Stanford LR 787, 792.

\textsuperscript{587} Helen Anderson, ‘Frenemies of the Court: The Many Faces of Amicus Curiae’ (2015) 49 University of Richmond LR (forthcoming) 1, 3 fn1-3 (highlighting the most recent reviews on this issue).
interpretivist. Another issue is the legitimacy of these citations. Bürli splits legitimacy into coherence and consistency, institutional legitimacy, and procedural legitimacy. She claims that *amicus* briefs can aid these forms of legitimacy by contributing to the decision-making process, so long as they are selected objectively. Indeed, evolutive legal analysis can be aided by *amicus* briefs, objective citation of which arguably strengthens democratic values such as public participation, when utilised as a complementary, rather than exclusive, tool for interpretation. In addition, coherence in principle is upheld by such an approach. This will be considered in an interpretivist light in Section 5.4.4.

Flango et al define the roles of *amicus* briefs as: to amplify or support legal arguments; to inform the Court of potential implications arising from the decision; and to communicate the importance of the case. The possibility for rational interpretivist inclusion of professional consensus for these purposes, rather than for arbitrary selectivity, will soon be considered. Before this can be carried out, fundamental concerns regarding the content of briefs pertaining to such consensus remain unaddressed. These issues, based on the substance of the citations rather than the procedure by which they are cited, may undercut the values presumed to be strengthened by their inclusion.

### 5.4.3.2 Substantive Concerns

A review of recent *amicus* briefs, including those cited in *Hall*, instantly reveals their far more adversarial role than the name would suggest. A deeper consideration of associated literature unveils two prevailing interpreters’ presumptions. First, the role of *amici*...
has evolved into that of a friend of the party, not the court.\textsuperscript{594} Second, the contents of \textit{amicus} briefs are correct and constitute expertise, in a similar vein to the collective knowledge of epistemic communities.\textsuperscript{595} The first of these presumptions is generally accepted as a caution, which must be taken into account when placing reliance on information provided by \textit{amici}. Objectivity is called into question when organisations answer the ideological battle-call.\textsuperscript{596} It must be conceded that to reference an \textit{amicus} brief with blind faith as to its objectivity would be naïve.\textsuperscript{597} Such naïveté transcends the brief itself, too, and relying on \textit{amicus} facts as hard science also risks overstating their role. ‘[C]onventional wisdom’\textsuperscript{598} presumes that \textit{amicus} facts are reliable and demonstrate professional consensus. Such a ‘chorus of praise’\textsuperscript{599} for \textit{amicus} briefs was demonstrated most recently by all nine Justices in \textit{Hall},\textsuperscript{600} where professional consensus surrounding ESD was discussed with extensive reference to supporting briefs. In contradiction, Alford has contended that even with the best intentions \textit{SCOTUS} ‘lacks the institutional capacity’\textsuperscript{601} to undertake proper considerations of external, extra-legal sources. Yovel and Mertz have similarly noted ‘translation difficulties’\textsuperscript{602} between the fields of social science and law, including but not limited to ‘difference[s] in methods, aims, and epistemologies’.\textsuperscript{603}  

\textsuperscript{594} Anderson talks about ‘the myth of disinterest’ (Anderson (n 587) 50); Lynch argues that a lot of briefs are merely lobbying (Kelly Lynch, ‘Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs’ (2004) 20 Journal of Law and Public Policy 33, 46-56); Judge Posner, renowned for his criticism in the 7th Circuit of \textit{amicis curiae}, has noted his belief that they should remain a friend to the court, but have become a friend to the party. (Ryan v Commodity Futures Trading Commission (1977) 1063-64). Nonetheless, Posner has cited \textit{amicis curiae} throughout his judgments (Flango et al (n 591)).

\textsuperscript{595} Meyer and Molyneux-Hodgson (n 479).

\textsuperscript{596} This thesis adopts “ideology” to mean more than political philosophy. See (nn 575-388).

\textsuperscript{597} \textit{Jaffee v Redmond} 518 US 1 (1996) 35-36 fn127: ‘[t]here is no self-interested organisation out there devoted to pursuit of truth in the federal courts.’ (Scalia, J). This acknowledgement did not stop Scalia referring to \textit{amicis} in more cases than any other Supreme Court Justice in the 2013-14 term.

\textsuperscript{598} Larsen (n 491) 1. Note Anderson (n 587) 12, who describes the modern role of \textit{amicus} briefs as providing specialist information.

\textsuperscript{599} ibid 3.

\textsuperscript{600} See Bidish Sarma, ‘How \textit{Hall v. Florida} Transforms the Supreme Court’s Eighth Amendment Evolving Standards of Decency Analysis’ (2014) 62 UCLA LRD 186, 194-195, noting that even the dissent ‘endorsed the view that the \textit{Hall} litigation required a search for methodological consensus.’


\textsuperscript{602} Jonathan Yovel and Elizabeth Mertz, ‘The Role of Social Science in Legal Decisions’ in Austin Sarat, \textit{The Blackwell Companion to Law and Society} (Blackwell 2007) 410.

\textsuperscript{603} ibid 412.
In a similar way, Epstein and King note a key distinction between the disciplines. Social science scholars are taught to subject hypotheses ‘to every conceivable test and data source’, whereas judges are instructed by legal briefs which typically ‘amass all the evidence for [that] hypothesis and distract attention away from anything that might be seen as contradictory’. This leads to an overconfident conclusion being drawn in the judicial world, based on an extract of empirical knowledge, which drew substantial debate in the empirical world.

Amicus briefs can, however, provide interpreters with a vital tool for adjudication in specialised areas of law. Take the definition of intellectual disability, for example. When Atkins was decided SCOTUS had never before struck down a capital statute for neglecting considerations of developmental disability. In effect, Atkins represented a movement by the Justices into the psychiatric thicket. Without professional insight, subsequent decisions such as that in Hall would have been at risk of misdirection and error in judgment. There is a reported agreement among Supreme Court clerks that briefs are most helpful when they advise on ‘highly technical and specialized areas of law’. Clerks play a major part in placing briefs before their Justices, effectively wielding the final ‘rational sieve’ before the Justices exercise discretion. Under the common presumption that amicus facts are representative, or even relatively accurate, this process is uncontroversial in substantive terms; the Court is informed by expertise.

Serious concern arises, however, when briefs are wrongly cited as representing scientific truth. Larsen presents the most recent analysis of relevant examples, providing Hollingsworth as one case in point. In the controversial Proposition 8 same-sex marriage

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605 ibid.
606 Lynch (n 594) 41.
608 Borrowing the language adopted by this thesis: Dworkin, TRS (n 18) 252.
609 Hollingsworth (n 503).
case, handed down in 2012, one brief provided by ‘Social Science Professors’\textsuperscript{610} purported to demonstrate that children of homosexual couples were less likely to finish school.\textsuperscript{611} This study sits on file with a Canadian University and its methods, results and possibility of peer-review remain private and untested.\textsuperscript{612} While this type of weak evidence is not an isolated example,\textsuperscript{613} no explicit reference to the Social Science Professors brief was made by SCOTUS in Hollingsworth. A degree of confidence must be presumed in the Justices, who look for bases to their arguments, and political morality plays a part in this analysis.

According to Larsen’s examination of the 417 cases decided by the Court between 2008 and 2013, 61\% of the 124 citations to amicus briefs that purported to provide factual expert information were citations only to the brief itself, not to scientific papers or published results.\textsuperscript{614} This has a potentially damaging effect on the reliability of a claimed “consensus” which is based on these results, as there is no chance for scrutiny of the study by peers or by the Court. Three-fifths of the citations to “expert knowledge” could therefore be described more accurately as displaying “amici knowledge” which, as demonstrated previously, is not necessarily expertise,\textsuperscript{615} and might not represent a consensus at all. Care must be exercised if professional consensus is to form part of the interpretivist assessment. For its inclusion to be taken seriously, an assessment of the potential for this form of epistemic knowledge to be incorporated into moral judgments of ESD must be undertaken. The following subsection will examine through an interpretivist lens the functionality of amicus curiae briefs for interpretive analysis of the Eighth Amendment.

\textsuperscript{610} Brief for Social Science Professors, Hollingsworth v Perry, No 12-144 (133 S Ct 2652 (2013)); US v Windsor, No 12-307 (133 S Ct 2675 (2013)).
\textsuperscript{611} ibid 23, citing Douglas Allen, ‘High School Graduation Rates Among Children of Same-Sex Households’ (unpublished manuscript 2012) 4 (on file with Department of Economics, Simon Fraser University, Vancouver, Canada).
\textsuperscript{612} ibid.
\textsuperscript{613} Larsen (n 491) 25-35 (providing similar instances).
\textsuperscript{614} ibid 20-21.
\textsuperscript{615} For a particularly egregious example of such a citation see the dissent of Chief Justice Roberts in Caperton v AT Massey Coal Co 556 US 868 (2009) 900-901 fn50, citing a brief which he claimed to provide ‘numerous examples of judicial elections in which independent expenditures backfired and hurt the candidate’s campaign.’ This brief relied on a paper (Anthony Champagne, ‘Interest Groups and Judicial Elections’ (2001) 34 Loyola LR 1391) which provided as evidence for the examples (on which Roberts based his dissent) from an email which is on file with the author and never made public. While data privacy might mandate such secrecy, it is difficult to derive a decision’s rationale when the reasoning was not transparent, obfuscating the interpretive task.
5.4.4 AN INTERPRETIVE ASSESSMENT OF PROFESSIONAL CONSENSUS

An argument presented earlier, rejecting the pre-interpretive data provided by poll results, can be extended to the current discussion.616 Professional consensus, comprising the accumulated knowledge presented within amici curiae briefs, provides an example of something Dworkin described as a mere statistic of collectivity,617 rather than a rational use of moral communal will.618 The Eighth Amendment’s ESD seeks moral answers to legal questions and the Court must make principled references to the community standards that show the law in its best moral light.619 To shed moral light on professional consensus, that information must be treated as a collection of background principles interlaced with rules to inform law. Respect must be paid to the concept of integrity, which acts as a moral driver in legal questions. Professional consensus can provide objective, measured, principled contributions to the interpretive tools sought by ESD analysis when seeking moral answers to legal questions.

It is contended that, if amicus curiae briefs from professional bodies are considered carefully, and the reality of amici as adversarial proponents of either side of a given case is acknowledged, professional consensus can be utilised as a non-binding interpretive tool in the ESD analytical process. The flaws highlighted by the last subsection are concerning, but do not provoke as much disapproval, under an interpretivist analysis, as merely pre-interpretive statistics such as poll results or mathematical averages. Gorod, who rebukes the inclusion of amici curiae from the outset, takes a positivistic approach to constitutional interpretation, by excluding all sources arising outside formal advocacy.620 Nonetheless, she concedes that some guidelines should exist for the inclusion of extra-record facts so that judges ‘do not simply engage in the ad hoc cherry picking of facts out of amicus briefs, their bedtime

616 Dworkin, LE (n 17) 67-68.
617 Dworkin, TYO (n 125) 1677.
618 Dworkin, LE (n 17) 189.
619 ibid 256. This claim was argued in full in Section 1.
reading, or their nightly news program’. This call for guidelines will provide an integrity-driven approach to the selection of sources for political morality assessments.

In his rebuttal of Hart’s master rule of recognition, which advocates for law to be binding only when it is adopted by legal institutions, Dworkin emphasised the role of principles. Principles, he explained, may or may not draw support from the acts of institutions (statutes and case-law), which Hart would describe as rules, which combine to form law. Whilst he departed from Austin’s strict rejection of non-legal community principles, Hart failed to clarify how to measure these ‘secondary rules’. Dworkin’s thesis offers to fill the gap Hart left open, appealing to an ‘amalgam of…community practices and understandings’ such as those found in *Henningsen v Bloomfield Motors, Inc.* In *Henningsen* a state court cited a ‘general principle’ of ‘a society such as ours,’ which had otherwise not been afforded Hartian legal recognition. It is contended that such an ‘amalgam’ of practice and understanding cannot be considered in the absence of a review of professional consensus, which may be the best-informed authority on many technical and scientific issues. Indeed, professional consensus may not be unanimous. It may be equally divided, or there may be no consensus whatsoever. Nonetheless, interpreters must always seek the most aspirational moral answers to legal questions. While those answers may not be carved into stone, an attempt to derive guidance from epistemic communities is an important part of the aspiration to find those answers. Without recourse to the information provided by the professions in *Hall’s amici*, for example, SCOTUS would remain ignorant of

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621 ibid 73.
622 Hart (n 12) Chapter 5.
624 ibid 59.
626 Hart (n 12) Chapter 5; Shapiro in Ripstein (ed) (n 54) 22-49; refuted by Dworkin, *TRS* (n 18) 61.
627 ibid.
628 ibid 53.
630 ibid 386: ‘In assessing its significance we must keep in mind the general principle that, in the absence of fraud, one who does not choose to read a contract before signing it, cannot later relieve himself of its burdens.’
631 ibid 387.
633 ibid 53.
the intricacies of IQ assessments and a man deemed intellectually disabled by a consensus of experts could have been executed.634

Nonetheless, in practical terms, partisan and selective usage of scientific consensus pays little respect to principles of morality identified throughout this chapter, and a proposed degree of stricter scrutiny for the inclusion of these sources will now be outlined. In *Daubert v Merrell Dow Pharmaceuticals*,635 plaintiffs sought damages for birth defects allegedly caused by the respondent company’s drug. A federal trial court rejected the claim, relying on expert testimony and an *amicus* brief consolidating scientific studies. The decision was affirmed by the Ninth Circuit,636 which relied on standards for the inclusion of expert testimony prescribed by a federal district court in *Frye v US*.637 The Supreme Court vacated that decision, rejecting the old (*Frye*) standard of “general acceptance in the field” as too rigid. The relevance of *Daubert* can be found in the Court’s consideration of science not as ‘an encyclopedic body of knowledge [but] a process for proposing and refining theoretical explanations’.638 To clarify which principles could aid the determination of reliability with respect to expert testimony, the Court outlined four main items for consideration by trial courts:639 Methodology, peer-review and publication,640 knowledge of the rate of error,641 and ‘general acceptance’642 among the expert community, which was later extended by the Court to include technical and specialist “non-science” communities.643 The latter consideration, which connotes professional consensus, was held not to be a ‘necessary precondition to the admissibility of evidence’,644 but a relevant consideration.645

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634 This would have neglected the purpose of *Atkins* (n 103), to protect ID offenders from execution.
636 *Daubert v Merrell Dow Pharmaceuticals* 951 F2d 1128 (1991) (9th Cir).
637 54 App DC 46, 293 F 1013 (1923).
638 *Daubert* (1991) (n 636) 590, original emphasis.
639 ibid 593-594, though SCOTUS emphasised that it was not a definitive checklist.
640 ibid 594, though the majority opinion acknowledged that publication (or lack thereof) is ‘a relevant, though not dispositive, consideration in assessing...scientific validity’.
641 The quantifiable for the likelihood of measurement errors.
644 *Daubert* (n 635) 597.
645 These criteria were broadly incorporated by the Federal Rules of Evidence (28 USC §702 (2011)).
The adoption of similar control measures to those laid out by *Daubert* is recommended, which aligns with the notion of a general, current, and rigorously tested ‘scientific community’.\(^{646}\) Again, the nature of judging is worth noting here.\(^{647}\) Few judges have scientific backgrounds, so rely on presentations of fact by their clerks, who have similar backgrounds to judges, and counsel. Neither of the parties in a case seeks impartial presentation of fact, so it is for the interpretivist to weigh evidence in a way which is objective. By facing similar quality control requirements on fact-bearing *amicus curiae* briefs before the Supreme Court,\(^{648}\) those claiming to provide expert consensus when they are in fact lobbyists or one-sided advocates are received with greater caution.\(^{649}\) Through this control measure Gorod’s concerns about cherry picking are also alleviated. The methodology, peer-review processes and publication details of facts claiming to represent expert opinion would be required;\(^{650}\) as would the Court’s knowledge of the rate of error.\(^{651}\) Additionally, the interpreter deriving sources of political morality must consider the possibility that the professional consensus is, itself, evolving. Judgments must be made with this in mind, otherwise the malleable character of morality is lost in interpretation.

Necessarily, too, is a consideration of ‘general acceptance’\(^{652}\) amongst the expert community, though such an indicator is supplementary. Together, these requirements would ‘push back on the natural tendency to “cherry pick” the factual authorities’,\(^{653}\) and provide a rational fit for professional consensus within Dworkinian interpretivism, where interpreter discretion is encouraged when informed by moral principles.\(^{654}\) Selectivity is therefore sieved

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\(^{646}\) Yovel and Mertz in Sarat (ed) (n 602) 418 note that this notion of science is Kuhnian, as defined by Thomas Kuhn, *The Structure of Scientific Revolutions* (UCP 1962).

\(^{647}\) See the note on legal education since the Legal Realist movement, at (nn 585-586).

\(^{648}\) This is in reference to “Brandeis briefs” of social science or other scientific literature. See (n 491).

\(^{649}\) Lobbyists play a valuable role, but this critique applies to briefs which pertain to factual information.

\(^{650}\) *Daubert* (n 635) 594.

\(^{651}\) ibid.

\(^{652}\) ibid, extended by Kumho (n 643) 1171.

\(^{653}\) Larsen (n 491) 54.

\(^{654}\) Dworkin, *TRS* (n 18) 31-39.
by rationality; the impact of ideologies is significantly hindered; and guiding principles are provided to facilitate greater moral inclusion when citing professional consensus.\(^{655}\)

### 5.5 Conclusion

The current and preceding chapters have sought to outline an interpretivist approach to adjudication, evaluating the principles of political morality which form the Eighth Amendment’s ESD. It is accepted that, when considering abstract, aspirational theories of law and deciphering the role of morality in legal interpretation, real-world applications risk suffocation by theory. To use selectivity as an attack on the objectivity of an interpreter is to misunderstand how lawyers operate. Selectivity need not be an inherent evil; the moral sieve applied throughout this chapter has developed a framework for the future inclusion of indicia of ESD, in order further to scrutinise punishment under the Eighth in a way which respects its inherent morality.

**Opinion Polling**

Interpretivism rejects pre-interpretive data such as that provided by poll results, whether methodologically sound or otherwise. Policy arguments grounded in polling data might be sufficient to justify a political decision, but principles of constitutional law require a moral gloss to be applied to primary sources. If polls are accepted at the base level for what they are: ‘useful indicators of social discourse’,\(^{656}\) they are somewhat representative of the public sentiment they purport to quantify. That said, polls still fail to provide the sound moral footing called for by interpretivist adjudication when they are selected in an unguided way. Cherry picking and argument-basing source selection might be the prerogative of the judge, but an interpretivist must heed principles of political morality.

Those principles, which include justice, fairness, and due process, require interpreters to justify their selections of indicia for ESD adjudication, and to apply rigour when

\(^{655}\) See (n 588) about additional positive impacts of transparency on institutional legitimacy.

generalising from data such as that provided by polls. Justifications ensure transparency and quell accusations of cherry picking. Rigour, such as is found by statistical significance tests, provides a more accurate inference of consensus. Picking polls merely in support of a personal value judgement, without a justified exclusion of competing results, undermines the integrity of the process of political morality. Integrity is inherently objective and relies on consistency in decision-making, and the objective arm of ESD requires respect to be paid to this principle.

It is concluded that the majority opinion in *Gregg* provides a satisfactory mid-way for the inclusion of polls in constitutional adjudication. ‘[O]bjective indicia that reflect the public attitude towards a given sanction’, polling in this example, can only guide the ESD assessment where sanctions ‘accord with “the dignity of man,” which is the “basic concept underlying the Eighth Amendment.”’

**Penology**

Vengeance, which the Court has muddled with state retributivism, is an archaic and illegitimate penological goal. To ensure that due respect is paid to proportionality, the Framers’ warnings against tyrannous majorities are recalled. By heeding that call, the model of proportionality set out by Beccaria, refined by Kant, and refined further by Robinson as ‘deontological desert’ is adopted. Robinson’s framework embodies a clearer set of principles which are derived from the fundamental values underlying the Eighth. Principles of just desert, which includes proportionality (subjective, and objective: ‘ordinal’ and across jurisdictions) and individualisation, ensures a moral approach to the inclusion of penology in ESD adjudication.

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658 *Gregg* (n 143) 173.
659 ibid, citing *Trop* (n 145) 100.
660 Adams (n 135) 291, relied on in Ball (ed) (n 135) No 10, 71.
661 Robinson (n 273) 151.
662 von Hirsch in Tonry and Frase (eds) (n 253) 410-415.
663 *Coker* (n 194) 613; *Kennedy* (n 196) 424-426.
Further, the often side-lined Gregg conditions of dignity and non-excessive punishment are paid respect by this approach, something which is so far lacking in Eighth Amendment jurisprudence. Instead of focusing on utilitarian deterrence, as the Court evidently has done, deontological desert leaves policy goals to the other branches, by squaring the judiciary’s focus on constitutional interpretation of background principles of morality. This theory of penology aligns with interpretivism, seeking aspirational answers ‘by appealing to an amalgam of practice’. By this tack, principles of consistency (derived from the holdings in Furman and Gregg) and individualisation (required by the Lockett and Eddings doctrines) can be reconciled. These constitutional values are not ‘all-or-nothing propositions’. Through a rational sieve they are cast as principles, informing the interpreter’s moral reading of the Eighth Amendment; a reading which will inform the discussions in the forthcoming chapters.

Transnational Comparativism

The dignitarian assessment called for by the ESD principle should be informed by the ‘accumulated legal wisdom of mankind’. Issues of selectivity are inoffensive under interpretivism if interpreters read sources in light of moral principles. The Dworkinian interpreter must instead unearth background principles of political morality with the aspiration of providing principled answers ‘by appealing to an amalgam of practice’. To do so, interpreters should use a version of weak discretion, channelled through integrity. That channelling appears in the form of reasoned opinions, objective decision-making, and the portrayal of community standards in the light that reflects integrity. If this framework is

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664 Dworkin, TRS (n 18) 36.
665 Furman (n 76); Gregg (n 143).
666 Lockett (n 81); Eddings (n 284), which require a narrow-proportionality presumption in non-capital cases.
667 ibid. See Dworkin, TRS (n 18) 25.
668 See Woodson v North Carolina 428 US 280 (1976) 304, where it is made clear that SCOTUS considers these values to be principles.
669 Waldron (n 464) 140.
670 ibid 36.
671 Dworkin, TRS (n 18) 31-39.
followed in earnest, issues of democratic deficit should fall by the wayside along with the originalist notions outlined above.

Adopting Waldron’s call for a ‘set of principles’ that represents ‘a sort of consensus among judges, jurists, and lawmakers around the world’, Murkens’s advice that the Court should ‘feel compelled to consult widely’ is endorsed. The ESD assessment asks a ‘human question, and the Americans are human – and so is everybody else.’ Fundamental interests and rights should be interpreted in light of their associated normative and moral values, which cannot fully be appreciated when restricted to domestic (American) assessments. Instead, ‘the evolving standards of decency which mark the progress of a maturing society’ are enriched by transnational comparativism, enrichment which will be sought in the remaining chapters.

Professional Consensus

Despite their procedural and substantive shortcomings, amicus curiae briefs can supplement ESD analysis. The interpretivist’s aim to fill positivism’s void by recourse to community practices and understandings benefits from an additional, expert insight into community consensus. Rational interpretive safeguards are encouraged, to protect against according amicus facts with blind-faith credence. Professional consensus might not be dispositive of an Eighth Amendment issue, but an adoption of control measures, first set out by Daubert, brings the assessment in line with the notion of a general, current, and rigorously tested ‘scientific community’. By applying such rigour, selectivity is sieved by rationality; the impact of ideologies is significantly hindered; and guiding principles are provided to facilitate greater moral inclusion when citing professional consensus.

672 Waldron (n 464) 132.
673 Murkens (n 465) 15.
675 Trop (n 145) 101.
676 Daubert (n 635).
677 Yovel and Mertz in Sarat (ed) (n 602).
Chapter V: Further Measures of Evolving Standards

The unprecedented level of deference accorded by the Court in Hall to professional medical opinion gives a clearer picture of the future of Eighth Amendment evolution. Hall provides a fresh challenge for further attacks on constitutional law, through professional medical consensus. Specifically, by determining that ESD can be informed by such consensus, the Court has prepared a Trojan Horse. Loaded with professionals armed with epistemic knowledge, this vehicle could prove evolutionary for constitutional challenges against practices which ask further medical questions, if SCOTUS is willing to open the hatch.

Such willingness was avoided in May 2015 when the Court rejected Bower v Texas,678 a case challenging inter alia the practice of executing a defendant ‘who has already served more than 30 years on death row while exercising his legal rights in a non-abusive manner’.679 Had SCOTUS granted review, significant attempts would have been made to demonstrate professional consensus in Bower’s favour.680 Since such an opportunity was denied, this thesis will seek similar evidence in Chapters VI and VII, to provide a comprehensive evaluation of the nation’s use of a form of punishment which exceptional by world standards, in terms of both its prevalence and its application: solitary confinement.

678 Bower v Texas (2015 No 14-292) cert denied.
679 Petition for Writ of Certiorari, Bower v Texas (No 14-292) i.
680 Indicated in the petition.
CHAPTER VI

THE HIDDEN CORNER OF THE PRISON

6.1 INTRODUCTION

In April 2015 a North Carolina prison official acknowledged that the Durham County Jail was using a new procedure he defined as a ‘modified detainee walk schedule’.¹ That procedure limited the amount of time 500 prisoners spend outside their cells to less than one hour per day. Neither the County Jail nor the state acknowledged that this modified schedule was a form of “solitary confinement”, a method officials claimed was provided for by different correctional policies.² The mislabelling of this procedure, solitary confinement by any other name, is a clear warning sign for the types of obscure euphemisms adopted by prison officials. For analysis of this form of extreme punishment, the demonstrated obscurity presents an immediate challenge. Accessing and evaluating data regarding the number of inmates held in forms of solitude or segregation across the US is extremely difficult, not only given the varying definitions, but also due to the practical issue of access to data: some states do not even keep such records, let alone publish them.³

From the available data, on any given day at least 81,000 prisoners are held in some form of solitary confinement in the US.⁴ While there is no universal definition of such confinement, Riveland’s is the most widely-accepted, defining it as: ‘a highly restrictive, high-custody housing unit … that isolates inmates from the general prison population and

² NCDOC Rules and Policies (2010) §§(8)(a)(1); (b)(1); (c)(1); (d)(1).
⁴ John Gibbons and Nicholas Katzenbach, Confronting Confinement (Commission on Safety and Abuse in America’s Prisons 2006) 52-53, 56. Figures vary since classification of “solitary” is not uniformly accepted across the fifty state jurisdictions, the federal government and the military.
from each other’. 5 Riveland’s definition also requires a period of at least 22 hours per day in which prisoners are not allowed to leave their cells, known as ‘lockdown’. 6 Since there is no central US prison system, a variety of labels are used by states and found throughout state policy, such as in the North Carolina example above. In addition, various monikers for solitary confinement are found in legislation, media, and academic literature, all pointing to the previously defined situation. Examples include Special Control Unit (SCU); Intensive Management Unit (IMU); Administrative Segregation (AdSeg); Super-Maximum Security (Supermax); in addition to other, more colloquial descriptions: “the hole”, “the bing”, “the chokey”, “the SHU”, “the box”, or “lockup”. This chapter adopts the acronym most commonly associated with legal and psychiatric assessments of solitary confinement: “SHU” (Secure Housing Unit). The use of “SHU” refers not only to housing units, but to any situation where sentenced inmates are held in isolating confinement for at least 22 hours per day.

It is worth noting that the use of SHU is not unique to the US, but its massive scale is very much an American phenomenon. 7 This chapter seeks to pay close attention to the practical impact of sentenced prisoners held in solitary confinement, 8 and the reality of associated constitutional issues hidden in this often overlooked sector of punishment. Context, including the history of solitary, the last Century’s boom in civil rights suits by prisoners, and the onset of mass incarceration will be introduced in Sections 6.2 and 6.3 for discussion-framing. By engaging in the analysis outlined by the interpretivist framework developed in the first half of this thesis, Sections 6.4 and 6.5 will introduce the practical issues faced by the American experiment with solitary confinement in order to provide the

5 Chase Riveland, Supermax Prisons (US Department of Justice 1999) 6, emphasis removed.
6 ibid.
7 Sharon Shalev, Supermax (Willan 2009) 9.
8 Pre-trial solitary confinement has been scoped out of this study, with a view to focusing on solitary as punishment, but it is noted as deserving further analysis in future work. A current assessment of this separate issue can be found in Peter Scharff Smith, ‘The Effects of Solitary Confinement on Prison Inmates’ (2006) 34 Crime and Justice 441, 445.
basis for an analysis of its constitutionality under the Eighth Amendment, which will follow in Chapter VII.

Supporters of SHU dismiss its critics as ‘sentimental, bleeding-heart liberals’. The claim will be developed that, by exposing the reader to the historical, social, and jurisprudential background of this form of punishment, a compelling case for greater scrutiny of solitary confinement practices arises. Respecting the Eighth Amendment’s evolving standards of decency (ESD), which is a principle of morality, is a fundamental part of reading law as integrity, where morals are viewed as interwoven within the framework of law.

Objective indicia of decency relevant to the Constitution’s punishments clause will be identified and interpreted by the framework developed in the past two chapters. Ultimately, it will be argued in Chapter VII that SHU, as practiced, is unconstitutional under the ‘evolving standards of decency that mark the progress of a maturing society.’ Before arguing as such, however, it is necessary to consider the historical overview of solitary confinement.

6.2 HISTORY AND CONTEXT

Following high-profile exposés of solitary confinement published by the New Yorker and New York Times, 2014 saw the most widespread reforms to solitary confinement in recent memory. Ten states adopted changes to their SHU policies, in addition to the introduction of three national reform bills, the greatest American solitary confinement action for nearly two decades. While it is unwise to conflate reform with abolition, the Court’s ESD precedent has been shown to include notice of the ‘consistency of

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11 Trop v Dulles 356 US 86 (1958) 1
14 Arizona, California, Colorado, Indiana, Michigan, Nebraska, New Mexico, New York, Ohio, and Wisconsin undertook reforms of SHU in their state facilities during 2014. Texas and New Jersey, have pending executive reviews or legislative considerations.
the direction of change\textsuperscript{15} in state and federal statutes. This consensus element of the ESD principle, state counting for the purpose of national consensus measurement, will be considered in detail in the next chapter and will draw conclusions as to the constitutionality of solitary confinement. Before that line of argument is pursued, an overview of the relevant history and context prior to 1976 is necessary.\textsuperscript{16}

6.2.1 Penological Shift

By the late-1600s American colonies had undergone major penal reform with stimulus from the Quakers movement,\textsuperscript{17} including most notably William Penn, who founded Pennsylvania. Penn deplored the brutal conditions of English prisons and pushed for the enactment of the ‘Great Code’,\textsuperscript{18} to provide for the establishment of houses of correction where, in theory, moral principles of proportionality and humanity would prevail. Thus, the Pennsylvania Prison Society, the first such humanitarian organisation in the world, was founded. Efforts were short-lived, however, and England forced the repeal of Penn’s Code upon his death in 1718. In Great Britain a 1751 Act of Parliament provided for an early form of solitary confinement, decreeing that, after conviction of a heinous offence, ‘[jailers] shall confine such prisoner to some cell…separate and apart from the other prisoners, and that no person or persons whatsoever, except the jailer or keeper…shall have access to any such prisoner.’\textsuperscript{19} The British public ‘revolted against this severity’\textsuperscript{20} and, following the American Revolution, Parliament repealed the section on solitary.\textsuperscript{21} American reform efforts could only reignite if the English reign over the colonies was shaken.

\textsuperscript{16} Section 6.3 will explain the relevance of this starting point.
\textsuperscript{17} George Kurian, World Encyclopedia of Police Forces and Correctional Systems (Gale 2006) 77.
\textsuperscript{18} Penn debarked at Philadelphia in 1682 and pursued his idea of a ‘civic utopia’, including his mild penal code. Jack Marietta and G Rowe, Troubled Experiment (University of Pennsylvania Press 2006) 263. In fact, as Marietta and Rowe demonstrate, this led to much higher crime levels than prior to Penn’s reforms.
\textsuperscript{19} Act 25 Geo II c37 (1751).
\textsuperscript{20} In Re Medley 134 US 160 (1890) 170.
\textsuperscript{21} Act 6 & 7 Wm IV c30 (1836).
6.2.2 Post-Independence Imprisonment

In the early United States, following independence from Britain and Jefferson’s proclamation that their ‘political bands’ must ‘dissolve’, founders Benjamin Franklin and Benjamin Rush echoed Beccaria’s European calls for limited punishment in the pursuit of life, liberty, and happiness. To those ends, Franklin and Rush supported the Pennsylvania Prison Society’s establishment of Walnut Street Jail, the first ever custom-built house of correction or “Penitentiary”, and the first prison to resemble those found today. Sixteen cells were provided within Walnut Street’s solitary wing, each measuring eight by six feet, with a small window out of the prisoner’s reach, and no table or bed. The thickness of the walls was described as so great ‘as to render the loudest voice unintelligible.’

Rush, the ‘father of American psychiatry’, viewed the solitude provided by Walnut Street as creating a moral infirmity, believing that penance in solitary confinement with labour would cure prisoners’ psychiatric criminality. Others, however, propagated solitary for its painful physical and emotional effects. Both justifications derive from a form of utilitarianism, either in terms of deterrence, or an early type of rehabilitation; both focused on the consequentialist purposes of the punishment. The early efforts at Walnut Street led to the construction of a similar prison in the same state, Eastern State Penitentiary (ESP) or ‘Cherry Hill’. Unlike Walnut Street, which enforced hard labour, ESP was faithful to solitary penance as the principal form of activity for prisoners, redolent of the solitary confinement

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22 Declaration of Independence (1776).
23 Borrowing the words from the Declaration, ibid. See Cesare Beccaria, On Crimes and Punishments (1764) (Richard Bellamy (ed) CUP 1995) 10 (punishment must be necessary); ibid 63 (and lenient). As noted in Chapter III, Beccaria significantly influenced the work of Voltaire, who was in frequent contact with Franklin and Rush. Marcello Maestro, Cesare Beccaria and the Origins of Penal Reform (Temple UP 1973) 18-19.
26 ibid 169.
27 ibid.
29 Lisa Guenther, Solitary Confinement (University of Minnesota Press 2013) 9-10.
30 Francis Gray, Prison Discipline in America (John Murray 1848) 37.
definition in the 1751 English statute. The penal revolution instigated by ESP became known as the ‘Pennsylvania model’ and, despite condemnation from prominent writers on each side of the Atlantic, Europe embraced this model. Pentonville was built in London (1842), Mazas in France (1850), and Louvain in Belgium (1860), each framed loosely on ESP’s adoption of Bentham’s spoked-wheel shaped Panopticon, a prison designed for maximum surveillance of prisoners. The rest of the US, however, took a different turn. The prison arrived during a period where public shaming had lost its appeal, due in part to the dissolution of close-knit communities, and to the shift away from English practices.

In 1821 New York built Auburn Prison, adopting the cellular system pioneered in neighbouring Pennsylvania, but with less emphasis on isolation. The Auburn system was much less costly than the Pennsylvania model, and provided inmates with work during the day. Against the international trend, the Auburn system became the predominant form of imprisonment in the US, which had turned away from the original practice of extreme solitary at ESP. During the latter-half of the 19th Century and the early 1900s the two distinct models prevailed on either side of the Atlantic, though the picture would change when the Great Depression struck in 1929. At this time a number of events that would shape the new era of penology took place in the US. Jacobs notes worsening violence and unemployment during the Depression, which in turn led to higher crime rates and

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32 Act 25 Geo II (n 19).
33 Skidmore (n 25).
34 Dickens described the conditions upon his visit to ESP as ‘cruel and wrong’ (Charles Dickens, American Notes (1842) (Penguin Classics edn, 2000) 111); Hans Christian Andersen, In Sweden (1851) (Asad Razzaki ebook edn, 2004) Chapter 6 (describing his visit to a Swedish prison based on the Pennsylvania model: ‘by solitary confinement, in continual silence, the criminal is to be punished and amended;...It is as though no one lived there or it was an abandoned house in time of plague....The whole is a well-built machine—a nightmare for the spirit.’)
35 John Roberts, ‘History of Prisons’ in Kurian (ed) (n 17) 79.
39 O’Donnell (n 28) 17.
41 O’Donnell (n 28) 17.
Chapter VI: The Hidden Corner of the Prison

overcrowding in the nation’s prisons. The later US involvement in World War II and a subsequent economic boom meant that attention was diverted from prisons in favour of broader social issues such as unemployment, and inmates became the hidden and ignored sector of society.

At the height of highly politicised state problems in Illinois, the American Correctional Association was founded, and the Model Penal Code (MPC) was introduced in the 1960s. The MPC led to the recommendation of a significant proportion of new paroles. In combination with the Civil Rights Movement’s ferocious momentum, the politicisation of the remaining inmates was generated, especially with respect to racial minorities, who had become the majority in prisons. As noted in Chapter III, the ‘softening’ of state power caused by a humanitarian shift in popular sensibilities in the mid-20th Century, combined with a loss of confidence in social institutions arising out of political turmoil; the struggle for civil rights and soaring crime rates led to the realisation that utilitarian sentencing policies, such as deterrence, were failing to deliver. The ‘rehabilitative ideal’, the idea of caring through coercion, had also reached its peak. In 1971, following 27 prison riots across the US in the previous year, New York would see the worst one-day encounter between fellow Americans since the Civil War, this time in a state prison. After four days of intensive rioting by the 2,200 inmates of Attica, New York, 39 men were killed, including 10 hostages. A further 80 suffered non-fatal gunshot wounds. A Commission created in the wake of Attica condemned the race-based abuse of black prisoners and poor planning of

43 ibid 28.
46 Ronald Dworkin, Taking Rights Seriously (TRS) (Gerald Duckworth 1977) 128.
50 ibid.
prison security, compounded by the warehousing of inmates who were in need of education and other reform-based programmes.

Spurred in part by events at Attica, and another 48 prison riots in 1972 – an historical peak – Martinson would declare in 1974 that ‘nothing works’, and the national Bureau of Prisons would abandon entirely the medical model for imprisonment. Instead, utilitarian models of safety and containment would return, with correction cast by the wayside. Solitary confinement was seen as a viable alternative to standard General Population, in which the vast majority of prisoners were held. Solitary would house the “worst of the worst”, confined in isolation, not for correction but for prevention of crime. Along with the decline of the rehabilitative ideal and following Attica, the late 1970s onwards saw a massive growth in imprisonment in the US. Widespread closure of mental health hospitals meant that prison authorities instead received psychiatric patients. These inmates struggle to cope with the exigencies of everyday prison life even more than standard prisoners, most of whom suffer from at least mild mental health disorders and limited sociability. Incapacitation and retribution filled the void left by the rehabilitative model, and the use of ESP-style solitary confinement increased.

When the US had abandoned the Pennsylvanian model in favour of the less restrictive Auburn system, the rest of the world had opted for greater confinement. By the late-20th Century, however, with Europe leading the humanitarian call for greater rehabilitation and

53 Welch (n 51) 296.
54 Case (n 48) 74.
56 Kurian (ed) (n 17) 85.
57 300,000 prisoners in 1978 grew to 2,300,000 in 2012, such that a country with 5% of the world population now has around 25% of its prisoners.
59 Doris James and Lauren Glaze, ‘Mental Health Problems of Prison and Jail Inmates’ Bureau of Justice Statistics Special Report (September 2006) 1 (reporting percentages of inmates with ‘any mental problem’ in state prison as 56%).
stricter scrutiny over imprisonment practices, the tables had turned. Those at the helm of US prison policy—generation had gained an appetite for more punitive practices than those used before, and were much less concerned with avoiding total isolation which would, after all, satisfy individual deterrence from crime. The events of October 1983 would extinguish any hope of that appetite diminishing.

6.2.3 The Modern Foundations of Solitary

United States Penitentiary (USP) Marion, in Illinois, was built in 1963 to replace Alcatraz, designed as a federal prison for the 500 ‘adult male felons who [were] difficult to control’. Inmates held at Marion initially underwent a behavioural modification programme called Control and Rehabilitation Effort (CARE). Strict solitary confinement was imposed, with pockets of intensive group therapy. On 22nd October 1983 events occurred which would reshape the American SHU. Convicted murderer Thomas Silverstein instigated the murder of two guards in the prison, and has been designated “Prisoner Zero” for his role in the subsequent lockdown across Marion. Fourteen months after it began, the US House of Representatives Judiciary Committee described the lockdown at Marion as the largest in history, with some inmates (most notably Silverstein) not having left their cells once in those months. At the time of writing, in June 2015, the lockdown is ongoing. Silverstein has left his cell on just a handful of occasions in 32 years. ESP-style solitary had returned to the US.

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62 In absolute solitary confinement, inmates’ violence against others was seriously limited, though not against themselves.
64 ibid 134-135.
65 US v Silverstein 732 F2d 1338 (7th Cir 1984).
66 This terminology borrows from medicine, where Patient Zero is the first to contract an infectious disease.
67 O’Donnell (n 28) 150.
69 Silverstein v FBP citation pending (12-1450) (10th Cir 2014)
The “success” of the USP Marion lockdown – in the sense that it led to lower crime in the prison – has led to what O’Donnell terms the ‘Marionization’ of the national system. Devoid of any considerations of political morality, Marion-style lockdowns are now catered for by custom-built institutions (or sections thereof), which are permanently closed off to other prisoners. No prisoner is able to have contact with another, even during recreation where they are held in single-walk exercise pens. These are SHUs, Solitary Housing Units, found in prisons across the US. Death row, protective custody, discretionary segregation, administrative segregation, and custom-build “Supermaxes” are all forms of SHU which lead to long-term confinement in solitude. An inevitable consequence is very limited access to the world outside the inmate’s cell, let alone outside the prison. Often designed on a “pod” basis, where around eight cells are further contained, SHU is accurately described as ‘a species of meta-prison’: a prison within a prison.

While Marion was once an exceptional institution, designed to cater for the prisoners left unsecured after the closure of Alcatraz, it laid the foundations for a much greater creation. The modern SHU, in which around 81,000 inmates are held at any one time, evolved out of the Marionisation of prison security. O’Donnell notes that Dickens is often criticised for having exaggerated the conditions at ESP, but that if he were to visit the SHU today, his descriptions would certainly apply. The accuracy of this purported return to a Dickensian condemnation of prison conditions will be examined in the next chapter. For present purposes, however, a refocus on the constitutional law trajectory is warranted. To that end, the next subsection will review the Supreme Court’s varied approach to prisoners’ rights over the past century.

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70 O’Donnell (n 28) 156.
71 Shalev (n 7) 101, citing the 1984 approval by the US National Institute of Corrections and the American Justice Association of the pod design.
73 O’Donnell (n 28) 175.
6.2.4 EXPANSION AND RETRACTION OF CONSTITUTIONAL PROTECTION

To varying extents, imprisoned Americans have been afforded limited constitutional guarantees. Until the mid-20th Century Madison’s caution against the Constitution’s provisions becoming mere ‘parchment barriers’ with no substantive guarantees was a very real risk in prisons. The federal courts treated prisoners as ‘the functional equivalent of non-citizens’, without access to many rights, which free citizens would otherwise have had. Local courts left matters of sentencing to the legislature, and its imposition, including imprisonment, to the executive. This exercise of the judicial ‘hands-off’ doctrine, introduced briefly in Chapter II, left almost total control of prisons to the other branches of government.

6.2.4.1 THE ORIGINAL POSITION

At the foundation of the US, civil rights simply did not exist as a concept behind the prison gate. The Bill of Rights applied only to the national government, at the federal level. Local prison systems were at liberty to contain prisoners in the circumstances and conditions prescribed by their states. Civil rights as a legal concept was a product of Reconstruction, where Congress passed federal provisions dealing with the freedom of US citizens. Take, for example, the 1867 Habeas Corpus Act, accompanied by the Fourteenth Amendment, which provided freed slaves with citizenship and the ability to challenge at the federal level any restriction of their liberty at the hands of any state. In addition to its role as a guarantor against slavery, importantly the 1867 Act also provided federal courts with oversight of

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76 John Fliter, Prisoners' Rights (Greenwood 2000) 45.
77 Jacobs (n 42) 105 (noting that the doctrine declined most notably from 1970-75).
78 In Stroud v Swope 187 F2d 850 (9th Cir 1951) 851-852 the Ninth Circuit (federal) court of appeals described the doctrine thus: ‘it is not the function of the courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.’
79 14 Stat 385 (39th Cong) (1867).
80 US Const, Amend XIV, Section 1: ‘All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States [and shall have access to] the equal protection of the laws.’
nationwide criminal justice. Nonetheless, despite these promising foundations, it would be decades before prisoners’ rights were built.

In *O’Neil v Vermont* the US Supreme Court considered the proportionality of a punishment under the Eighth Amendment for the first time. Declining to conclude on the merits of a sentence of 54 years at hard labour, and in spite of the Fourteenth Amendment’s guarantee to provide all citizens within ‘the equal protection of the laws’, SCOTUS explicitly refused to apply the punishments clause to the states. A majority viewed the Eighth as a matter for the federal government, and not one designed to encroach on state power. Fliter has noted that an important issue not considered by the Justices in *O’Neil* was solitary confinement, which up to that point had not come before the Court. The decision gained just one dissenting opinion from Justice Field, who decried the barbarity of O’Neil’s sentence: ‘it is hard to believe that any man of right feeling and heart can refrain from shuddering [at its] severity’. Following America’s acquisition of the Philippines during the American-Spanish war over Cuba in the same year as *O’Neil* was decided, the Court was provided with another occasion to consider solitary confinement.

In *Weems v US*, SCOTUS reviewed a challenge to the Philippine colony’s solitary confinement and hard labour scheme, which held onto the early Philadelphian model. Justice McKenna’s majority opinion offered consideration of Field’s sympathy towards offenders handed disproportionate sentences. While avoiding the question of incorporation, in a judgment noted in Chapter II as somewhat imperialistic, McKenna declared that the Eighth Amendment was ‘not fastened to the obsolete, but may acquire meaning as public opinion is enlightened by a humane justice’, the statement which provides the emphasis for the

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82 144 US 323 (1898).
83 US Const, Amend XIV, Section 1.
84 *O’Neil* (n 82).
85 Fliter (n 76) 56.
86 *O’Neil* (n 82) 340 (quote reordered).
87 217 US 349 (1910).
88 ibid 378.
principle of evolutive decency upon which this thesis is based. It would take much more than aspirational statements to deliver the Constitution’s guarantees behind prison walls, however, and that opportunity would only arise with a Court willing to adopt a more “hands on” approach in the civil rights sphere. Chief Justice Earl Warren provided hope for that willingness.

6.2.4.2 Warren’s Due Process Revolution

Known for its activism in desegregation cases introduced in Chapter II,\(^89\) the Warren Court (1953-1969) played the most significant role in the expansion of prisoners’ access to civil rights. After a decade of due process expansion in other substantive areas of constitutional protection,\(^90\) the Warren Court revitalised *Weems* and declared in *Trop* that the Eighth Amendment contained a principle of evolutive decency.\(^91\) Four years later the Court finally incorporated the Eighth Amendment, applying the punishments clause to the states in addition to the federal government.\(^92\) As a result, the proportion of prisoners alleging unconstitutional sentences and prison conditions rocketed. Warren’s criminal due process revolution swung into action and the lower federal courts began to hear various frivolous constitutional challenges to uncomfortable conditions.\(^93\) Unsurprisingly, the rights of prisoners were litigated like never before.

The 1960s saw various attempts by the Court to deliver better civil rights protection to prisoners. First, in *Monroe v Pape*,\(^94\) the applicability of 42 USC §1983 to prison suits was considered.\(^95\) Though §1983 provides that claims can be brought against ‘[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

\(^89\) Chapter II, Section 2.3.
\(^90\) *Yates v US* 354 US 298 (1957) (developing the “clear and present danger” test for speech which was not protected by the First Amendment, expanding this area); *Gomillion v Lightfoot* 364 US 339 (1960) (beginning the decades-long battle against voting-boundary malapportionment and Fifteenth Amendment protection); *Mapp v Ohio* 367 US 643 (1961) (increasing defendants’ rights under the Fourth Amendment, holding evidence obtained in violation thereof inadmissible).
\(^91\) *Trop* (n 11) 100; 101.
\(^95\) A federal statute first intended to provide for private remedies for federal law violations. See *Memphis Community School Dist v Stachura* 477 US 299 (1986) 305.
Territory…depriv[es] any rights, privileges, or immunities secured by the Constitution and laws’, 96 no case prior to Monroe had extended this provision to state officials who had acted beyond their lawful authority. Monroe determined for the first time that a public official, here a police officer, who exceeded his lawful authority was nonetheless still acting under the colour of state law. Consequentially, §1983 was expanded to include actions which were outside the official’s authority. While certainly promising for the general cause of expanding due process in the US, the application of §1983 to prisoners was not considered. Soon thereafter SCOTUS held in US v Muniz that the Federal Tort Claims Act (FTCA) 97 made damages available to prisoners successfully alleging civil wrongdoing by the State. 98 Despite these efforts, the impact of Muniz on prisoners’ rights was also limited, 99 because FTCA applied only to inmates held by the Federal Bureau of Prisons (FBP), not the state systems.

Building on the precedent of Trop, Monroe, and Muniz, SCOTUS in 1964 would fully engage with prisoners’ rights for the first time. In Cooper v Pate the Warren Court applied Monroe’s expansion of §1983 to prisons. 100 State prisoners, as well as those held by the federal government, were able for the first time to bring claims against their captors. Such expansion, combined with Robinson’s incorporation of the Eighth Amendment, meant that prisoners were provided with more legal protection than they had been at any point in American history. Thousands of federal court claims were filed in the year following Cooper, 101 yet the tide of Warren’s due process revolution did not stem. Further due process was later provided to prisoners, including guarantees of counsel for probation hearings, 102 equal protection in prison, 103 and access to certain legal services. 104

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96 42 USC §1983.
97 60 Stat 812 (1946), 28 USC § 1346(b).
99 Fliter (n 76) 81.
100 Cooper v Pate 378 US 546 (1964).
101 ibid.
The expansion of access to civil rights during this period was so significant that it became Warren’s legacy, leading some to voice concerns that the Court had become too activist, encroaching on state sovereignty like never before.\textsuperscript{105} Chambers, for example, described Warren’s efforts as ‘courageous and, to a significant degree, successful’,\textsuperscript{106} and noted that critics exaggerate the Warren Court’s role. With a switch in Chief Justices from Warren to Burger in 1969, and the subsequent appointment by President Nixon of the ‘strict constructionists’\textsuperscript{107} Blackmun, Powell and Rehnquist, it must have seemed certain that the expansion would be suppressed. That was not to be the case.

6.2.4.3 From Expansion to Concern

Fliter notes that, ‘surprising many’,\textsuperscript{108} the Burger Court followed the path Warren had paved, increasing the civil rights of prisoners from 1971 to 1974. An expansion of access to legal materials and rights of free speech expression in prisons, handed down in \textit{Younger v Gilmore},\textsuperscript{109} was followed by the holding in \textit{Cruz v Beto} that prisoners of varying religions must be permitted to exercise their beliefs freely.\textsuperscript{110} The \textit{per curiam} decision emphasised the federal judiciary’s seemingly “hands-on” approach to prisoner complaints: ‘Federal courts sit not to supervise prisons, but to enforce the constitutional rights of all “persons,” including prisoners.’\textsuperscript{111} Supervision, in the form of closer oversight, would follow and prevails today, but the early Burger Court cases affirmed a willingness to at least scrutinise state punishment at the highest level.

In 1974, during the \textit{de facto} moratorium on the national death penalty stemming from \textit{Furman v Georgia},\textsuperscript{112} SCOTUS provided inmates with procedural rights for the first time.\textsuperscript{113}

\textsuperscript{105} Strauss notes that these criticisms typically take ‘the form of condemning “judicial activism of the left or the right,” with the Warren Court (or “Warrenism”) seen as an example of the former’. David Strauss, ‘The Common Law Genius of the Warren Court’ (2007) 49 W&Mary LR 845, 846.
\textsuperscript{107} Fliter (n 76) 94.
\textsuperscript{108} ibid 97.
\textsuperscript{109} 404 US 15 (1971).
\textsuperscript{110} 405 US 319 (1972).
\textsuperscript{111} ibid 321.
\textsuperscript{112} 408 US 238 (1972).
Where other cases had focussed on increasing prisoners’ access to substantive guarantees, *Wolff v McDonnell* concerned certain procedural issues, such as the right to appeal the decisions of a warden in internal disciplinary proceedings.\(^{114}\) Specifically, in *Wolff* the Court provided prisoners with a procedural due process guarantee of evidentiary hearings for internal misdemeanours. ‘There is no iron curtain’,\(^ {115}\) the majority noted, ‘drawn between the Constitution and the prisons of this country’,\(^ {116}\) thereby establishing that prisoners have certain ‘liberty interests’,\(^ {117}\) even while imprisoned. *Wolff* therefore represents another amplification of prisoners’ rights, developing the substantive field of constitutional protection.

Despite this further expansion, however, the Burger Court would attempt to backpedal on the civil rights it had established for prisoners the decade before, with numerous restrictions on due process decided between 1976 and 1986.\(^ {118}\) Even more significant was the emergence of a developing Eighth Amendment jurisprudence. Immediately following the attention that had been paid to capital punishment, in *Furman*,\(^ {119}\) *Gregg v Georgia*,\(^ {120}\) and their progeny, SCOTUS would turn to a new controversy: confinement conditions and their acceptability under the punishments clause.

### 6.3 Post-1976: The Modern Era

1976 marked the dawn of the modern Eighth Amendment. *Gregg* reinstated the death penalty after two-thirds of states re-enacted capital codes. *Wolff* paid considerable lip service to the idea of prisoners’ access to the courts and, unsurprisingly, litigation thrived. Indeed

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\(^{113}\) See Barbara Belbot, ‘Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate’ (1998) 42 New York Law School LR 1, 60.  
\(^{114}\) 418 US 539 (1974).  
\(^{115}\) ibid 555.  
\(^{116}\) ibid 556.  
\(^{117}\) A right to remain free from certain constraints. In prison this is inherently limited, but certain rights (including due process) are nonetheless guaranteed.  
\(^{118}\) Examples include: *Baxter v Palmigiano* 425 US 308 (1976) (restricting the right to counsel and cross-examination in prison hearings, and removing the Fifth Amendment right to non-self-incrimination in similar circumstances); *Meachum v Fano* 427 US 215 (1976) (restricting liberty interests in prison).  
\(^{119}\) *Furman* (n 112).  
\(^{120}\) 428 US 153 (1976).
before 1976, silence surrounded the constitutionality of confinement conditions. Due process in sentencing had been the most frequent channel for prisoners’ civil rights suits and, as such, that was the matter to which the Supreme Court paid most attention. At the same time that the Burger Court was reacting to an overabundance of prisoner litigation in procedural and substantive due process, non-capital Eighth Amendment challenges amplified. Amidst the battling for the death penalty’s reinstatement, Estelle v Gamble reached the Supreme Court in 1976. SCOTUS was faced with a challenge to treatment during confinement, and the next line of Eighth Amendment attack was drawn.

6.3.1 CONFINEMENT CONDITIONS: BURGER AND REHNQUIST COURTS

In 1972 a prisoner in the Texas Department of Corrections had been injured while undertaking mandatory work exercises, and alleged that the subsequent treatment he received was constitutionally insufficient under the Eighth Amendment. Considering the role of prison authorities with regard to treating the medical needs of inmates, the Court held that serious neglect, ‘may actually produce physical “torture or a lingering death”’ as prohibited by the Eighth. Creating a subjective, intent-based standard, the Estelle majority held that ‘deliberate indifference to serious medical needs of prisoners constitutes the “unnecessary and wanton infliction of pain”’ prohibited by the punishments clause. Bennion notes that the decision met with some criticism, since serious illness or injury might still occur, without the requisite ‘deliberate indifference’.

Dolovich extends this argument, arguing that negligence standards are troublesome in litigation, and a tendency for prisoners

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121 An extreme case of frivolity was decided in In Re Green 669 F2d 779 (DC Circuit 1981), where a federal court held a prisoner’s 600-700 suits to make a mockery of civil rights access.
122 See the discussion of Gregg (n 120) in Chapter II, Section 2.4.3.
124 Ibid 98.
125 Ibid 103 (quoting In Re Kemmler 136 US 436 (1890) 447).
126 Ibid 104 (quoting Gregg (n 120) 173).
127 Bennion (n 58) 774-775.
to be viewed as ‘less than human’ leads to reticence in court. A standard that focuses more squarely on the subjective suffering of prisoners might alleviate these concerns.

The strongest condemnation of the majority’s position in *Estelle*, however, came from Justice Brennan’s dissent. Noting that ‘[p]ublic apathy and the political powerlessness of inmates have contributed to the pervasive neglect of the prisons,’ Brennan described the Eighth Amendment’s ‘touchstone’ as ‘the effect upon the imprisoned.’ Such aspirations for an offender-based assessment reflects the theoretical framework adopted by this thesis. Under that framework – interpretivism – moral analysis of the punishment imposed on an offender is far more compelling than any positivistic rule. Such an argument is expanded throughout the latter section of this chapter and in Chapter VII, where objective indicia of evolving standards, represented by political morality, are applied to solitary confinement.

With a strong conservative bloc comprising Chief Justice Burger and Justices Rehnquist, Powell, and O’Connor, with Justice White as the swing-vote, the 1981 Court consistently favoured states’ rights over prisoners’ rights during the final five years of Burger’s chiefdom. In *Bell v Wolfish* the Court had its first opportunity to review double-celling, a common practice in federal and state prisons. Describing it as innocuous and reasonable, the *Bell* Court clarified its position in *Rhodes v Chapman* four terms later. While *Wolff* might have spoken of a lifted iron curtain between prisoners and constitutional rights, SCOTUS in *Rhodes* held that ‘the Constitution does not mandate comfortable prisons, and prisons...cannot be free of discomfort.’

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129 *Estelle* (n 123) 358.
130 ibid 366.
131 ibid.
133 *Bell v Wolfish* 441 US 520 (1979).
135 *Wolff* (n 114) 556.
136 *Rhodes* (n 134) 349.
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At the same time as *Rhodes* was decided, USP Marion had gone into lockdown, starting the first permanent form of solitary confinement in modern history. In spite of what was happening on the ground in Illinois, the new Rehnquist Court, significantly more conservative than any of its predecessors, continued to limit the due process rights of prisoners. In addition, the Eighth Amendment protection hinted at by *Estelle*, albeit in very limited, intentional circumstances, was not often forthcoming in the following years. A slim majority applied *Estelle*’s “deliberate indifference” test to prison conditions in *Wilson v Seiter*, admitting in *Hudson v McMillan* that excessive force could constitute cruel and unusual punishment, but, again, only if inflicted intentionally. In 1994 another confinement conditions challenge was placed on the Court’s docket, challenging the “hands-off” declaration from *Rhodes*. Ferguson notes that SCOTUS continued to ignore the problems of contemporary US imprisonment in that case, *Farmer v Brennan*. Instead of taking the opportunity to outline minimum constitutional requirements the *Estelle* standard of “deliberate indifference” was applied, creating yet another subjective recklessness test and giving little slack to prisoners seeking to challenge the serious harm they suffered.

An examination of the cases outlined above makes it clear that a trend was developing from 1976 to 1995. Prisoners, while engaging in litigation at a rate never seen before, were not finding success with Eighth Amendment challenges. Solitary confinement, which at this point had become the norm rather than the exception, had barely been noted by the Court, let alone restricted. The limited guarantees provided to non-capital punishments constituted subjective recklessness tests, with little regard for societal decency, unlike in the concurrently evolving capital sphere. To add insult to injury, Congress enacted the Prison Litigation

\[\text{References:}\]
137 See (n 44) and accompanying text.
138 Fliter (n 76) 146.
142 *Rhodes* (n 134).
144 *Farmer* (ibid) 828, 831.
Reform Act (PLRA) in 1995, to restrict the number of civil (§1983) lawsuits a prisoner could bring,¹⁴⁵ and limit the power of ‘liberal Federal judges’.¹⁴⁶ This cross-governmental effort to curtail the rights of prisoners was successful, with a sharp decline in the rate of suits brought by prisoners from 1995 onwards.¹⁴⁷ In 2015 the Estelle-Farmer standard is the most recent precedent by which to deal with confinement conditions challenges under the punishments clause. The evolving standards envisaged by SCOTUS in Trop and relied on to refine capital and terms-of-years¹⁴⁸ sentencing seems to have reached a form of evolutionary saturation. This is in spite of an astronomical rise in lower court complaints against confinement conditions, massive prison overpopulation,¹⁴⁹ and a rise in the use of SHU, both in prominence and intensity.

Notwithstanding the significant restrictions developed by the Rehnquist Court and the US Congress in response to Warren’s and Burger’s expansions of prisoners’ rights, more recent cases have resurrected the precedent created by Estelle and its progeny. While the Supreme Court has never extended Estelle’s “deliberate indifference” standard to psychiatric care, there is a burgeoning field of academic literature where the introduction of limits to the severity of modern imprisonment is called for. Additionally, recent case law has hinted at an awakening of the Eighth Amendment in confinement challenges. The following sections will present the legal picture of the Eighth’s reach into prisons and combine it with an examination of the core controversies which Chapter VII will ultimately analyse under the Trop standard of evolutive decency.¹⁵⁰

¹⁴⁶ Case (n 48) 84.
¹⁴⁹ Mass incarceration is an issue which compounds the problems Chapter VII will address. For an overview see Jonathan Simon, ‘Mass Incarceration’ in Joan Petersilia and Kevin Reitz (eds) The Oxford Handbook of Sentencing and Corrections (OUP 2012) 23.
¹⁵⁰ Trop (n 11) 101.
6.3.2 CONTEMPORARY CONFINEMENT CONDITIONS POST-1995

Although the Supreme Court has never upheld a challenge to solitary confinement simply in and of itself, it did once accept (in 1890) that such hardship could become so extreme that it constitutes psychological torture. In the same term that the Court held that electrocution was inoffensive to the Eighth Amendment,\(^\text{151}\) the majority in *In Re Medley* described solitary as creating ‘one of the most horrible feelings to which [an inmate] can be subjected’.\(^\text{152}\) Nonetheless, that dictum seems to have been long forgotten by the modern Court. Since *Estelle* and *Farmer*, the Court’s attention in punishment jurisprudence has fixated on the capital sphere. This evolution of moral standards under the Eighth, while encouraging, has distracted the Court from arguably a far more pressing issue. Life without parole (LWOP) sentences, confinement in mass overpopulated incarceration, and SHU itself (on death row and during non-capital sentences) are issues that affect far more prisoners. A consideration of reach is important here. While execution is the ultimate penalty available to sentencers in the US, strict conditions of confinement create a far greater unhappiness for a far greater number. To tie this utilitarian reflection to an interpretivist assessment, moral scrutiny is required. The media may occupy this space for now, but the courts must fill the gap if the Eighth Amendment is to reflect contemporary decency into the darkest corners of the criminal justice system.

The only Roberts Court decision to cite *Rhodes*, the case that announced prisons as vestibules of permissible and expected discomfort,\(^\text{153}\) came in a challenge to the Californian prison system, *Brown v Plata*.\(^\text{154}\) *Plata* arose from a decision handed down by a special, PLRA-created,\(^\text{155}\) three judge federal court which had reviewed the system in 2009. In the

\(^{151}\) *Kemmler* (n 125).

\(^{152}\) *Medley* (n 20) 172.

\(^{153}\) *Rhodes* (n 134) 349.

\(^{154}\) 131 S Ct 1910 (2011)

\(^{155}\) PLRA (n 145) §3626(a)(3).
earlier decision, Coleman-Plata v Schwarzenegger, the first litigation against mass incarceration, the federal court heard how California held approximately 156,000 inmates in a network of prisons designed for 85,000, 83% over-capacity. The system was found unfit for purpose, as it had subjected a mass of prisoners to undue hardship in conditions such as triple-bunked beds, contained in wards which more closely resembled refugee camps than modern prisons. The three-judge court recommended diversion from prisons, insisting that lesser culpability offences should not be matched with custodial sentences, and ordering a 46,000-prisoner reduction in California’s inmate population within two years.

After that time had passed, Plata was decided by the Supreme Court, where the order was upheld. SCOTUS acknowledged that ‘[p]risoners retain the essence of human dignity inherent in all persons’. Holding the entire state prison system in violation of the Eighth Amendment for lacking adequate safeguards for physical and mental safety, the Roberts Court had a significant impact. As noted previously, until Plata the Court had never equated mental health with physical needs. Justice Kennedy’s majority expanded the approach significantly, paying particular attention to the ESD element of the assessment. To ‘subject sick and mentally ill prisoners in California to “substantial risk of serious harm” cause[s] the delivery of care in the prisons to fall below the evolving standards of decency that mark the progress of a maturing society.’

According to one writer, Plata’s resurrection of federal judicial scrutiny of prisons, from the Supreme Court’s twenty-year deep freeze, could cause ‘a legal dismantling of mass incarceration.’ Simon exposes Plata as a mechanism for constitutional revolution, with

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156 Coleman v Schwarzenegger; Plata v Schwarzenegger (Nos Civ S-90-0520; C01-1351) (ED CA; ND CA 2009) (three-judge court).
157 Newman and Scott (n 145).
159 Coleman-Plata (n 156).
160 Plata (n 154) 1928.
161 ibid 1947.
162 Plata (n 154) 1925 fn3.
decency as the driving force. He argues that the shift in jurisprudence to a dignitarian assessment could lead to a shakeup of the punishment system, which has the potential to shift the approach from civil rights to human rights. Through such a shift, the transnational comparative element of the ESD assessment becomes even more vital for the Court’s assessments of the Eighth Amendment, since the bulk of interpretation in this area arises from international and supranational human rights bodies, introduced in Chapter V. By placing psychiatric care in the same light as physical medicine, albeit without clarifying the constitutional minima required, the Plata majority ‘broke with the posture of extreme deference toward imprisonment choices and unleashed a potential sea change’. That sea change, it will be contended, has the potential to seep into the hidden corner of the prison, SHU.

With no prison conditions cases on the Court’s foreseeable docket, at the time of writing, an opportunity for this sea change or a revival of the Estelle-Plata standard any time soon seems unlikely. The Justices have refocused on capital punishment, to the detriment of worsening conditions in prisons, specifically in SHU, across the US. This further deterioration is the subject of Sections 6.4 and 6.5, which will lay the foundations for Eighth Amendment scrutiny.

6.4 CONTEMPORARY SOLITARY CONFINEMENT ISSUES

In order to introduce the two main routes of challenge to American SHU, attention is given to two important bases of Eighth Amendment jurisprudence fundamental to this thesis. The first is Trop, from which the ESD principle originates. In that case the Supreme Court

164 Simon (n 158) 134-135.
166 ibid 152.
168 Trop (n 11).
condemned a punishment of banishment for its extreme nature and the unconstitutional level of suffering subsequently caused:

‘This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress....He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies.’¹⁶⁹

The claim will be sustained in Chapter VII that the ‘ever-increasing fear and distress’¹⁷⁰ condemned in Trop is perpetuated, to an even greater extent, by contemporary SHU conditions. That argument will made through an application of Eighth Amendment principles, which are the objective indicia of evolving standards to which Chapters IV and V applied an interpretivist moral sieve. The most recent consideration by the Court of prison conditions, Plata,¹⁷¹ will be relied on in Chapter VII with a view to addressing the wider issue of solitary confinement.

The second base of Eighth Amendment jurisprudence to be applied to SHU is the incorporation case, Robinson.¹⁷² In that case SCOTUS noted that society ‘would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick.’¹⁷³ It will be argued that imposition of the modern SHU on mentally ill inmates ‘forget[s] the teachings of the Eighth Amendment’¹⁷⁴ by punishing illness. Furthermore, after undertaking a review of professional consensus, it will be argued that the use of SHU creates an even greater level of depravity due to the onset of psychiatric injury which results from its imposition. The context for each of these claims, unconstitutional conditions and unconstitutional imposition, will now be provided.

¹⁶⁹ ibid 102.
¹⁷⁰ ibid.
¹⁷¹ Plata (n 154) 1925 fn3.
¹⁷² Robinson (n 92).
¹⁷³ ibid 678.
¹⁷⁴ ibid.
6.4.1 CONDITIONS: THE PHYSICALITY OF SHU

To understand the impact of SHU on a large portion of imprisoned Americans, its extent needs to be appreciated. First, the average time spent by prisoners on death row (a form of extreme SHU) rose sharply between 1987 and 2009, and further again in 2010 and 2011.\textsuperscript{175} According to the most recent Bureau of Justice statistics, the average stay on death row is at an historical peak of 198 months (16.5 years).\textsuperscript{176} The delay is so long, in fact, that one academic has described modern capital sentencing as life imprisonment ‘in the shadow of death’.\textsuperscript{177} Instead of a death sentence, it can be more accurately described as Life Imprisonment with the Chance of Execution. Simmons argues that such inordinate delay between sentencing and execution constitutes cruel and unusual punishment,\textsuperscript{178} establishing this argument on four main bases, namely: long stays are contrary to ESD; contrary to the Framers’ intent; do not further goals of deterrence and retribution; and are inconsistent with transnational norms.\textsuperscript{179} While the present discussion is not focused on long execution delays, known as Lackey claims,\textsuperscript{180} Simmons’s analytical framework will be drawn on, extrapolating it to the intensity experienced by those held in SHU.

Moving to non-death row SHU, there are three main routes into this form of confinement. The most common is administrative segregation where inmates are held, often for the duration of their sentences, for reasons such as historic gang-involvement.\textsuperscript{181} Second

\textsuperscript{175} Erin Simmons, ‘Challenging an Execution after Prolonged Confinement on Death Row [Lackey Revisited]’ (2009) 59 Case Western Reserve LR 1249; E Carson and William Sabol, Prisoners in 2011 (Bureau of Justice Statistics 2012).
\textsuperscript{176} Carson and Sabol (ibid).
\textsuperscript{177} Angela April Sun, “‘Killing Time” in the Valley of the Shadow of Death’ (2013) 113 Columbia LR 1585, 1614.
\textsuperscript{178} Simmons (n 175); Sun (ibid); Kara Sharkey, ‘Delay in Considering the Constitutionality of Inordinate Delay’ (2013) 161 University of Pennsylvania LR 861; Corey Burton and John Burrow, ‘How Long Must They Wait?’ (2015) 26 Criminal Justice Policy Review 620.
\textsuperscript{179} Simmons (n 175) 1252.
\textsuperscript{180} Lackey v Texas 514 US 1045 (1995) cert denied, was the first claim against inordinate delays, and SCOTUS has continually rejected every such claim since. See Knight v Florida 528 US 990 (1999) cert denied; Smith v Arizona 128 S Ct 466 (2007) cert denied; Thompson v McNeil 129 S Ct 1299 (2009) cert denied; Bower v Texas (2015 No 14-292) cert denied; Jane Marriott, ‘Walking the Eighth Amendment Tightrope: Time Served in the United States Supreme Court’ in Jon Yorke (ed) Against the Death Penalty (Ashgate 2008) 159.
\textsuperscript{181} Bruce Arrigo and Jennifer Bullock, ‘The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units’ (2008) 52 International Journal of Offender Therapy and Comparative Criminology 622, 626:
is discretionary detention where a prison authority imposes SHU on misbehaving inmates, sometimes for trivial offences, and usually for short periods of time. Protective custody is the third form of SHU, where inmates are held separately from General Population, under the colour of their own “safety”. In addition to the obvious example of protective custody for offenders convicted of child sex offences, sometimes safety is defined in such broad terms that even former ‘dog caretakers...in state or local correctional facilities’ are placed in non-negotiable protective custody for the duration of their confinement. Such is the present situation in American prisons.

Forms of medium or even long-term lockdown also constitute SHU, a situation where, in a General Population ward, cells are constantly locked for a period of time, thus prisoners are held in solitude. Standards of cleanliness and care will inevitably regress under these conditions, since cleaning and airing of the cells will be neglected, and the proximity of confinement will become more severe. These forms of pseudo-SHU vary considerably from prison to prison, so are difficult to define. Nonetheless, all forms of post-sentencing SHU are included in the forthcoming analysis. That includes SHU which is purpose-built or otherwise, and for which statistics are available.

According to a 2013 report by the ACLU, 93% of inmates held in state SHU do not leave their cells for more than two hours per day. Recreational opportunities are highly restricted, and exercise is normally in solitude, often in a roofed cage. SHU cell sizes reported by the ACLU varied from 60 to 90 square-feet in varying forms. In Marion, the

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182 ‘Prisoners are often placed in the SHU because...they were identified as gang members, or because they were involved in a single fight.’
185 Pre-trial sentencing is outside of the remit of the Eighth Amendment, as it is not punishment.
186 ACLU, A Death Before Dying (ACLU 2013) 5.
187 ibid.
188 Some cells were narrower, while others were square. The vast majority (82%) were larger than 60 square-feet. ibid.
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prison subjected to the longest lockdown in US history, the SHU cells were only 48 square-feet, with a width of just six feet. Marion and its several predecessors will form the basis of scrutiny intended by the next chapter. Moreover, Shalev notes that new technology, building materials, and professional knowledge have brought on a new wave of prison design. Some cells are completely windowless, and others actively prohibit the use of Television sets, creating further sensory limits for SHU prisoners. Some SHU is so extreme that inmates can go years without any skin-on-skin contact with another human; guards use cattle-prod style implements attached to shackles, and wear body armour.

Having drawn a picture of the life of a prisoner in American solitude but without delving into the specific, ESD-based objections to these conditions, the next key concern must briefly be introduced: the harmful effects of SHU-misuse.

6.4.2 IMPOSITION: PSYCHIATRIC EFFECTS OF MISUSE

The empirical research undertaken in the field of psychiatry will be drawn on, with a focus on mental disorders created by close confinement, and the impact of mental defects on a prisoner’s health. This will be of particular relevance to the evaluation of professional consensus, where the psychiatric model of punishment effects will be applied to the ESD assessment. As a result, the accepted professional picture of the effects of solitary confinement will contribute to the overall assessment of its compatibility with a morality-driven interpretation of the Eighth Amendment.

Even more concerning than the fact that the majority (56%) of prisoners held in the state system suffer from at least mild mental illness, is the claim by Abramsky and Fellner

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188 See Section 6.2.3.
189 ACLU (n 185) 5.
190 Shalev (n 7) 103.
191 ibid 120.
192 ibid 150. See See Harrison v Indiana DOC Case 1:08-cv-01317-TWP-MJD (SD Ind 2012) (noting that television sets are initially restricted for 90 days or totally prohibited).
193 King, Benjamin Steiner and Stephanie Breach, ‘Violence in the Supermax’ (2008) 88 The Prison Journal 144, 148: ‘Before leaving his cell, an inmate is placed in handcuffs attached by officers through the food slot...exiting the cell, the handcuffs are attached to a belly chain, and both ankles are hobble-chained.’
194 James and Glaze (n 59).
that at least 8% of all US prisoners suffer from ‘significant psychiatric or functional disabilities’. While that statistic is contested, with other estimates of similarly affected prisoners at around 5%, there is a growing body of psychiatric literature in strong opposition to the unchecked use of SHU. Guenther notes that hallucinations and dementia in SHU have been noted since as early as the 1830s, and modern enquiries consistently report anxiety, paranoia, depression, and headaches. Kupers has observed that all prisoners held in conditions of SHU will eventually deteriorate psychologically, with Grassian reporting ‘delirium-like effects’ including cognitive disturbances. Physiologically, heart palpitations; deterioration of eyesight, and diaphoresis have all been linked to solitary confinement.

It is worth noting that contemporary studies into SHU consistently demonstrate at least some negative health effects of such close confinement. Authors examining these effects have even attempted to develop specific medical definitions for what they have observed. Grassian’s ‘SHU Syndrome’, introduced earlier, is just one part of this development. Scott and Gendreau defined this syndrome as ‘confinement psychosis’ in 1969, long before SHU became as prevalent and oppressive as it is today. Kaufman claims that inmates held in SHU are driven away from morality and become dehumanised, degraded, and demonised by society and by the prisons themselves. On an abstract level, this removal of prisoners from the moral conscience of the populace, and the Court, can be deemed unconstitutional. The Constitution applies in prisons, applies to SHU prisoners, and should condemn conditions

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195 Sasha Abramsky and Jamie Fellner, Ill-Equipped (Human Rights Watch 2003) 17.
197 Guenther (n 29) xi.
198 Scharff Smith (n 8) 488.
199 Terry Kupers, Prison Madness (Wiley 1999) 56.
201 Grassian (n 200) 354.
which offend the principles of the Eighth Amendment and which give rise to a ‘substantial risk of serious harm’.\textsuperscript{205} That risk, Chapter VII will show, is very real within American SHU.

6.4.2.1 CONCLUSION

The true extent of solitary confinement’s effects cannot be underestimated. Caution must be exercised when attempting to understand the severity of any human based on doctrine alone. Moreover, measurement of physical or psychiatric damage (or risk thereof) is also susceptible to inaccuracy and error. However, these shortcomings should not distract from the aspirational pursuit of ESD, which this study has continually sought. The establishment of principles of political morality, achieved through the sources exposed in earlier chapters will provide the best definition of the Constitution’s limits on SHU.

6.4.3 THE NEXT STAGE OF ANALYSIS

Before a connection can be made between the interpretivist framework and contemporary issues surrounding SHU, it is worth restating the core tenets of integrity. Law is read as being informed by communal principles of political morality (“interpretivism”), and can be summarised thus. At the pre-interpretive stage data comprising rules, practices, precedents and other sources of social normativity are considered to constitute community principles of political morality. These principles are established within the legal framework of the law and are identified and held in their best possible light. Without further analysis, this data has not been passed through a rational sieve, and another step is required to do so.

At the interpretive stage moral principles are sought from the pre-interpretive data, and these are viewed as coexisting with rules to form law. Judgements of political morality (the “moral lens” or “rational sieve”, as guided by moral responsibility and political integrity – consistency in decision-making) are applied at this stage. Rights and duties are interpreted through consideration of the core principles of justice, fairness, and due process. Finally, at the post-interpretive stage, the interpreter views the object of her interpretation in the best

\textsuperscript{205} Plata (n 154) 1925 fn3.
moral light to reflect the greatest possible conception of political morality. This permits, even encourages, refinement, improvement, consistency, and ultimately an expression of legal rights at their moral zenith.

This framework was applied to the Supreme Court’s use of the ESD assessment in Eighth Amendment precedent in Chapters IV and V. It was concluded that majoritarian state counting is the foremost indicator of contemporary standards, though caution was urged and recourse to further indicia was encouraged in order to strive for the Eighth Amendment’s best moral interpretation. Chapter V undertook an assessment of such further indicators of societal decency, drawing conclusions as to opinion polling, penological goals, transnational comparativism, and professional consensus. A reprise of those conclusions, and their application to sources of morality relevant to SHU will now be outlined. These outlines establish the precursor to Chapter VII’s analysis and Chapter VIII’s conclusions regarding solitary confinement.

6.5 Analytical Method Outlined

6.5.1 State Counting

Chapter IV concluded that state counting was a fundamental starting point for ESD assessments. The legislative schemes of the fifty state jurisdictions, in addition to those of the military and the federal government, represent the pluralism engaged in by elected representatives. While caution must be urged with respect to the counter-majoritarian problem and the tyranny of an ill-informed majority, it is accepted that state counting must at least provide an adequate introduction to the evolutive assessment. The concept of states-as-laboratories, when checked, is pivotal to that process. These checks, it was argued, could be ensured through the interpretivist exercise of “best fit”, where law is viewed in light of principles of political morality. Where an outcome in line with state trends would be abhorrent to morality, like in Brown v Board of Education206 or Lawrence v Texas,207 for

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example, state counting must be overridden. Where a better fit can be found for the legal rule, equal protection in those cases, then that fit should be applied. As a conclusion it was proposed by Chapter IV that state counting would provide the initial framework for analysis, to outline the nationwide picture. Disposition of the issue in a hard case such as one which might invite constitutional evolution, however, is not provided by this state headcount. This is where further objective indicia provide a valuable resource.

6.5.2 PUBLIC OPINION POLLING

In addition to state counting, another form of majoritarianism is found in the quantification of public opinion via polling, a concept referred to explicitly in *Trop* when SCOTUS pronounced the ESD principle. In Chapter V it was concluded that poll results, whether methodologically sound or otherwise, were rejected when read merely as pre-interpretive data. It was claimed that poll results were fraught with such error and gave rise to serious concerns, both substantively and procedurally. Even if, for the sake of analysis, polls are presumed to inform the public opinion debate, Chapter V noted that polls still fail to provide the sound moral footing called for by interpretivist adjudication when they are selected in an unguided way.

Polling results are not dismissed outright for ESD analysis, but further indicia of political morality provide a firmer moral footing for the interpretivist approach. Chapter VII will consider available polls on public sentiment towards the treatment of domestic prisoners in solitary, where available, but will treat this information with caution. Rigour which facilitates such caution includes transparent decision-making, justifications for non-selections of opposing poll results, and statistical significance tests. To provide data which pertains to community principles of political morality, this scrutiny must be applied to pre-interpretive polling data when Chapter VII examines SHU.

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208 *Trop* (n 11) 101.
6.5.3 PENOLOGICAL PRINCIPLES

In its Eighth Amendment precedents SCOTUS has wrongly conflated personal vengeance with retributivism, and the warning within Federalist No 10, against a tyrannical majority, is an important point of departure for Chapter VII’s consideration of penological principles. Where state counting and opinion polling might provide a picture of public sentiment, these indicia give rise to a risk that proportionality will become jettisoned by penal populism. Interpretivism defers to moral principles, where rights trump policies, in the face of majority preferences. Proportionality is fundamental to the interpretivist reading of the Eighth Amendment, and a model for its inclusion first set out by Beccaria and later refined by Kant and Robinson was adopted in Chapter V. That model, ‘deontological desert’, embodies a clearer ‘set of principles derived from fundamental values, principles of right and good’. The concept of desert, for Chapter VII, asks whether SHU is subjectively proportionate (comparing the gravity of the offence with the harshness of the penalty) and objectively proportionate, by a comparative reading of sentences for other crimes in the trial court’s jurisdiction and the same crime in other jurisdictions.

The principles of: consistency, derived from the holdings in Furman and Gregg; and individualisation, required by the Lockett and Eddings doctrines, can be reconciled by deontological desert. Instead of focusing on utilitarian deterrence, as the Court evidently has done, the approach adopted here leaves policy goals to the other political branches. If SHU is imposed arbitrarily or excessively, then disproportionality might be demonstrated. Moreover, if in Chapter VII psychiatric concerns demonstrably outweigh the reason for an inmate’s confinement in solitary, with proportionality as the yardstick, then further arguments against its imposition may arise. Instead of consequentialist concerns, Chapter VII will focus on the

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210 von Hirsch in Tonry and Frase (eds) (n 253) 413.
212 ibid.
213 Furman (n 112); Gregg (n 120).
constitutional question posed by the punishments clause, one of principle. That principle, asking whether SHU is proportionate, might evoke different responses in different situations. Nonetheless, Chapter VII will attempt to provide an Eighth Amendment standard adequate under interpretivism: casting the punishments clause in its best moral light.

6.5.4 **TRANSPORTATIONAL COMPARATIVISM**

Notwithstanding the shortcomings of the transnational comparative approach highlighted in Chapter V, evolutive decency can and must be informed by the ‘accumulated legal wisdom of mankind’. Issues of selectivity are, again, inoffensive under interpretivism if adjudicators read those sources in light of moral principles. Those principles are available ‘by appealing to an amalgam of practice’. That practice, includes the law of external legal bodies, most particularly in international and regional human rights instruments designed to uphold dignity.

Additionally, it is accepted that similar issues with transnational law exist as with national law; majoritarianism is at least as dangerous at the global level where tyrannous majorities are concerned. Nonetheless, value can be found by establishing the transnational framework for prisoners’ rights, specifically for humane standards of treatment in SHU, and guidelines for the imposition of SHU on more vulnerable inmates. Such value is even more compelling given the Court’s human rights framework in *Plata*, one Simon noted was capable of dismantling American punishment, and which Chapter VII will apply to SHU. Seeking a ‘set of principles’ that represents ‘a sort of consensus among judges, jurists, and lawmakers around the world’, Murkens’s advice ‘to consult widely’ will be heeded. Fundamental interests and rights should, can, and will be interpreted in light of their

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216 Dworkin, *TRS* (n 46) 36.
217 Neyfakh (n 163).
218 Waldron (n 215) 132.
associated normative moral values. These values will be derived from international and regional human rights instruments, the selection of which will be justified.

6.5.5 PROFESSIONAL CONSENSUS

Dworkin’s aim to fill the gap left open by positivism by appealing to community practices benefits from additional, expert, information regarding community consensus. Selectivity of sources remains a concern for the interpretivist, but guiding principles facilitate greater moral inclusion when citing professional consensus. Such guidance will be applied in Chapter VII, where safeguards such as a search for sources which are general, current, and rigorously tested will protect against according amicus facts with blind-faith credence.

To enrich the ESD assessment beyond penal populist statistics, simple state counting (national and international), or abstract considerations of penology, the final assessment of Chapter VII will draw on professional consensus as an indicator of the punishments clause’s political morality. It has been argued that the unprecedented level of deference accorded by SCOTUS in Hall v Florida to professional medical opinion provides a fresh opportunity for further Eighth Amendment challenges.220 One of those challenges – evolutive decency of the Eighth Amendment – will be established with respect to SHU. Chapter VII will consider the ‘germane expertise’221 of non-profit organisations and professional bodies will be sought, with input from an emerging interdisciplinary field of psychiatry and the law. Psychopathological and social effects of SHU will be examined, as will the potential shortfalls associated with the methodology and reliability of such studies.

Chapter VII must now establish the prevailing standards of decency within a variety of cross-sections of contemporary society with a view to painting the Eighth Amendment’s protection against cruel and unusual punishments in its best light, and investigating whether, as a result, contemporary solitary confinement practices pass constitutional muster.

221 Atkins (n 103) 316 fn21.
CHAPTER VII

SOLITARY CONFINEMENT AND EVOLVING STANDARDS

Justice Kennedy’s opinion in Brown v Plata provided the clearest assurance of the relevance of dignity to the Eighth Amendment, focusing on an often neglected area of the Gregg conditions: the ‘dignity of man’. The opinion in Plata followed a series of progressive federal policies and jurisprudence regarding sentencing proportionality. Most recently, these included the Fair Sentencing Act 2010, which reduced the extreme disparity between federal penalties for possession of crack and powdered cocaine, and the Second Chance Act 2007, which granted funding to prisoner re-entry programmes. The Supreme Court had weighed in during the 2005 term in US v Booker, holding that the Federal Sentencing Guidelines were only advisory, not mandatory. Booker afforded greater sentencing discretion to state and federal district judges who had become dissatisfied with the severity of mandatory minimums required for certain non-violent drug offences.

Despite these advances, Adelman has noted that, ‘[i]n comparison to the immense scope of the public policy disasters that gave us mass incarceration, the positive changes of the last decade are small beer’. Furthermore, these reforms deal only with one issue: proportionality on paper, not the lived-experiences of prisoners, suffering in worsening conditions of imprisonment, most acutely on secure wings or in Supermax facilities, both forms of solitary confinement.

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1 131 S Ct 1910 (2011) 1928: ‘Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment...The basic concept [of which] is nothing less than the dignity of man.’ (Quoting Trop v Dulles 356 US 86 (1958) 100); Jonathan Simon, Mass Incarceration on Trial (The New Press 2014) 134-135
2 Gregg v Georgia 428 US 153 (1976) 173, citing Trop (ibid) 100.
6 ibid 245
8 ibid 115.
Life terms have risen, as have multi-decade imprisonment sentences. In the specific context of SHU, the proportion of prisoners has risen disproportionately in recent years. \(^9\) *Plata* might therefore have offered some promise to opponents of SHU seeking Eighth Amendment redress, but clearly far more must be done if Kennedy’s promises of constitutional dignity are to be kept. This chapter will seek to expand the reasoning from *Plata* by considering the constitutionality of solitary confinement in light of the evolving standards of decency (ESD) assessment set out and refined in previous chapters. \(^12\) It will be argued that the use of SHU in the US is impermissible on the following two constitutional bases.

First, the ‘ever-increasing fear and distress’ \(^13\) caused by denationalisation and condemned in *Trop v Dulles* is perpetuated, to an even greater extent, by contemporary SHU. Second, the warning from *Robinson v California* that society ‘would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick’ \(^14\) is applicable to SHU, due to its flagrant disregard for the psychiatric welfare of the inmates on whom it is imposed. In order to sustain these arguments, the remainder of this chapter will apply an interpretivist reading of the data provided by public opinion polls (Section 7.1), state counting (7.2), penological principles (7.3), transnational law (7.4), and professional consensus (7.5), to argue that today’s use of SHU in American punishment is offensive to the evolving standards of decency, particularly with respect to human dignity, \(^15\) being fundamental to the punishments clause of the US Constitution.

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10 This chapter will reuse the acronym SHU to refer to all post-sentencing solitary confinement.
11 In 2000 it was predicted that around 20,000 would be held in SHU by 2010. Human Rights Watch (HRW), ‘Out of sight’ (2000) 12 HRW 1. The reality is far worse, with claimed figures of up to 81,000. Lisa Kerr, ‘The Chronic Failure to Control Prisoner Isolation in US and Canadian Law’ (2015) 40 Queen’s LJ 483, 497 fn50.
12 See Chapter VI, Section 6.5 for a summary.
13 *Trop* (n 1) 101.
15 *Plata* (n 1) 1928; Gregg (n 2) 173, citing *Trop* (n 1) 100.
7.1 OPINION POLLING

A wide-scale review of national, regional, and local news outlets in the US found half of the stories reporting on the criminal justice system (CJS) in 2013 focused on one aspect: imprisonment.16 The sample comprised online reports from mainstream news sites, print media, and oral transcripts. Those reports relating to worsening prison conditions were ‘well represented’17 by the sample, appearing as the main issue in 16% of CJS topics. Analysis by The Opportunity Agenda concluded that one of the three recurring themes of the mainstream narrative on American criminal justice was concern surrounding inhumane prison conditions and the poor provision of psychiatric healthcare to inmates.18 In totality, reporting was ‘overwhelmingly negative in tone’,19 in that people generally disapproved of the inhumanity in prisons. A further examination of the sources found by this review uncovers very few opinion polls relating specifically to SHU, in spite of its regular lip service in mainstream media.

Moreover, while headlines and reports might perpetuate a master-narrative of inhumanity in American prisons, the few polls that do exist on the issue indicate that measured public sentiment favours SHU, indicating either a lack of understanding surrounding the conditions and effects of that punishment, or a broadly punitive populace. Sample surveys comprising polls, a pre-interpretive source of public opinion with respect to the ESD assessment,20 will now be analysed.

16 The pool, comprising 26 print outlets, 5 broadcast outlets, and 6 news blogs, was narrowed from 978 sources to a randomised sample of 100. The Opportunity Agenda, An Overview of Public Opinion and Discourse on Criminal Justice Issues (Tides Center 2013) 54.
17 ibid 55, 59.
18 ibid 69.
19 ibid 59.
20 Furman v Georgia 408 US 238 (1972) 242: ‘the proscription of cruel and unusual punishments “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”’ (Quoting Weems v US 217 US 349 (1910) 378.)
7.1.1 Pre-Interpretive Data

With reference to Figure 7.1 below, a review of these main sources found just five opinion polls, which address directly the issue of solitary confinement. Since the most heavily funded, widely publicised, and politically impactful polls do not feature in this analysis,\(^{21}\) it is worth reflecting on their notable absences. While polls by these organisations on other elements of criminal justice can be found in abundance, especially with respect to the death penalty or LWOP, confinement conditions and SHU appear to be issues often kept out of sight, as well as out of mind. The remaining polls are strictly quantitative, and proffer no confidence statistics for the extrapolation of the data, rigour that will be applied at the interpretive stage in Section 7.1.2.

**Figure 7.1:**

<table>
<thead>
<tr>
<th>Poll</th>
<th>n</th>
<th>Support for SHU (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>YouGov(^{22})</td>
<td>998</td>
<td>56.00*</td>
</tr>
<tr>
<td>MSNBC(^{23})</td>
<td>497</td>
<td>36.82</td>
</tr>
<tr>
<td>OregonLive(^{24})</td>
<td>209</td>
<td>61.72</td>
</tr>
<tr>
<td>Sodahead(^{25})</td>
<td>7,102</td>
<td>84.95</td>
</tr>
<tr>
<td>GreatFallsTribune(^{26})</td>
<td>105</td>
<td>71.00*</td>
</tr>
<tr>
<td><strong>MEAN</strong></td>
<td></td>
<td><strong>62.10</strong></td>
</tr>
</tbody>
</table>

*More accurate rounding unavailable.

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\(^{21}\) Such as Roper, Pew, and Gallup.


\(^{26}\) Greatfallstribune.com, ‘Do you support a ban and/or restrictions on solitary confinement for some prisoners?’ <http://archive.greatfallstribune.com/poll/2015-02-20/8669543/results> accessed 21st April 2015.
Further obfuscating the possibility of deriving any form of consensus from these polls is their inconsistent results, demonstrating no clear consensus in any direction. A news poll carried out online by MSNBC (n=497) showed just 36.82% support for solitary confinement,\textsuperscript{27} whereas a similar online poll hosted by discussion forum Sodahead (n=7,102, the largest sample size found) reported 84.95% in support of SHU.\textsuperscript{28} The average support for SHU from these polls was 62.10%, a simple majority,\textsuperscript{29} but given that the data is taken from just five polls, and because of the concerns, which are discussed in the next subsection, drawing conclusions would be unwise. In addition, the proportion of Don’t Know (DK) responses was generally high, with the YouGov poll (n=998, a large sample) reporting 14% respondents answering that they were “not sure” whether SHU was appropriate,\textsuperscript{30} demonstrating a lack of awareness surrounding the issues in solitary confinement, in spite of wide media reports.\textsuperscript{31} The proportion of respondents to the YouGov poll who were “not sure” how long they thought prisoners should be kept in SHU was even higher, 25%,\textsuperscript{32} indicating shakier ground. Similar uncertainty was reported in the remaining polls where a form of DK option was made available.

While there is limited pre-interpretive data to work with at this juncture, an attempt must be made to view it in its best moral light. In order to do so, the methodological warnings heeded by Chapter V should be remembered. These will be revisited and applied in context in the next subsection, before any conclusions under ESD analysis can be drawn.

\textbf{7.1.2 Interprettive Analysis}

The interpretivist critique of ESD analysis presented by Chapter V concluded by stating that, if indeed polling results are able to provide any form of credible measure of public sentiment, cherry picking adds a layer of unbridled discretion which undermines the

\textsuperscript{27} MSNBC (n 23).
\textsuperscript{28} Sodahead (n 25).
\textsuperscript{29} Fig 7.1.
\textsuperscript{30} YouGov (n 22) 5.
\textsuperscript{31} The Opportunity Agenda (n 16) 55, 59. This extends Marshall’s Hypothesis introduced in Chapter V (n 269).
\textsuperscript{32} YouGov (n 22) 6.
objectivity of an interpretivist judge. The current assessment has attempted to avoid unbridled selectivity by analysing all relevant and available results, but even then that data is scarce. As Chapter V demonstrated, a small sample size decreases the stability of data. It was shown that a sample size of 100 provides a confidence interval which leaves a great deal of uncertainty regarding generalisability, whereas any sample larger, ideally as large as 1,000, provides stability.

As such, although a small handful of other SHU polls was located, found online in sources such as un-moderated discussion forums, the samples sizes were all smaller than 50, and the foregoing assessment could not include the results in a reliable way. In the interests of transparency, those polls are provided in Appendix 1, Figure 7.1A, alongside specific justifications for their exclusion. Five polls remained, with sample sizes ranging from 105 to over 7,000 (see Figure 7.1 above). Despite the small amount of relevant polling data located, further evaluation of these polls can nonetheless be attempted by drawing on the methodological cautions expressed in Chapter V, namely the quality of polling samples, and quality of the questions posed to respondents.

7.1.2.1 SAMPLE QUALITY

Before pollsters can analyse popular sentiment or draw conclusions, they must first select their respondents. Sampling error is one hurdle to a representative sample collection, which occurs when a sub-group within a population is included in the survey.33 The risk of sampling error is faced by every pollster seeking to represent ‘national consensus’,34 or ‘society’s standards’,35 since sub-groups are invariably relied upon. An opinion poll of the entire country, an election on every societal issue, would be impracticable. In place of this unachievable optimum, the polls introduced in the previous subsection were conducted by

35 ibid.
using varying forms of sub-groups. Of the five, four were conducted online.\textsuperscript{36} The target focus of the polls might have been refined to, in the case of OregonLive for example, the population of the state of Oregon. Nevertheless, there was no control measure in place to restrict polling to Oregon residents. This criticism can also be applied to the polls carried out by MSNBC,\textsuperscript{37} Sodahead,\textsuperscript{38} and GreatFallsTribune,\textsuperscript{39} where residents of foreign countries could participate in the polls, limiting the propensity of the results to represent national consensus.

Furthermore, respondents to the four online polls could easily vote more than once, and there is no data on the proportion of unique or duplicate votes. This constitutes a strong form of coverage error,\textsuperscript{40} where polling is not as representative as it purports to be. As noted in Chapter V, survey literature has criticised contemporary polling method in strong terms. The elderly and those with lower socio-economic backgrounds were shown to be less likely to respond to telephone surveys.\textsuperscript{41} That criticism applies only in this chapter to the YouGov phone poll,\textsuperscript{42} though the elderly are even less likely to access the internet,\textsuperscript{43} the medium of the remaining polls. Since non-respondents to polls are also more likely to be black,\textsuperscript{44} further concern is cast over all five SHU polls. Just 13\% of Americans are black,\textsuperscript{45} so for more than 50\% of non-respondents to be black constitutes an extreme form of coverage-error for this demographic. Moreover, surveys routinely over-represent women.\textsuperscript{46} Given that at least 37.5\%
of the American prison population is black,\textsuperscript{47} and 91.5% is male,\textsuperscript{48} such coverage errors in the context of polls about imprisonment are even more concerning to anyone attempting to find a consensus applicable to SHU issues.

Additionally, when statistical rigour is applied to these polls, confidence in the results varies. As the one-sample t-test in Figure 7.1B demonstrates, not all data has generated equal reliability. Most results might present some promise to proponents of SHU, at least in terms of popular support, but the fact remains that these poll results cannot be cited as conclusive indicia. Instead, the most that can be derived from this data is that, in three out of five cases, the polled support for SHU can be extrapolated to the general population at a confidence level of at least 50%.\textsuperscript{49} The outliers were MSNBC and OregonLive, which proffered data too insignificant to give 50% confidence in the supporting results.

<table>
<thead>
<tr>
<th>Poll</th>
<th>n</th>
<th>SHU support</th>
<th>t-score</th>
<th>Confidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>YouGov</td>
<td>998</td>
<td>56.00%</td>
<td>0.6757</td>
<td>50 - 60%</td>
</tr>
<tr>
<td>MSNBC</td>
<td>497</td>
<td>36.82%</td>
<td>0.3968</td>
<td>&lt;50%</td>
</tr>
<tr>
<td>OregonLive</td>
<td>209</td>
<td>61.71%</td>
<td>0.3300</td>
<td>&lt;50%</td>
</tr>
<tr>
<td>Sodahead</td>
<td>7,102</td>
<td>84.95%</td>
<td>3.0303</td>
<td>99.5 - 99.8%</td>
</tr>
<tr>
<td>GreatFallsTribune</td>
<td>105</td>
<td>71.00%</td>
<td>0.7813</td>
<td>50 - 60%</td>
</tr>
</tbody>
</table>

In addition to the uncertainty surrounding the reliance which can be placed on this data, the inclusion of these statistics depends on their passing through a rational sieve, since as it stands they are examples of pre-interpretive data. Overreliance on these polls could cause

\textsuperscript{47} In March 2015 the figure for the federal system was reported as 37.6%, but further reports often state 40% nationwide. Cf FBP, ‘Inmate Race’ (March 28, 2015) <www.bop.gov/about/statistics/statistics_inmate_race.jsp>; Prison Policy Initiative, ‘Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity’ <http://www.prisonpolicy.org/reports/rates.html> both accessed 22\textsuperscript{nd} April 2015.


\textsuperscript{49} The hypothesis tested was whether the entire population supports SHU at least as strongly as the poll respondents (H0: μ≥\bar{x}). \bar{x} is the sample mean or probability for each poll. σ (standard deviation) is calculated by \sqrt{(\bar{x}(1-\bar{x})); where SE = σ/\sqrt{n}. t is provided by (\bar{x}-μ)/SE. t figures were then compared to statistical tables to produce a confidence level. See San Jose University, ‘t-table’ <http://www.sjsu.edu/faculty/gerstman/StatPrimer/t-table.pdf> accessed 24th August 2015.
ignorance of the pluralistic nature of public sentiment, and oversimplify the challenge of framing a consensus. This is unsurprising, since the purpose of creating such polls is merely to provide an indicator of social discourse and not consciously to provide the Supreme Court with the data to evolve the Constitution. The rigour applied by the statistical tests demonstrates that reliability varies from poll to poll, and that generalisability arises from those in which more respondents were targeted. Nonetheless, sample quality is not dispositive of the discussion, and the contents of the questions must be examined before any value can be derived.

7.1.2.2 Question Quality

In addition to concerns about the sampling carried out by the five SHU polls, the quality of the questions is another area of contention. As noted in Chapter V, the principal question form for criminal justice polls is dichotomous: “Yes” or “No”; “Agree” or “Disagree”. Indeed this is the form three of the five SHU polls take.\(^{50}\) Such question-form gives very little discretion to the respondent, again ignoring the pluralistic nature of opinion. Given that attitudes about fundamental and often controversial topics such as SHU are seldom ambivalent,\(^{51}\) these three polls ignore the nuanced complexity with which respondents might view contemporary issues, especially if presented with background information.

One of the dichotomous polls provided respondents with powerfully loaded questions and answers. Asking ‘Solitary Confinement: Is It Wrong?’\(^{52}\) the available responses comprised: ‘Yes, prisoners can mentally suffer from the lack of social interaction’, or ‘No, it is an appropriate punishment in prison’.\(^{53}\) The presumption here is that prisoners do indeed suffer from mental illness caused by SHU, and that such illness is caused by the lack of social interaction and not other conditions. Without further information or an opportunity for a third response (such as “SHU is appropriate where prisoners are provided with mental healthcare”)

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\(^{50}\) OregonLive (n 24); Sodahead (n 25); Greatfallstribune (n 26).


\(^{52}\) Sodahead (n 25).

\(^{53}\) Ibid.
the possible responses are rather arbitrarily restricted. Perhaps as a result of such a contrived and loaded approach, support for SHU was extremely high among Sodahead respondents (84.95%).

A similar issue was demonstrated by the MSNBC poll, though with the opposite result (36.82% support). This poll allowed respondents to say either that SHU was ‘akin to torture and the US should end its use’, or ‘[i]t can be necessary for prisoner and guard protection’. Though engaging in a type of deliberative question-form, the poll’s predominantly selected response (the latter, in support of SHU) was loaded with the presumption that solitary confinement policies have a safety element, regardless of moral questions. Any data derived from these results is therefore questionable. There is no definition of torture for example, which could have been provided with at least the UN’s definition. Additionally, the pollster offered no evidence for protection or deterrence due to SHU. Though it would be to over-expect of public opinion researchers to include such extensive information, it is nonetheless an absence worth reflecting on for the purposes of moral scrutiny under the ESD assessment.

YouGov is the only SHU poll found to facilitate less rigid expression of opinion when designing questions for criminal justice issues, something Chapter V called for. YouGov asked respondents whether they considered SHU to be ‘an appropriate punishment’ or whether it was ‘a form of torture’. Available answers were placed on a scale of: ‘[a]ppropriate punishment’, ‘[i]nappropriate punishment, but not torture’, and ‘[a] form of torture’. Again, torture was not defined. Deliberative discussions were permitted and attempts were made to represent a cross-section of the American public, though the methodological criticisms highlighted in Subsection 7.1.2.1 still apply. Irrespective of any

54 ibid.
55 MSNBC (n 23).
56 ibid.
57 See Shauna Reilly and Sean Richey, ‘Ballot Question Readability and Roll-Off’ (2011) 64 Political Research Quarterly 59 (concluding that closed-questions provide insufficient data to generalise public opinion on types of punishment).
58 YouGov (n 22) 4.
59 ibid.
60 ibid 1-6.
cynicism with which this thesis treats the YouGov poll, it is by far the most comprehensive and intricate, and the only SHU survey to use telephone methods. Respondents may have fallen foul of ‘satisficing’, or response-shifting to satisfy the researcher. In any case, the response was more than 50% in favour of SHU, with confidence greater than 99.9% that the result is generalisable to a majority of the wider population, at least as a statistic of collectivity if not moral value.

The final route of analysis for the question-construction of the five SHU polls is their inclusion (or lack thereof) of a “Not Sure” or “Don’t Know” (DK) option, argued in Chapter V to contribute a degree of balance to the problem of non-attitudes. Without this addition, poll results are far less reliable, since a number of respondents may have filled in either dichotomous response without any real conviction, knowledge, or concern. Two of the five SHU polls (Sodahead, which had by far the largest response rate, and GreatFallsTribune) did not cater for any DK option. Those which did reported a DK-rate of between 6.7% and 14%, evidencing the perennial issue of disinterest, misinformation, or a truthful lack of knowledge, each a perfectly understandable form of (non-)opinion, but of little help to the interpretivist challenge. Admitting that polls play an important role as ‘useful indicators of social discourse’ and as instigators of public debate, this analysis nonetheless confirms concerns highlighted at various stages throughout this thesis. Public opinion data, as measured by polls – especially that uncovered by this chapter – is insufficiently rigorous as a source of public morality for interpretation of the Eighth Amendment.

62 YouGov (n 22).
63 See Figure 7.1B.
65 Greatfallstribune (n 26).
66 Oregonlive (n 24) and YouGov (n 22), respectively.
7.1.3 **Drawing Conclusions**

In addition to the paucity of relevant polling data, compounded by the methodological infirmities and varied generalisability addressed by the previous subsections, pre-interpretive data is only relevant to the ESD assessment where it reads law as integrity. In the context of this chapter’s assessment of SHU, integrity can be ensured by interpreting sources of political morality in their best moral light. When interpreting the Eighth Amendment, ‘objective indicia that reflect the public attitude towards a given sanction’\(^{68}\) – opinion polling in this example – can therefore only act as a guide where sanctions accord with ‘the dignity of man’\(^{69}\) at the abstract level. Where a sanction is offensive to dignity, a fundamental tenet of the punishments clause, the potentially tyrannical majority’s opinion is no longer a relevant interpretivist source.

When continuing the discussion of penology in Section 7.3 it will be argued that a form of deontological desert, proportionality guided by morality rather than by utility, is the best fit for ESD analysis of SHU. Before developing that line of argument further, a much more abundant source of majoritarianism is worth considering. The legislative provisions and executive policy implemented by the fifty states, the federal government, and the military provide much richer ground for claims of nationwide consensus than scarce polling data. Again, sources of political morality must be read in light of interpretivist principles, to view them in their best moral light. That is the objective of the next section, which will consider the traditionally ‘primary’\(^{70}\) source of ESD in Eighth Amendment jurisprudence: state counting.

\(^{68}\) *Gregg* (n 2) 173.

\(^{69}\) Ibid.

7.2 STATE COUNTING

Jacobs and Lee provided limited data about nationwide solitary confinement in 2012.\textsuperscript{71} Though a helpful resource, it did not paint the full picture since only state policies were relied on. Naturally, policy is prescriptive, not necessarily descriptive. The data provided overleaf builds on the framework created by Jacobs and Lee first by updating the inclusion of state policies, but also incorporating far more media resources and local information, including first-hand reports. The resultant data may not be complete, and the further selectivity by journalists is a real concern for any data handler. What can be shown, however, is a more comprehensive picture of the extent of national solitary confinement than any others that could be located in the existing literature. Further scrutiny will be undertaken in the sections that follow this, pre-interpretive stage.

The present section seeks broadly to represent the current national picture with respect to the use of SHU in American state, federal, and military prisons. SHU is defined as any period of post-sentencing penal confinement, punitive, administrative, or otherwise, for at least 22 hours per day in a locked single cell. The statistics analysed here do not include waits on death row SHU, as those are part of a different form of sentence and ask a separate Eighth Amendment question.\textsuperscript{72} This pre-interpretive data, regarding jurisdictional use of extremely long-term SHU; its imposition on juveniles; and on mentally ill inmates is outlined in Figure 7.2, overleaf.

### 7.2.1 Pre-Interpretive Data (as at 1st September 2015)

#### Figure 7.2

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Max duration in SHU</th>
<th>Recent MI SHU reforms†</th>
<th>Juvenile SHU?‡</th>
<th>Without review</th>
<th>After review</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>6 months</td>
<td>-</td>
<td>YES</td>
<td>8hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Alaska</td>
<td>2 months</td>
<td>-</td>
<td>YES</td>
<td>24hrs</td>
<td>5days</td>
</tr>
<tr>
<td>Arizona</td>
<td>6 years</td>
<td>Limited in 2014</td>
<td>YES</td>
<td>24hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Arkansas</td>
<td>12 years</td>
<td>-</td>
<td>YES</td>
<td>8hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>California</td>
<td>42 years</td>
<td>Limited in 2014</td>
<td>YES</td>
<td>24hrs</td>
<td>90days</td>
</tr>
<tr>
<td>Colorado</td>
<td>10 years+</td>
<td>Prohibited in 2014</td>
<td>YES</td>
<td>N/A</td>
<td>60days</td>
</tr>
<tr>
<td>Connecticut</td>
<td>1.3 years</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Delaware</td>
<td>3 months</td>
<td>Pending prohibition</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Florida</td>
<td>27 years</td>
<td>-</td>
<td>YES</td>
<td>2hrs</td>
<td>5days</td>
</tr>
<tr>
<td>Georgia</td>
<td>1.5 years</td>
<td>-</td>
<td>YES</td>
<td>24hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Hawaii</td>
<td>5 days</td>
<td>-</td>
<td>YES</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Idaho</td>
<td>3 months</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Illinois</td>
<td>3 months</td>
<td>Limited in 2013</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Indiana</td>
<td>5-10 years</td>
<td>Limited in 2014</td>
<td>YES</td>
<td>24hrs</td>
<td>5days</td>
</tr>
<tr>
<td>Iowa</td>
<td>5-10 years</td>
<td>-</td>
<td>YES</td>
<td>12hrs</td>
<td>24hrs</td>
</tr>
<tr>
<td>Kansas</td>
<td>5-10 years</td>
<td>-</td>
<td>YES</td>
<td>30days</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Kentucky</td>
<td>2-5 years</td>
<td>-</td>
<td>YES</td>
<td>24hrs</td>
<td>5days</td>
</tr>
<tr>
<td>Louisiana</td>
<td>40 years+</td>
<td>-</td>
<td>YES</td>
<td>8hrs</td>
<td>72hrs</td>
</tr>
<tr>
<td>Maine</td>
<td>1-2 years</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Maryland</td>
<td>5-10 years</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>10 years+</td>
<td>Prohibited in 2012</td>
<td>YES</td>
<td>24hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Michigan</td>
<td>1 month+</td>
<td>Prohibited in 2013</td>
<td>YES</td>
<td>72hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2-5 years</td>
<td>Limited in 2014</td>
<td>YES</td>
<td>30days</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Mississippi</td>
<td>5-10 years</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Missouri</td>
<td>12 months</td>
<td>-</td>
<td>YES</td>
<td>24hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Montana</td>
<td>10 years+</td>
<td>2013 failed prohibition</td>
<td>YES</td>
<td>23hrs</td>
<td>4days</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Max duration in SHU</td>
<td>Recent MI SHU reforms†</td>
<td>Juvenile SHU?‡</td>
<td>Without review</td>
<td>After review</td>
</tr>
<tr>
<td>------------------</td>
<td>---------------------</td>
<td>------------------------</td>
<td>----------------</td>
<td>----------------</td>
<td>-------------</td>
</tr>
<tr>
<td>Nebraska</td>
<td>10 years+</td>
<td>Very limited in 2014</td>
<td>YES</td>
<td>24hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Nevada</td>
<td>2 years</td>
<td>-</td>
<td>YES</td>
<td>24hrs</td>
<td>72hrs</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>6months+</td>
<td>-</td>
<td>YES</td>
<td>Data N/A</td>
<td>Data N/A</td>
</tr>
<tr>
<td>New Jersey</td>
<td>6 months</td>
<td>Pending prohibition</td>
<td>YES</td>
<td>24hrs</td>
<td>10days</td>
</tr>
<tr>
<td>New Mexico</td>
<td>1.8 years</td>
<td>Reduced in 2014</td>
<td>YES</td>
<td>24hrs</td>
<td>72hrs</td>
</tr>
<tr>
<td>New York</td>
<td>26 years</td>
<td>Prohibited in 2008</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>North Carolina</td>
<td>10 years+</td>
<td>-</td>
<td>YES</td>
<td>24hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Several months</td>
<td>-</td>
<td>YES</td>
<td>N/A</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Ohio</td>
<td>2.6 yrs average</td>
<td>-</td>
<td>YES</td>
<td>8hrs</td>
<td>48hrs</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1 month+</td>
<td>Limited in 2013</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Oregon</td>
<td>1 month+</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>8 years</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>3 months+</td>
<td>-</td>
<td>YES</td>
<td>N/A</td>
<td>3days</td>
</tr>
<tr>
<td>South Carolina</td>
<td>10 years+</td>
<td>-</td>
<td>YES</td>
<td>N/A</td>
<td>Indefinite</td>
</tr>
<tr>
<td>South Dakota</td>
<td>2-5 years</td>
<td>-</td>
<td>YES</td>
<td>24hrs</td>
<td>5days</td>
</tr>
<tr>
<td>Tennessee</td>
<td>10 years+</td>
<td>-</td>
<td>YES</td>
<td>72hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Texas</td>
<td>30 years</td>
<td>2013 Review ordered</td>
<td>YES</td>
<td>24hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Utah</td>
<td>1.7 years</td>
<td>-</td>
<td>YES</td>
<td>3hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Vermont</td>
<td>1 month+</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Virginia</td>
<td>14 years</td>
<td>2012 Review ordered</td>
<td>YES</td>
<td>24hrs</td>
<td>5days</td>
</tr>
<tr>
<td>Washington</td>
<td>10 years+</td>
<td>-</td>
<td>YES</td>
<td>1hr</td>
<td>Indefinite</td>
</tr>
<tr>
<td>West Virginia</td>
<td>1 month+</td>
<td>-</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>10 years+</td>
<td>Limited in 2014</td>
<td>YES</td>
<td>6hrs</td>
<td>6days</td>
</tr>
<tr>
<td>Wyoming</td>
<td>2-5 years</td>
<td>-</td>
<td>YES</td>
<td>24hrs</td>
<td>Indefinite</td>
</tr>
<tr>
<td>Federal Govt</td>
<td>22 years</td>
<td>Prohibited</td>
<td>NO</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Military</td>
<td>9 years+</td>
<td>-</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>National (52)</td>
<td>-</td>
<td>14 reforms, 2 pending, 2 reviews</td>
<td>Permitted (YES): 36</td>
<td>Average: 67 hours</td>
<td>-</td>
</tr>
</tbody>
</table>

In Figure 7.2 Column (A) displays the maximum reported stay in SHU from 2005-2015. If a legislative provision or executive directive provides for a figure higher than any other reported figure for a SHU-stay, the higher is included in the table. Column (C) confirms whether SHU is permissibly imposed on juveniles (those under-18 at the time of confinement). Columns (D) and (E) also apply to juveniles only, asking how long a juvenile inmate many be contained in SHU without further review (D) and after review (E), either by an executive or judicial hearing, or by a local Board of Prisons supervisor. A value of “Indefinite” signifies that no statutory limit is imposed after review. In all columns a single dash represents that the value is inapplicable. For the full references of the data included in this table, see Appendix 1, Figures 7.2A-7.2C.

7.2.2 INTERPRETIVE ANALYSIS OF STATE CONSENSUS

From the outset every single US jurisdiction permits some form of SHU. The number of states providing for purpose-built super-maximum security prisons (‘Supermax’), where SHU is the principal form of confinement, is a different statistic and one well reported by the existing literature. Digestible information for: the longest reported maximum SHU-stays, a jurisdictional headcount of juvenile SHU, and mental illness reforms, however, is something which has not yet been forthcoming. That gap will be filled by the present discussion, which will demonstrate the pervasiveness of this form of punishment and provide pre-interpretive ‘national consensus’ data for the traditional starting point of ESD analysis: state counting. A jurisdictional comparison for treatment of the most vulnerable prisoners will first be presented, data which will also form part of Section 7.3’s proportionality assessment. The rate of change at which states are reforming their approach to SHU must also be considered.

74 ibid. At least 44 states have built Supermax prisons, in addition to the federal government and the military.
75 Roper (n 34) 572.
7.2.2.1 MAJORITY CONSENSUS: GENERAL REMARKS

When compiling this data the first observation to become apparent was the inconsistency with which SHU is applied by the 52 American jurisdictions. The longest recorded stay, bearing in mind that not all states keep accurate records so these figures depend heavily on media scrutiny of specific cases, was experienced by Hugo Pinell, who spent at least 504 months in SHU in California.\textsuperscript{76} At the time of writing Albert Woodfox, of the “Angola Three”, a trio of prisoners who were placed in SHU in 1972 for the murder of a prison guard,\textsuperscript{77} remains imprisoned in SHU as he has done for the past 480 months in Louisiana.\textsuperscript{78} Woodfox’s release was ordered in June 2015,\textsuperscript{79} though the Fifth Circuit stayed the release shortly thereafter, pending a retrial.\textsuperscript{80} Aside from these two extreme examples, the average is comparatively modest.

With all American jurisdictions included in the count, the mean of the longest stays in SHU located by this research was 91 months (see Figure 7.2, Column (A)). Excluding the extremities, California and Louisiana, reduced the mean to 75 months, just over six years. In just six states the highest reported stays in SHU were for less than one month.\textsuperscript{81} Moving to a pre-interpretive consensus framing exercise, 27 of the 52 jurisdictions (a bare majority) provided a recorded maximum of at least 42 months in SHU. Some 32 (60%) jurisdictions reported a maximum of at least 22 months. In sum, it can be concluded with relative certainty that a mathematical consensus, whether taken as a bare majority (one half) or a supermajority (three fifths), of American jurisdictions has held an inmate in SHU for at least 22 months in

\begin{itemize}
\item \textsuperscript{76} Kiilu Nyasha, ‘Hugo Pinell: Is 42 years in isolation about to end?’ <http://sfbayview.com/2012/05/hugo-pinell-is-42-years-in-isolation-about-to-end/> accessed 29\textsuperscript{th} April 2015.
\item \textsuperscript{77} Amnesty International, ‘Louisiana’s Angola 3: 100 Years of Solitude’ <http://blog.amnestyusa.org/iar/louisianas-angola-3-100-years-of-solitude/> accessed 1st September 2015.
\item \textsuperscript{78} Woodfox v Cain 3:06-cv-00789-JJB-RLB (MD Louisiana 2015); Ed Pilkington, (\textit{Guardian}, 4 September 2014) ‘Angola Three inmate in longest solitary confinement seeking damages in court’ <https://tinyurl.com/GuardianWoodfox3> accessed 1\textsuperscript{st} September 2015.
\item \textsuperscript{79} Woodfox (ibid). Woodfox’s stay in SHU is estimated to be at least 480 months, and up to 520. The table in Figure 7.2 adopts the lower estimate, uncertain due to the lack of early records.
\item \textsuperscript{81} Hawaii, Michigan, Oklahoma, Oregon, Vermont, and West Virginia.
\end{itemize}
recent years.\textsuperscript{82} This figure represents a consensus far lower than the mean (of 91 months, or 75 excluding Louisiana and California).

In \textit{Graham v Florida},\textsuperscript{83} where SCOTUS found mandatory juvenile LWOP unconstitutional, Justice Kennedy noted that, while 37 state legislatures (74\%) permitted LWOP for some juvenile non-homicide offences, in practice more than 60\% of those sentences were from Florida alone.\textsuperscript{84} Kennedy noted that Florida’s overrepresentation in these figures indicated a national consensus against Florida’s practice, and thus against the penalty itself. Factoring the \textit{Graham} reasoning into the present assessment of SHU-use results in a different outcome. All 52 US jurisdictions, to varying degrees, permit some form of SHU. Even excluding the jurisdictions with maximum stays in SHU above the mean (>91 months) this leaves 19 states, with an average recorded maximum stay of 16 months. Statistics on the numbers of inmates held in SHU state-by-state are seldom made available, a fact confounded by the obscure definitions attributed to this type of confinement. Nonetheless, some efforts have been made to gather this data.

\textit{SolitaryWatch} reported that, between 2003 and 2013, nine of the most punitive prison systems in the US held a combined total of 37-44,000 prisoners in SHU,\textsuperscript{85} of an estimated 81,000 in total.\textsuperscript{86} While not as extreme as Kennedy’s argument about Florida’s wildly disproportionate number of LWOP sentences;\textsuperscript{87} some of the same logic can be applied to the nine (17\%) jurisdictions holding a disproportionate quantity (45-54\%) of the nation’s SHU inmates. Factoring general population into the equation, however, can account for this discrepancy to a certain extent. Those nine states, providing around half of the nation’s SHU,

\textsuperscript{82} As Appendix 1, Figure 7.2A shows, data is from 2010-2015, with limited exceptions.  
\textsuperscript{83} 560 US 48 (2010).  
\textsuperscript{84} 77 of 123, see \textit{Graham} (ibid) 12-13, Kennedy, J.  
\textsuperscript{85} The federal government (11,000); California (3,000-9,000); Texas (9,000); New York (5,000); Pennsylvania (2,400); Colorado (2,100); Virginia (1,800); Arizona (1,600); Michigan (1,300). SolitaryWatch, ‘FAQ: How many people are held in solitary confinement?’ <http://solitarywatch.com/facts/faq/> accessed 29th April 2015.  
\textsuperscript{87} \textit{Graham} (n 28) 12-13.
account for 41% of the general American population. While this does not factor out the potential criticisms, which can be weighed against a still disproportionate imposition by a minority of justice systems, it does reduce the shock-factor that might be represented by a simple state nose-count.

Whether these jurisdictions are imposing disproportionately harsh punishments in respect of the physical severity of SHU is a matter for the latter stages of this chapter. That said, it is worth noting at this stage that, in 36 of the 52 US jurisdictions, SHU is imposed on juveniles. Given the Court’s treatment of individualisation—including age—as an important factor in Eighth Amendment adjudication, further investigation is warranted into the consistency with which SHU is applied to the most vulnerable inmates, in order to establish whether any consensus exists.

7.2.2.2 MAJORITY CONSENSUS: JUVENILES

The 69% of US jurisdictions where SHU is imposed on juveniles can be regarded as “active states”, in the same language as the Court’s death penalty jurisprudence. With respect to the maximum period of SHU imposable on juveniles before some form of due process, however, only 31 active states provide this data. The remaining five states either have no due process requirement for juvenile SHU, or merely provide no data in the public domain. As such, they are excluded from this count, along with inactive jurisdictions.

With the assessment refined in this way, a juvenile’s average permissible stay in SHU is 67 hours before a prison administrator or other executive official must review his case. As with the previous assessment, however, two states stand out as extreme outliers. Kansas and Minnesota provide for a maximum period of 30 days (720 hours) before juvenile SHU is reviewed. Excluding these outliers results in a mean of just 22 hours across 29 states.

88 129,275,303/318,857,056=0.405 (0.41 to 2dp).
89 *Lockett* (n 214).
90 *Eddings* (n 214) 115: ‘youth is more than a chronological fact’. First applied to non-capital sentences in *Graham* (n 28).
91 Figure 7.2, Column (D).
92 For data which is easier to compare at a glance, see Appendix 1, Figure 7.2(E).
Moreover, the mode – the most common value, found in 16 states – provides for a maximum 24 hours before review. It can be concluded that the national consensus element of the ESD assessment clearly indicates around 22-24 hours as the legislated optimum period of review for juvenile SHU. Kansas and Minnesota swim against a strong tide.

That said, the assessment does not end with SHU review. Once due process has taken place, juvenile inmates can be held in SHU for varying periods. The number of active states to provide this data is 35, of a possible 36. Just over half of these (18) permit juvenile SHU for an indefinite period of time, and the remaining 17 provide an average of 12 days before a juvenile must be released into the general prison population, or at least onto a less-intensive segregation programme with longer breaks from isolation. National averages cannot be concluded when indefinite values are presented, so a consensus is difficult to conclude here. Nonetheless just 18 of the 52 US jurisdictions permit juveniles to be held in SHU for longer than 90 days. As the detailed data in Appendix 1, Figure 7.2(C) demonstrates, there is no indication of any change in this national picture. If anything, the permissibility of SHU is waning, and that is a topic which the next and final subsection of interpretivist review will address.

7.2.2.3 The Rate of Reforms

In addition to prohibitions in federal prisons, and ongoing reforms, which started in New York in 2008, several more states undertook substantive reforms to their use of SHU for mentally ill or juvenile inmates between 2013 and 2015. At this juncture it is worth revisiting Justice Stevens’s judgment in Atkins, where the Court held that a national consensus had developed against the execution of intellectually disabled offenders. In Atkins Stevens

93 New Hampshire does not make this data publicly available.
94 For a breakdown of all data summarised in this subsection, see Appendix 1, Figure 7.2(C).
95 Juveniles are protected from SHU in the federal system. DC Mun Regs tit 29, §6273.12. Mental Health clearance is also required before inmates are placed in SHU, and regular review is provided. 28 CFR §541.20-33.
96 Mentally ill inmates were banned from SHU in 2008 (NY Correctional Law §§137, 401, 401(a)) and SHU was limited even further in 2012, effectively banning juvenile SHU in 2014 following two settlements (Peoples v Fischer 898 FSupp 2d 618 (SD NY 2012) and Cookhorne v Fischer (PC-NY-0065) (2014)).
described an increase in the number of states supporting such a restriction, noting that the state count in support had risen from two to 18 states in just 12 years, indicating a growing consensus against the execution of offenders who were intellectually disabled.  

Relating this argument to the present assessment, it can be seen from Figure 7.2, Column (B) that four jurisdictions have enacted a legislative prohibition on the use of SHU for mentally ill inmates in the last seven years. In addition, 13 more have either significantly restricted the use of SHU against mentally ill inmates, are in the process of legislating to this effect, or have ordered state-wide reviews of the use of SHU against vulnerable offenders. Moreover, only one state is recorded as having failed in an attempt to undertake such restrictions in recent years. While a majority consensus is not represented by these figures, it is Stevens’s emphasis on the ‘consistency of the direction of change’ of state action in Atkins which is again relevant.

Additionally, it is the morality which is sensed by these reforms, which take into account lower culpability of offenders with disabilities, thus treat people with dignity, which the interpretivist must acknowledge. There is certainly no evidence of harsher treatment of mentally ill inmates in prisons, unsurprising in the wake of the Supreme Court’s condemnation of California’s negligence and resultant lack of prisoners’ dignity in Plata. In Robinson, condemning that same state for criminalising drug-addiction, the Court warned that society ‘would forget the teachings of the Eighth Amendment if we...permitted sick people to be punished for being sick’. States are taking action to avoid a similar lapse of decency, even half a century after Robinson was decided. If prisoners are to ‘retain the

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98 ibid 9 (Stevens, J).
99 Colorado, Massachusetts, Michigan, and New York.
100 Arizona, California, Illinois, Indiana, Minnesota, Nebraska, New Mexico, Oklahoma, and Wisconsin.
101 Delaware and New Jersey.
102 Texas and Washington.
103 A bill to restrict SHU for seriously mentally ill inmates died in the standing committee in March 2013 (LC 2085/ HB 536: Montana Solitary Confinement Act 2013). For details relating to the previous four footnotes, see Appendix 1, Figure 7.2B.
104 Atkins (n 97) 10 (Stevens, J).
105 Plata (n 1) 1928.
106 Robinson (n 14) 678.
essence of human dignity inherent in all persons’,107 states must take action to stop the punishment of sick people for being sick, and follow the evolutionary line drawn by 17 states in the last several years and encouraged by the federal government. Anything less offends the basic precept of morality underlying the Eighth Amendment.

7.2.3 POST-INTERPRETIVE CONCLUSIONS

In 2011 the ACLU released its vision for a Model Solitary Confinement Improvement Act (“Model Act”), including, in Section (2)(a), an absolute prohibition on SHU when imposed on seriously mentally ill inmates.108 Section (1)(a)(i)-(ii) defines SMI by reference to the DSM,109 a definition which will be discussed in Section 7.5. Such an enactment would strive for the type of protection envisaged by the Eighth Amendment, protecting all citizens from punishments that are cruel and unusual, and informed by reference to principles of political morality such as proportionality and treatment as equals.

So far this chapter has sought to investigate the ESD of the Eighth Amendment in relation to SHU. Opinion polling was shown in Section 7.1 to provide limited assistance to this interpretivist challenge, especially given the paucity of relevant data and its methodological shortcomings. In the present section, consensus framing by way of jurisdictional counting demonstrated a number of points. First, 22 months was shown by a mathematical consensus to offer the most representative national average for the imposition of SHU. Two states, California and Louisiana, stood out as extreme outliers with maximum recorded stays in SHU of 504 and 480 months, respectively. Six more states provided maximums of at least 12 years,110 joining California and Louisiana in swimming against a strong legislative tide. Moreover it was argued, in line with Kennedy’s majority judgment in

107 Plata (n 1) 1928.
110 Arkansas (144 months); Virginia (168); Federal (264); New York (312); Florida (324); Texas (360). See Appendix 1, Figures 7.2A and 7.2E for detailed and more readable digestible information.
that nine (17%) US jurisdictions holding around 50% of the nation’s SHU inmates demonstrated that the figures might be disproportionately skewed by a punitive minority.

Next it was shown that, while juvenile SHU is permitted in 37 jurisdictions, it is generally only allowed for 22-24 hours before a form of due process. Half of those “active” juvenile SHU jurisdictions permit its imposition indefinitely after review. Finally, most significantly, there is a clear trend indicating the restriction of SHU for mentally ill inmates due to the velocity of recent reforms. Consistency of application and individualisation have been noted throughout the present section, and tie into the next part of this chapter – penology – where proportionality will provide the framework for analysis. Importantly, proportionality should ensure that any potential tyranny of the majority is constrained by further, objective indicia of moral standards. Whether constitutional evolution against current SHU practices is supported by the penological element of the Eighth Amendment’s background principles of morality is therefore the next question faced by this investigation.

7.3 Penology

The placement of prisoners in SHU constitutes an additional level of hardship, where an inmate is held in a more closely confined, isolated, and restricted manner. As a result, SHU invariably has a serious impact on the severity of an inmate’s punishment. This increased severity is inconsistently caused by the states, which have also had little regard for individualisation and the varied effects SHU can have on a person. In the previous two chapters it was established that, to seek better moral answers to constitutional questions than those revealed by pre-interpretive majoritarian opinion polling and state counting, recourse must be made to interpretive strategies. Penological principles champion rights as trumps over policies, and this is a form of such a strategy.

\[111\] Graham (n 28).
\[112\] Chapter V, 5.5.B and Chapter VI, 6.5.3.
Chapter VII: Solitary Confinement and Evolving Standards

Where state counting and opinion polling might provide a picture of public sentiment, these indicia give rise to a risk that proportionality will become jettisoned by penal populism, a form of tyrannous majority.\textsuperscript{113} In the present context, the Eighth Amendment right to be protected from punishments which might offend ESD should trump the broad discretion afforded to state legislatures and state prison executives. Pre-interpretive (consequentialist) goals of punishment are viewed as less relevant than principles to the prevailing integrity-driven approach. Instead, the principle of proportionality permits a number of inquiries that are fundamental to the interpretivist reading of the Eighth Amendment. This section will undertake such a reading.

The model of proportionality adopted is Robinson’s framework of deontological desert (DD), which refines Beccaria’s classical definition to embody principles ‘of right and good’.\textsuperscript{114} This model applies an interpretivist function by channelling the executive’s discretion to punish citizens through principles of restraint. DD pays respect to the often sidelined Gregg conditions of dignity\textsuperscript{115} and non-excessive punishment.\textsuperscript{116} In effect, DD is both subjectively proportionate – comparing the gravity of the offence with the harshness of the penalty – and objectively proportionate, by a comparative reading of sentences for other crimes in the trial court’s jurisdiction and the same crime in other jurisdictions. Such an approach reconciles consistency derived from the holdings in Furman and Gregg\textsuperscript{117} with individualisation (required by the Lockett and Eddings doctrines),\textsuperscript{118} all principles which act as a rational sieve for penology in the ESD assessment.

In the case of constitutional law, the jurisdiction is the entire US, meaning the 50 states, federal government, and the military. Such a hybrid form of penology permits an interpreter to seek the best answer to moral questions in hard cases. Moreover, the DD

\textsuperscript{113} James Madison, \textit{The Federalist} (Terence Ball (ed) CUP 2003) No 10.
\textsuperscript{115} ‘A penalty also must accord with “the dignity of man”. Gregg (n 2), quoting Trop (n 1) 100.
\textsuperscript{116} ibid.
\textsuperscript{117} Furman (n 20); Gregg (n 2).
\textsuperscript{118} Lockett (n 214); Eddings (n 214).
approach caters for the Court’s hints in *Graham*, and much clearer expression in *Plata*, that conditions of confinement are relevant to the proportionality assessment. This is because the subjective element of proportionality review must consider the individual severity and suffering imposed on inmates. That the severity of punishment is measurable in part according to the individual harshness it causes is ‘a central aspect’\(^{119}\) of proportionality, and one which will be considered next.

For present purposes, in the context of SHU, this section will first assess the consistency with which SHU is imposed (7.3.1), an objective reading of proportionality. Next, in Section 7.3.2 the (subjective) individualisation of punishment will be considered, with a view to establishing whether SHU causes greater suffering to certain individuals and is therefore disproportionate in its application. Finally, Section 7.3.3 will consider the dignitarian assessment, and asks whether SHU is morally permissible in any circumstances.

### 7.3.1 Consistency

For a prisoner’s punishment to be assessed in terms of its objective proportionality, a comparison between the several jurisdictions and across sentences for other crimes in the trial court’s jurisdiction is required. Undertaking a search of press reporting into the use of SHU by state prison systems unveils a web of different standards. In Massachusetts, for example, state prisoners can be sent to SHU for up to a week for throwing an empty plastic cup.\(^{120}\) In California, possessing more than five dollars without official approval can land an inmate in SHU,\(^{121}\) an offence contained within the states’ penal regulations. South Carolina, which permits juveniles to be held in SHU indefinitely,\(^{122}\) recently imposed 37.5 concurrent years in SHU on a prisoner for ‘Creating and/or Assisting with A Social Networking Site’.\(^{123}\) Whilst

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\(^{121}\) Cal Code Regs, tit 15 §3341.5(c)(9) (2013).

\(^{122}\) See Figure 7.2.

an extreme example, sixteen other inmates in that state face confinement in SHU for at least a decade on similarly punitive grounds, which are not found in other US jurisdictions.\textsuperscript{124}

Caution must be urged when reliance is placed on press reports, since journalists are more likely to document stories that sell,\textsuperscript{125} though it is notable that there has been no challenge against the reported facts of these cases by any state officials. While the case studies might express the extreme end of the spectrum with respect to SHU-use, that does not detract from penological concerns surrounding the proportionality of imposition. Of the 39 states, which provided a response to a \textit{MotherJones} investigation into nationwide solitary use, 13 of them segregate inmates in a form of SHU on account of their being validated as gang members or part of “Security Threat Groups”\textsuperscript{126}. Three: California, South Carolina, and Texas, have a policy to segregate such inmates automatically, an emphatic demonstration of inconsistent practices in those states. In one, Maine, an official noted that prisoners are confined in SHU ‘when they become a danger to themselves’.\textsuperscript{127} The implication of this latter statement is mentally ill inmates who inflict self-harm, which – as the medical literature discussed in Section 7.5 will show – is not alleviated by SHU, but compounded. Such disregard for the safety of prisoners is a core concern of this discussion.

At this stage it is worth recalling the states-as-laboratories metaphor discussed in Chapter IV, where it was noted that majoritarian state counting undercuts ‘one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory’.\textsuperscript{128} Under an interpretivist reading, moral lessons are taught by recourse to principles embedded more deeply than in explicit legislative provisions, and that applies to state experimentation with SHU-imposition. The punishments clause places limits on governmental power, and rights arising from these limits trump policies. Schwarz noted that

\begin{itemize}
  \item \textsuperscript{124}ibid.
  \item \textsuperscript{125}The American public has ‘been exposed to countless hours of consistent media stereotypes about the nature of violent crime, the kind of person who supposedly commits it, and why.’ Craig Haney, ‘Evolving Standards of Decency’ (2008) 36 Hofstra LR 835, 837.
  \item \textsuperscript{127}ibid.
  \item \textsuperscript{128}\textit{New State Ice Co v Liebmann} 285 US 262 (1932) 311.
\end{itemize}
‘the laboratory of state experimentation is not a sealed room’, 129 and a punishment which
offsends a prisoner’s dignity is not one which the Eighth Amendment permits. To develop the
dignitarian element of this argument, and if the morality of a nation (or a state for this matter)
is indeed to be measured ‘by how it treats its weakest members’, 130 juveniles held in solitary
confineinent can provide a clear tidemark.

As has been indicated, more detailed nationwide use of SHU is difficult to gauge. This
is especially so given the obscure euphemisms Boards of Correction attribute to their
confineinent policies and the poor record-keeping in this regard. Instead looking to media
reports of particularly lengthy stays in solitary can provide an interpreter with educated
estimates. Nonetheless, a more fruitful frame of reference is the jurisdictional comparison of
juvenile SHU demonstrated in Section 7.2.2. Of the 51 US jurisdictions to imprison
juveniles, 131 14 of them (27.5% of jurisdictions, representing 19.5% of the general American
population) 132 will not subject juveniles to SHU. It is fair to surmise on this basis that just one
in five juveniles imprisoned across the US will never be subjected to a form of SHU (for more
than 22 hours per day). For the remaining four in five who could face SHU, therefore, it is
quite possible that their imprisonment will become more severe. Since the interpretivist
endeavour is to seek the best moral outcome from a question of law, the policies of the
minority of those states striving for better protection of juvenile offenders trump the
consequentialism propagated by the rest. It is the silent minority to whom this chapter pays
most attention for an integrity-led Eighth Amendment assessment. At least with respect to
consistency it is clear to see that juveniles are faced with differences in their treatment on the
basis of the arbitrary grounds of geography.

129 Frederick Schwarz Jr, ‘States and Cities as Laboratories of Democracy’ (1999) 54 The Record 157, 163.
130 Justice D Warren, “It was Mahatma Ghandi who said “A nation’s greatness is measured by how it treats its weakest members.”” (UNC School of Law, 7 March 2012) <https://tinyurl.com/MH2012warren> accessed 1st
May 2015.
131 The military holds no juveniles.
132 62,257,611/318,857,056=0.195 (to 3sf). Population data is taken from Appendix 2, Figure 7.3.
In the vast majority of states where juvenile SHU is permitted, review takes place by the end of the first day. Juveniles held in Wyoming, Indiana, Iowa, Kansas, and Maryland may be held in SHU without any due process for between 3 and 30 days. For those juvenile inmates, their stays in solitary are permitted for far longer than anywhere else in the nation. Moreover, of those states to permit juvenile SHU and also require review after a representative average of around 22-24 hours, half of them (18 of 36 active states) allow juvenile SHU indefinitely after review. A juvenile unlucky enough to face SHU in one of those 18 states could face the back of a locked door in an isolated cell for several years, longer than he would ever face in any of the remaining 33 SHU-active jurisdictions.

Solitary confinement is imposed to varying degrees, with a handful of particularly punitive US jurisdictions where a prisoner’s punishment is more likely to incorporate long stays in SHU. Classification of gang status has a lot to do with an inmate’s chances of facing SHU, and discrepancies in these policies exist across the nation, where different actions are punished to varying degrees across the US. Such objective disproportionality is most marked with respect to the treatment of juveniles, who are handed inconsistent degrees of SHU according to the location of their offences. Though this might deem the American experiment with SHU offensive to the objective arm of proportionality, the Lockett and Eddings principles of individualised, subjective review must be considered for the full picture to be painted, and for the reprehensibility of SHU’s overuse to be pinned to the Constitution’s ESD assessment.

133 26 out of the 32 states which provide this data. See Appendix 1, Figure 7.2E, Column iii.
135 Broyles (n 120); Maass (n 123).
136 Jacobs (n 126).
7.3.2 INDIVIDUALISATION

As noted in the introduction to this section and demonstrated in Chapter II, *Lockett* and *Eddings* emphasised the importance of subjectivity in proportionality review. The touchstone of the punishments clause is the effect a punishment has on the imprisoned and, as such, this section must consider those effects. For present purposes, the relevant effects are those suffered by inmates held in SHU.

Arrigo and Bullock note that different inmates react differently to solitary confinement.137 First, the personality-types of those often found in SHU were more vulnerable than average to the psychiatric effects of confinement in solitude. Grassian and Friedman noted that sensory deprivation had a more debilitating effect on inmates with mental illness, and those with the personality disorders most frequently found in prisoners.138 At the outset, this is concerning, especially given the statement by a Maine official that prisoners who are at risk of harming themselves are placed in SHU.139 Take the example of Prisoner X, who suffers from no psychiatric illness and no personality disorders, and who is placed in SHU due to a rule infraction. This is a common example. Prisoner Y, however, suffers from severe psychiatric illness, compounded by various personality disorders which make his confinement more difficult to cope with. He is placed in SHU due to exactly the same misbehaviour as Prisoner X, and both prisoners spend fifteen days in SHU. So far, the objective proportionality of their punishments (remembering that conditions of imprisonment are a relevant part of “punishment” under the Eighth Amendment) is upheld.

When subjectivity is involved, however, the individualisation element causes problems for proportionality. Prisoner Y is far more likely to suffer from adverse effects which could range from restlessness, regression, and confusion,140 to symptoms as serious as

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139 See (n 127).
tachycardia (over-pulsation of the heart); serious problems with impulse-control (self-harm); and even Post-Traumatic Stress Disorder. A widespread lack of psychiatric care, such as that condemned in California by *Plata*, compounds this issue. Arrigo and Bullock note that even advocates of solitary confinement for correctional purposes admit that some personality types would deteriorate and should be screened out. Further, O’Donnell found that individuals who cope best with solitary confinement are those who were able to develop good attachments during childhood. Kerr notes that, ‘[n]ot only does mental health erode in the highly non-therapeutic conditions of segregation, segregated prisoners often become increasingly unable to meet the behavioural standards required for release.’ It is a cruel twist of irony that prisoners, especially those held in SHU, are usually those who did not have such fortunate upbringings, so are even more likely to suffer in isolation.

In addition, the individual’s expectation of a punishment has been shown to be relevant to their overall experience in isolation. Grassian and Friedman reported that SHU which was perceived to be punitive, rather than administrative for instance, was more likely to produce adverse reactions in inmates. Clearly, where an inmate such as Prisoner Y is more susceptible to violent reactions, and anticipates that his confinement is punitive; the punishment is more severe when imposed on him than it is on someone like Prisoner X (who will still suffer symptoms). Without engaging in a dignitarian discussion of the permissibility of a state causing these effects, which is something reserved for the remainder of this chapter, it suffices to say that individualisation is neglected when prisoners are treated as one and the same. In *Taking Rights Seriously* Dworkin summarises this problem aptly, stating that moral equality concerns the treatment of people as equals, with the same concern and respect, rather

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141 ibid 1452.
142 ibid 1453.
144 *Plata* (n 1).
145 Arrigo and Bullock (n 137) 631.
147 Kerr (n 11) 497.
148 See Grassian and Friedman (n 138).
than treating people in exactly the same way.\textsuperscript{149} Applied to the example of Prisoners X and Y, these individuals have been treated with equality: they have been handed the same punishments for the same misbehaviour. However, Prisoner Y’s individual circumstances have not been taken into account. He has been treated with no concern or respect for his situation. The individualisation element of proportionality is thereby neglected.

As shown in Section 7.2, a number of states have sought to remedy this problem to a large extent by protecting inmates with mental illnesses from SHU, and the Federal Government has itself admitted the risks of SHU-imposition on vulnerable inmates, though without making any legislative reforms.\textsuperscript{150} Without repeating the call for a consideration of the consistency in the direction of the state-level changes,\textsuperscript{151} it can be concluded by noting that there is still a strong potential for disproportionality in American SHU. Defended ordinarily under the colour of equality, due to its blanket-imposition, the effects of these non-individualised policies can in fact be far more punishing to certain inmates. For individuality to undergo proper consideration, it must be acknowledged that proportionality requires a view of the subjective effects on the punished, something which appears to be lacking, perhaps owing to political pressures to remain “tough on crime”,\textsuperscript{152} or budgetary constraints.

In \textit{Estelle v Gamble} SCOTUS held that neglect of prisoners’ medical needs, ‘may actually produce physical “torture or a lingering death”,\textsuperscript{153} prohibited by the Eighth. Whether deontological desert might include SHU in the \textit{Estelle} standard, honed most recently by \textit{Plata},\textsuperscript{154} must now be established.

\begin{flushleft}
\textsuperscript{149} Ronald Dworkin, \textit{Taking Rights Seriously} (Gerald Duckworth 1977) 370.
\textsuperscript{150} See National Institute of Corrections, \textit{Supermax Prisons and the Constitution} (Department of Justice 2004) (noting that SHU is hazardous to mental health and that some inmates should never be placed these conditions).
\textsuperscript{151} Borrowing from the reasoning in \textit{Atkins} (n 97).
\textsuperscript{152} J Oleson, ‘The Punitive Coma’ (2002) 90 California LR 829, 841 (noting that a ‘punitive coma’ among legislators has defeated the medical model, replaced by incapacitation and retribution).
\textsuperscript{153} 429 US 97 (1976) 103 (quoting \textit{In Re Kemmler} 136 US 436 (1890) 447).
\textsuperscript{154} \textit{Plata} (n 1).
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7.3.3 Deontological Desert as a Bar to SHU

A final line of argument which can be sustained under deontological desert is that some rights are readable in the abstract. That is to say that they are universal, non-relative, and absolute in character. Dworkin emphasises this with respect to freedom from torture, a punishment that is so abhorrent that it offends dignity outright. Importantly, for the present discussion “torture” is used in the abstract, not in its international legal sense which is considered shortly, in Section 7.4. That torturous punishments are condemned by dignitarian assessments does not mean to say that there is no-one who advocates such policy, and there are infamous historical instances of its imposition by states. Nonetheless, the DD approach holds that there is no-one who can morally justify torture. It is vital, therefore, to distinguish justice from democracy. Where democracy might permit harsh punishments, and historic majoritarianism has instigated this, justice requires that harshness that offends human decency, a tenet of morality, is not permitted. Applying this abstract principle of decency to the present context, asking whether SHU is compatible with DD leads to a number of further questions.

If it is presumed that torture is morally wrong and therefore unjustifiable, regardless of its proportionality, the outstanding question is one of definition. International, regional, and domestic definitions and absolute condemnations of torture do exist, but they invariably fixate on the mens rea or mental state of the inflictor, rather than the suffering of the victim. Stepping back to the Eighth Amendment assessment, the treatment and suffering of individuals is the touchstone for analysis. If a prisoner suffers treatment at the hands of the

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156 Ibid 52-53.
157 Perhaps the most infamous example from the last century is Hitler’s Nazi regime, see Fred Weinstein, The Dynamics of Nazism (Academic Press 1980) 86, and generally.
158 Dworkin, JfH (n 155) 289.
160 Applied most recently in Plata (n 1).
state, which is so cruel as to offend ‘evolving standards of decency’, then that element of his punishment is proscribed by the Eighth Amendment. Punishments that offend a person’s dignity in this way, regardless of whether they are imposed proportionately, fall foul of the Estelle and Gregg criteria. Linking this argument to classical retributivism, even Kant’s reading of Beccaria looks only to “eye for eye” insofar as the result does not degrade humanity in a way that is morally impermissible. Robinson’s refined model of deontological desert adds an additional level of interpretive scrutiny, with Ryberg explaining that in the severity assessment not everything has ‘moral relevance’. Torture, for example, can never be morally relevant, regardless of the strength of any proportionality arguments.

Solitary confinement, as was shown by Section 7.2, is accepted by and imposed to varying degrees by all states across the US. In the present section it has been argued that the American application of SHU is demonstrably disproportionate, both in terms of its inconsistent application and its lack of individualisation. Meeting the higher bar of abstractly prohibited “torture”, however, requires further discussion. Establishing whether SHU constitutes torture, and therefore infringes an absolute right protected under DD, regardless of proportionality, is a matter of definition. That definition is one more routinely carried out in the context of transnational law rather than the US Constitution. The argument will be sustained in the following section that a consideration of transnational perspectives on the acceptability of SHU will enrich ESD analysis. Aspirational answers to interpretive questions are only found when sources of political morality are exhausted, seeking the best fit for constitutional interpretation. Chapter IV argued at length that transnational law, when read interpretively, is one such source. As such, the next section will investigate the transnational

161 Trop (n 1) 101.
163 Ryberg (n 119) 106.
164 ibid.
legal landscape to assess the strength of any claims of SHU offending contemporary standards of decency, and to discuss whether the high bar of torture is reached.

7.4 Transnational Comparativism

Any focus on international and regional human rights instruments for constitutional interpretation invigorates debate. As Chapter V discussed at length, human rights principles, in theory, transcend politics and form part of a higher normative order – one by which the interpretivist informs his decision-making. The Supreme Court’s recent expression of a human rights framework in Plata, which Simon noted was capable of dismantling American punishment,\(^{166}\) gives rise to a strong argument for the inclusion of transnational human rights sources in ESD adjudication. Transnational comparativism is not argued to be dispositive of the Eighth Amendment question, but it will be sustained that the punishments clause benefits from the rich body of dignitarian standards which can be found via comparativism.

The term “soft law”, advisory provisions and instruments which are non-enforceable by legal actors, has a range of definitions.\(^{167}\) Scholars have disagreed as to its value as a source of international law,\(^{168}\) though Bianchi et al found a middle ground, noting that the search to fill gaps in existing legal regimes can be informed by soft law.\(^{169}\) To fill those gaps, which are reminiscent of the positivist’s exhaustive rules outlined in Chapter III, interpretivism provides a resolution by reading law as integrity. In the context of the present discussion the gap is the distance between the current legal protections afforded by the Eighth Amendment and the suffering caused by SHU. The question faced by an interpretivist is therefore one of political morality: do the principles underlying the Constitution prohibit such infliction? Hard and soft legal principles arising from transnational documents, rather than merely national rules, serve to provide a constitutional interpreter with further general principles of human rights law, through a series of norms, guidelines, and standards. In the

\(^{166}\) Simon (n 1).
\(^{169}\) Bianchi, Peat and Windsor (ibid) 100.
present chapter, which is attempting to inform constitutional interpretation of the Eighth Amendment, Subsection 7.4.1 will analyse the international picture relating to solitary confinement. Subsection 7.4.2 will then contribute a discussion of regional human rights law to this analysis.

### 7.4.1 INTERNATIONAL LAW

The right to be free from torture and cruel, inhuman, and degrading treatment and punishment pervades the International Human Rights system, existing in various United Nations (UN) legal instruments. Moreover, it is widely accepted as a non-derogable (*jus cogens*) norm of customary international law that states must not violate those rights. Conley notes that the US has ‘largely insulated itself from judicial review by international tribunals’, though an entirely separate debate exists surrounding Congressional incorporation of international law into US law, touched on in Chapter V. While an expansion of that debate is beyond the purview of this analysis, it is worth noting that there is a rich body of hard and soft law arising from the UN system to show that SHU is routinely criticised across the world. That body will now be examined.

Following the introduction of the UN Charter, which established the UN and was silent regarding prisoner treatment, the 1948 Universal Declaration on Human Rights (UDHR) expressed the protection against ‘torture [or] cruel, inhuman or degrading treatment or punishment.’ One of the most notable changes to follow the adoption of the UDHR was a shift towards collaborative international penal policy. In the mid-1950s, while Chief Justice Warren was beginning his due process revolution on the US Supreme Court, the UN held

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170 See Chapter V, Section 3.1 for an overview of Public International Law and its constituent elements.
171 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* 2009 ICJ Rep 139, [99].
175 See Chapter VI, 6.2.4.2.

While the SMRs are broadly a form of soft law, like the UDHR, their creation during a period when civil rights were dominating the political agenda in the US provided the first example of a comprehensive (albeit aspirational) set of prisoners’ rights at an international level.\footnote{James Jacobs, \textit{Stateville} (UCP 1977) 57-59.} Furthermore, Vasiliades has noted that, although the SMRs are not strictly enforced by any one body, they ‘have been increasingly recognised as a generally accepted body of basic minimal requirements.’\footnote{Elizabeth Vasiliades, ‘Solitary Confinement and International Human Rights’ (2005) 21 American University International LR 71, 83 (quoting Nan Miller, ‘International Protection of the Rights of Prisoners’ (1995) 26 California Western International LJ 139, 148).} Notable rules include R21.1’s provision of outdoor exercise for at least one hour per day and R32.1-2, which indicates that confinement, which is prejudicial to a prisoner’s mental health, should be avoided.\footnote{SMRs (n 179) R32.1-2: ‘Punishment by close confinement…shall never be inflicted [where it] may be prejudicial to the physical or mental health of a prisoner.’} As Section 7.2 demonstrated, the US prison system is not averse to permitting lengthy stays in solitary confinement, often irrespective of age or vulnerability. While there may be a general trend away from the use of SHU against mentally ill inmates, it prevails in several jurisdictions. Section 7.5 will show that the American practice of SHU is offensive to R32.1-2’s principle insofar as it degenerates the mental integrity of inmates.
In May 2015 the SMRs were updated and renamed the “Mandela Rules” and, at the
time of writing in September 2015, are pending adoption by the UNGA.\textsuperscript{183} While these
revisions, the first in 60 years, mainly focus on modernising specific rights such as those
surrounding prisoner communication,\textsuperscript{184} a notable addition is the explicit condemnation by
Rule 43 of ‘prolonged solitary confinement’,\textsuperscript{185} defined as 22 hours per day for at least 15
days.\textsuperscript{186} As the state count showed, the US currently falls short of those standards, though it is
notable that Barack Obama became the first sitting American President to visit a federal
prison in July 2015, and the first openly to speak against SHU.\textsuperscript{187} Given that Guantanamo Bay
– the US military detention camp which itself imposes SHU on all inmates – remains open
eight years after the President’s first of two campaign pledges to close it,\textsuperscript{188} rapid reform
should not be expected. Further, the US standards fall short not only of the renewed SMRs,
but also those which had existed for 60 years, spanning 11 American presidencies. That said,
the widespread acknowledgement of the hardship created by SHU, at both the federal
executive and judicial levels,\textsuperscript{189} serves only a positive albeit early function for its future
restriction.

Further soft law exists in the form of the UN General Assembly’s Basic Principles for
the Treatment of Prisoners (1990).\textsuperscript{190} The Basic Principles encourage Member States to strive
for the abolition or at least restriction of solitary confinement,\textsuperscript{191} something that a small
minority of US states has respected in recent years. Moreover, the 1990 UN Rules for the

\textsuperscript{185} Mandela Rules (n 183) R43(1)(b).
\textsuperscript{186} ibid R44.
\textsuperscript{187} The White House Office of the Press Secretary, (14 July 2015) ‘Remarks by the President at the NAACP Conference’ <http://1.usa.gov/1KvzI20> accessed 28th July 2015, speaking on SHU: ‘an environment [ ] that is often more likely to make inmates [worse]’.
\textsuperscript{189} In addition to Obama’s statement (n 187), see Justice Kennedy’s concurrence in Davis v Alaya, 576 US ___ (2015) (noting that SHU had been hidden from the public conscience but could offend the Eighth’s ESD).
\textsuperscript{190} UNGA Res 45/111 (1990) UN Doc A/45/49, 45 UN GAOR Supp (No 49A) 200.
\textsuperscript{191} ibid P7.
Protection of Juveniles Deprived of their Liberty,192 another soft law instrument, expressly condemn any form of SHU used against under-18s or inmates with mental illness, principles again reiterated by the Mandela Rules.193 As the jurisdictional analysis in Section 7.2 demonstrated, the US also falls short of this standard, giving rise to an argument in favour of greater Eighth Amendment protection according to transnational norms.

In addition to the various soft law sources opposing SHU is an emergent body of binding international law. In the latter half of the 20th Century the UN created much clearer definitions of international law regarding prisoner treatment.194 This clarity was achieved most markedly by the introduction of the 1984 UN Convention Against Torture (UNCAT), ratified by the US in 1990,195 and the 1966 International Covenant on Civil and Political Rights (ICCPR),196 ratified in 1992. While it must be reiterated that the present focus is not on investigating US liability for non-implementation of international law, the inclusion in ESD analysis of harder forms of law offers a more compelling argument for its relevance to comparativism than that of soft law, which could be argued only to exist as a guide.

The UNCAT is the principal international treaty to prohibit torture, with a comprehensive and binding definition in Article 1. For the past two decades the Human Rights Council (HRC),197 in addition to recent Special Rapporteurs on Torture, have all emphasised concern that US solitary confinement is offensive to UNCAT Article 1,198 and to Article 16 which prohibits ‘cruel, inhuman or degrading treatment or punishment’.199 Moreover, the HRC and the Special Rapporteurs have insisted that Article 7 ICCPR, which provides identically worded guarantees as UNCAT’s Articles 1 and 16, has also been

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192 ibid 45 UN GAOR Supp (No 49A) 205.
193 Mandela Rules (n 183) RR45(1)-(2).
194 Vasiliades (n 181) 85.
197 UNHRC, ‘CCPR General Comment No 20: Article 7’ (10 March 1992) UN Doc HRI/GEN/1/Rev 9 (Vol I);
199 UNCAT (n 195) Article 16.
threatened by the American practice of SHU. Additional concern has been raised surrounding the practice of enforcing solitary confinement against juveniles or mentally ill inmates, permitted in two-thirds of US jurisdictions.

Significantly, while these concerns continue to resonate in the international sphere, the US remains reluctant to refuse ratification or even signature of the UNCAT Optional Protocol (OPCAT), which would provide the HRC with prison-inspection authority. The Bush administration reasoned that such inspections would be ‘overly intrusive’ to existing federal oversight, though issues of transparency still exist, especially given the widespread concern surrounding conditions of American imprisonment. This concern might be less pressing, and the sovereignty argument more compelling, if federal oversight of a small minority of prisons had actually resulted in improvements to conditions. Some promise to that effect has been forthcoming, but – as this chapter has demonstrated – standards continue to fall well below those of the international system. Two more UN treaties, the Convention on the Rights of the Child, and the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, have been argued to contain further prohibitions on the use of SHU against the most vulnerable inmates. Though professional bodies have reiterated these charges, as it will be shown in Section 7.5, such claims have not been upheld by the HRC in as strong legal terms as for UNCAT or the ICCPR.

200 UNHRC (n 197); Polay Campos v Peru (ICCPR/C/61/D/557/1994) (1998), [8.8]: ‘The Committee finds that...isolation for 23 hours a day in a small cell...constitue[s] treatment contrary to article 7’.
201 See Section 7.2 generally, and Figure 7.2.
205 The Californian prison system, which has been overseen federally since the 1990s, finally showed some promise following Plata. At the time of writing a pending class-action lawsuit might result in the curtailment of extreme SHU. See Center for Constitutional Rights, ‘Ashker v. Governor of California’ <http://bit.ly/1TRDUOB> accessed 1st September 2015.
206 (Entered into force 2 September 1990) UNGA Res 44/25 (1989) UN Doc A/44/49, Article 37(b): ‘[SHU] shall be used only as a measure of last resort and for the shortest appropriate period of time.’
208 See Kathryn DeMarco, ‘Disabled by Solitude’ (2011) 66 University of Miami LR 523, 528.
In sum, if indeed it can be established that SHU does cause ‘severe pain or [mental] suffering’,²⁰⁹ this could in turn lead to an accusation of the US wilfully engaging in internationally offensive practices throughout its prison system. Not only could such a finding be in contravention of America’s commitments to various treaty systems and *jus cogens* norms,²¹⁰ but, vitally, it contributes to the political morality of the Eighth Amendment. Insofar as the punishments clause is informed at the interpretive stage by transnational comparativism, a widely accepted definition of torture and inhuman or degrading treatment or punishment might compel the conclusion that SHU is offensive to the evolving standards of decency of that clause. For such an argument to be sustained a stronger demonstration of the psychiatric harm resulting from the use of long-term SHU must be established, a task for Section 7.5. First, the regional human rights system must be examined.

7.4.2 REGIONAL LAW

As noted in Chapter V, care must be taken to justify the selection of interpretive sources. In addition to international law the Court has looked to foreign law when interpreting the Eighth Amendment. To pre-empt accusations of selection-bias when examining regional sources, reasoned and transparent decision-making must be demonstrated. As a result, rational community standards are unveiled, and the task of reading law as informed by objective indicia of political morality is achieved.

A variety of characteristics can be considered when justifying the selection of a foreign comparator. Sartori notes that entities for comparison should have shared and unshared attributes,²¹¹ and Landman highlights the democratic nature of states as a relevant frame of comparison.²¹² Additionally, to justify the selection of foreign law, a helpful waypoint is posted by the judgment in *Thompson v Oklahoma*.²¹³ In *Thompson* the Court

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²⁰⁹ UNCAT (n 195) Article 1.
²¹⁰ *Belgium v Senegal* (n 171).
relied on ‘the leading members of the Western European community.’\(^{214}\) Given that the jurisprudence of that category is represented most cogently by the Member States of the European Convention on Human Rights (ECHR), it is that transnational system which will form the first frame of comparison. After all, ‘if Justices seek to bolster their opinions with additional logic and support, looking to the most respected [and relevant] foreign countries simply makes the most sense.’\(^ {215}\) The ECHR represents the human rights standards of 47 Western liberal democracies,\(^ {216}\) for all of whom ‘one of the major mechanisms for accommodating difference...is the protection of the civil and political rights of individuals.’\(^ {217}\)

In addition to the European Human Rights system is one to which the US might be more willing to pay closer attention. The Organisation of American States (OAS) established the American Declaration of the Rights and Duties of Man in 1948, the same year as the UDHR,\(^ {218}\) vowing that all prisoners have ‘the right to be free from cruel, infamous, or unusual punishment.’\(^ {219}\) While the US does not participate in the region’s human rights system which will be discussed in Subsection 7.4.2.2, it is an OAS member. Additionally, Conley has noted that the Inter-American system is ‘the most vocal global voice against solitary confinement’,\(^ {220}\) highlighting its poignancy, not just in geographical terms, to the comparison against the US use of SHU.

Justice Kennedy’s majority opinion in *Roper* described the ‘express affirmation of certain fundamental rights by other nations and peoples [that] simply underscores the centrality of those same rights within our own heritage of freedom.’\(^ {221}\) That notion of political morality – understood by an interpretivist to reach beyond the rules created by Congress, into the principles underlying their creation – is fundamental to the present comparative

\(^{214}\) ibid 830.


\(^{216}\) Varying definitions of liberal democracy exist, but useful characteristics are provided by Anne Phillips, ‘Dealing with Difference’ in Seyla Benhabib (ed) *Democracy and Difference* (PUP 1996) 143.


\(^{219}\) ibid Article XXV.

\(^{220}\) Conley (n 172) 440.

\(^{221}\) *Roper* (n 34) 575.
assessment. Building on Simon’s argument that *Plata* represents a potential attachment of the punishments clause to a human rights framework, the present section will now attach that claim to an assessment of SHU, drawing on the most prominent and relevant regional rights bodies of the European and Inter-American systems.

7.4.2.1 COUNCIL OF EUROPE

Since the most notable, and controversial, Supreme Court citation of regional law can be found in the 2003 decision of *Lawrence v Texas*, that decision provides a suitable starting point. In *Lawrence* the Court cited European human rights jurisprudence to determine what restrictions on private sexual conduct were ‘necessary in a democratic society’. Reflecting on ‘values we share with a wider civilization’, Justice Kennedy cited foreign law in an interpretivist fashion, reading it ‘as a transmitter of society’s values’. If society’s values are at all represented by supranational agreements, the European Convention on Human Rights (ECHR) is a strong starting point. Adopted by the Council of Europe in 1950, the ECHR creates a permanent Court of Human Rights (ECtHR), which accepts the ECHR as a living instrument, which should be ‘interpreted in the light of present-day conditions’.

As such, the ECtHR’s ability to overrule its prior case law plays an important role in shifting the interpretation of certain provisions in line with societal values, in a similar vein to the ESD assessment under the Eighth. Unlike the punishments clause, Article 3 ECHR provides a broader guarantee, reading: ‘No one shall be subjected to torture or to inhuman or

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222 Simon (n 1) 134-135, and accompanying text.
225 *Dudgeon v United Kingdom* (1981) 4 EHRR 149, [36].
226 *Lawrence* (n 224) 576.
227 Toobin (n 223) 213.
229 ibid Protocol 11.
231 Note Alastair Mowbray, ‘An Examination of the European Court of Human Rights’ Approach to Overruling its Previous Case Law’ (2009) 9 Human Rights LR 179 (discussing the Court’s reluctance to acknowledge that it is overruling its own precedent).
degrading treatment or punishment.”232 The Article, unlike other, far lengthier provisions in the ECHR,233 provides limited definitions and defers to the Court’s evolutive interpretation, again closely parallel to the Eighth Amendment jurisprudence introduced throughout this thesis.

Protection from torture, defined by a high threshold of ‘deliberate inhuman treatment causing very serious and cruel suffering’,234 is a non-derogable right under the ECHR: justifications are not accepted under any circumstances.235 SCOTUS has required a high bar for torture, including treatment worse than the stress techniques in Ireland v UK,236 and infliction in order to obtain information or to intimidate prisoners.237 In Selmouni the ECtHR decided that this bar could be lowered in light of societal values and, as such, acts which were previously considered to fall below the threshold may now constitute a breach of the fundamental protection guaranteed by the second clause of Article 3.238 To sustain a claim of ill treatment, the acts must also reach a minimum level of severity before being caught by the Convention. This assessment depends on all the circumstances surrounding a case: duration of confinement, its particular effects, as well as the sex, age, and health of the victim.239

In the ECHR system, treatment has been held to be “inhuman” within the definition of Article 3 because it has caused intense mental suffering,240 and “degrading” when it has caused extreme levels of fear and anxiety to be aroused.241 While at first glance this appears to be a much less restrictive reading of fundamental protections than that undertaken by the US

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232 ECHR (n 228) Article 3.
233 ibid Article 6, which gives a 266-word recantation of the right to a fair trial, with a series of minimum rights.
234 Ireland v UK (1978) Series A no 25, [167].
235 ECHR (n 228) Article 15(2).
236 Ireland (n 234) [167]: “five [stress] techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment”.
237 Salman v Turkey, App no 21986/93 (judgment 27 June 2000), [114].
238 Selmouni (n 230) [101].
239 Ireland (n 234) [162].
240 Lindström and Mässeli v Finland, App no 24630/10 (judgment 14 April 2014), [39].
241 Kudla v Poland (2000) 35 EHRR 198, [92].
Supreme Court, the ECtHR has re-iterated in a number of cases that the suffering must go beyond ‘that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment’. This has been applied to conditions of detention, when the cumulative effects of those conditions are so severe that protection is triggered, and during which conditions must be ‘compatible with respect for [prisoners’] human dignity’, a similar standard to the US Supreme Court’s in *Plata*.

Insofar as European human rights jurisprudence is able to inform the present assessment of ESD, some important principles regarding SHU can be derived. First, solitary confinement must not be indefinite, although the ECtHR has permitted terms of several years in SHU. Additionally, where there is no justification for placement in restrictive SHU, or a justification is whimsical, the detention could breach Article 3. A number of ECtHR cases in the past several years have expanded the *Ramirez Sanchez* principle of human dignity to SHU. For example, in *Onoufriou v Cyprus* the Court insisted that SHU ‘should be ordinarily ordered only exceptionally and after every precaution has been taken’. In addition, in 2013 the ECtHR held that extradition of a prisoner who was seriously mentally ill was offensive to Article 3 where it was possible that he would be placed in SHU for long periods of time.

In addition to ECtHR jurisprudence is the law arising from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

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242 Textually, Article 3 ECHR includes “treatment” as well as “punishment”, enabling the protection to be extended to state actions prior to and during arrest, or to pre-trial confinement: issues with which this thesis is not concerned.


244 *Dougoz v Greece* (2002) 34 EHRR 61, [46].


246 *Plata* (n 1) 1928.

247 *Ramirez Sanchez* (n 245)

248 ibid (eight years).

249 *Mathew v The Netherlands* (2006) 43 EHRR 23 (that the defendant could not adapt to prison life was an insufficient justification for SHU); *Iorgov v Bulgaria* (2005) 40 EHRR 7 (three years of unjustified SHU was deemed offensive under Article 3).

250 *Ramirez Sanchez* (n 245) [119].

251 App no 24407/03 (ECtHR, 7 January 2010) [70].

252 *Aswat v United Kingdom* App no 17299/12 (ECtHR, 16 April 2013).
The CPT was derived from Article 3 ECHR in 1989 and provides the most detailed regional response to questions of confinement conditions,\textsuperscript{253} since the Committee has similar oversight and inspection roles as those provided to the UN’s HRC by OPCAT. On its face, the CPT is concerned only with aspirational standard setting and insists that its role is not to resolve disputes.\textsuperscript{254} That said, Morgan notes that most ‘readers of CPT reports’\textsuperscript{255} are interested in establishing whether a certain jurisdiction has been condemned for poor treatment or punishment of its prisoners. The Committee’s reports are undoubtedly influential,\textsuperscript{256} and certainly relevant for the normative exercise intended by this chapter. The CPT adopts a cumulative approach to confinement conditions challenges,\textsuperscript{257} in a similar vein to the US Supreme Court’s totality of conditions assessment of the Eighth Amendment.\textsuperscript{258} With respect to SHU, the Committee concluded after a visit to Bulgaria that ‘a prisoner, undergoing a disciplinary sanction of 14 days in isolation, being held in a small (approximately two metres squared), dark and unventilated cell [was] deplorable\textsuperscript{259} and amounted to inhuman treatment.\textsuperscript{260} While the confinement in solitude itself was not legally offensive, it was the cumulative effect of poor conditions which gave rise to stricter scrutiny, reflecting similar concerns highlighted by the UN’s HRC condemnation of cumulative suffering in US prisons.\textsuperscript{261}

The CPT also publishes a precise and descriptive account of its own minimum standards of prisoners’ rights,\textsuperscript{262} which are not far out of kilter with the Mandela Rules,

\begin{footnotes}
\footnotetext[253]{Rod Morgan, ‘International Controls on Sentencing and Punishment’ in Michael Tonry and Richard Frase, \textit{Sentencing and Sanctions in Western Countries} (OUP 2001) 389.}
\footnotetext[254]{CPT, ‘1st General Report on the CPT’s activities covering the period November 1989 to December 1990’ CPT/Inf (91) 3 (1991).}
\footnotetext[255]{Morgan (n 253) 389.}
\footnotetext[256]{Vasiliades (n 181) 91 (the European regime ‘is becoming known for its progressive policies on…prisoner rights’ and noting that Europeans are the ‘global leaders’ in this field).}
\footnotetext[257]{CPT, ‘Report to the Portuguese Government on the visit to Portugal carried out from 14 to 26 May 1995’ CPT/Inf (96) 31 (1996), [95]: ‘The Committee is particularly concerned when it finds a combination of those [harmful] factors. The cumulative effect of such conditions will be extremely detrimental for prisoners’.}
\footnotetext[258]{Rhodes v Chapman 452 US 337 (1981).}
\footnotetext[259]{CPT, ‘Report to the Bulgarian Government on the visit to Bulgaria from 26 March to 7 April 1995’ CPT/Inf (97) 1 [Part 1] (1995), [109].}
\footnotetext[260]{ibid [110].}
\footnotetext[261]{See (n 197).}
\end{footnotes}
providing states with the opportunity to react with specific responses to human rights issues. Particularly noteworthy provisions of the CPT’s minimum standards include s56(b), which provides that SHU should not be used for periods longer than 14 days, and less for juveniles,263 far below the averages demonstrated across the US in Section 7.4.2. Moreover, s57(c) provides for due process review of SHU after 24 hours, a standard generally met in the US with respect to juveniles,264 but a safeguard with which adult prisoners are seldom provided. Specific provisions of the CPT standards relating to confinement conditions include a prohibition on any cell smaller than six metres-squared,265 and a recommendation of at least one hour’s outdoor exercise per day.266 Applying these minima to the US context again shows the American SHU in a poor light, since many cells measure just 6x8ft (4.47 metres squared),267 far less than six metres squared, and exercise is often restricted to within an indoor holding pen.268

While it must be accepted that the ECtHR gives a wide margin of appreciation to its signatory states with respect to criminal justice,269 and the CPT Standards could be seen as merely aspirant soft law, clearly there are minimum standards towards which the human rights bodies of Europe strive. At least, for the interpretive task of portraying societal values in their best moral light, these considerations have a great deal of merit, and the US is clearly falling short if Europe is to be taken as any form of bellwether region for ESD assessments. The Inter-American system, which can be considered to have made the greatest progress towards a comprehensive and dignity-led prisoners’ rights jurisprudence, at least in principle if not in practice, must now be considered.

263 ibid S56(b) fn1: ‘The maximum period should certainly be lower in respect of juveniles.’
264 Figure 7.2, Column (D).
265 CPT Standards (n 262) S59.
266 ibid S61(b).
7.4.2.2 **Organisation of American States**

As noted in the previous subsection, the OAS established the American Declaration of the Rights and Duties of Man and vowed that all prisoners have ‘the right to be free from cruel, infamous, or unusual punishment.’ Three decades later, via the American Convention on Human Rights (ACHR) the OAS committed to providing every person with ‘the right to have his physical, mental, and moral integrity respected,’ and, to that end, established two principal organs: the Inter-American Commission (IACHR) and the Inter-American Court (IACtHR). Article 5 ACHR goes much further than the ECHR with respect to prisoners’ dignity, stating this right explicitly.

Conley’s remark about the Inter-American human rights system leading the call against SHU is demonstrated most clearly by the IACHR’s Principles and Best Practices (PBB), which urge states to abolish juvenile SHU and restrict it significantly in general. In addition, Article 5 ACHR includes a requirement that states treat prisoners ‘with respect for the inherent dignity of [humans],’ wording similar to the US Supreme Court’s call for prisoner dignity in *Plata,* and the ECtHR’s in *Ramirez Sanchez.* While *Plata* is a relative newcomer to the Eighth Amendment’s history, the jurisprudence of the Inter-American Court of Human Rights demonstrates the region’s maturity, at least judicially, with respect to its high level of prison scrutiny and a “hands-on” approach to confinement complaints. It is worth noting that the actual picture is far worse than aspirant case law will suggest, with extremely high levels of ill treatment, torture, and death in the prison systems of the OAS.

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270 ibid Article XXV.
272 For a review of the functions and processes of these organs, see Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (OUP 2010) 438-441.
273 ACHR (n 271) Article 5(2).
274 See Conley (n 172).
276 ibid PXXII(3).
277 ACHR (n 271) Article 5(2).
278 *Plata* (n 1).
279 *Ramirez Sanchez* (n 245) [119].
member states, even those party to the ACHR.\textsuperscript{280} As such, caution is exercised when relying on the OAS system as an indicator of political morality. That said, the case law is the element considered by the foregoing discussion, and it is that which has developed the most comprehensive set of prisoners’ dignity standards of any transnational system.

Three significant cases illustrate the scope of Article 5 ACHR with respect to SHU in the OAS system. First in 1988 the IACtHR deemed ‘prolonged isolation and deprivation of communication’\textsuperscript{281} a breach of Article 5, since this was in itself ‘cruel and inhuman treatment, harmful to the psychological and moral integrity of the person’.\textsuperscript{282} Next, in 2000, the Court noted the development of international jurisprudence condemning psychological torture,\textsuperscript{283} including ‘acts that produce severe physical, psychological or moral suffering in the victim.’\textsuperscript{284} Finally, in 2006 the IACtHR addressed SHU head on, emphasising the necessity arm of proportionality encouraged by Section 7.3: ‘solitary confinement cells must be used...only during the time necessary and in strict compliance with the criteria of reasonability, necessity and legality.’\textsuperscript{285}

Of the 35 OAS Member States, just 24 have ratified the ACHR: the US has not. Although the US does not accept the jurisdiction of the OAS’s human rights system, the same line of argument as for the relevance of the Council of Europe can be applied, namely that the dignitarian assessment called for by the ESD principle of the Eighth Amendment can be informed by the ‘accumulated legal wisdom of mankind’.\textsuperscript{286} In addition, the greater relevance of the Inter-American regional human rights system than its European counterpart is its


\textsuperscript{281} Velasquez Rodriguez v Honduras (1988) IACtHR Series C No 4, [516].

\textsuperscript{282} ibid.

\textsuperscript{283} Cantarol-Benavides v Peru (2000) IACtHR Series C No 69, [100].

\textsuperscript{284} ibid [102].


geographic proximity to the US, and the fact that the US is of course an OAS member state. Echoing the concerns of the UN Special Rapporteur on Torture, the OAS counterpart noted in 2009 his ‘distress’ upon witnessing the extreme use of SHU in the US. Even stronger condemnation followed in 2013 when the OAS criticised the US for its neglectful placement of juveniles and intellectually disabled inmates in SHU.

Under the foregoing interpretivist approach, which has consistently sought a ‘set of principles’ that represents ‘a sort of consensus among judges, jurists, and lawmakers around the world’, that the US is out of kilter with this consensus is a relevant consideration for the political morality assessment of the Eighth Amendment. Justice O’Connor, though dissenting in *Roper*, noted that the ‘evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with the values prevailing in other countries.’ Clearly, again the US fails to meet this comparative standard of decency, by reference to the Inter-American regional human rights system.

### 7.4.3 Transnational Perspectives: Concluding Points

Through international and regional comparativism it has been shown by this section that SHU is routinely criticised across the world. In particular, various bodies within the two most developed and relevant human rights systems have singled out the harsh practices of the United States for criticism. Any consensus found by the transnational evaluation paints a far more dignity led picture, where principles of proportionality, dignity, and individualisation are prioritised over consequentialist policy objectives. Additionally, respect is found regarding treatment of juveniles and mentally ill inmates, something which has crept onto the American agenda but with much less velocity than on the international stage. The extent to

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289 Waldron (n 286) 132.

290 *Roper* (n 34) 604-605 (O’Connor, J, dissenting).
which the US swims against a transnational tide is highlighted most notably by the 2015 Mandela Rules, the CPT minimum standards, and the calls from regional bodies for greater scrutiny of SHU. In essence, the totality of the American experiment with SHU falls short by this measure of accumulated legal wisdom.

Focusing closely on the criticisms weighed against the US for its use of SHU, a deeper question surrounding the specific human effects is posed. While it has been shown that there is a strong consensus among international and regional human rights bodies, who agree to a great extent with the concerns surrounding US SHU, closer scrutiny of the justifications for that condemnation must be analysed. That scrutiny is the task for the next, and final section of this chapter.

7.5 PROFESSIONAL CONSENSUS

The 2011 Supreme Court decision in *Plata* and subsequent media-led investigations into America’s SHU shone a light into a previously hidden corner of the criminal justice system. Not only has reporting increased, as was shown in Section 7.1, but so has the transnational community’s scrutiny of the US experiment with extreme confinement. Chapter V first noted the unprecedented level of deference accorded by the Court in *Hall v Florida* to professional medical opinion, arguing that it provides a ripe challenge for further constitutional attacks.291 In Chapter VI that claim was developed with respect to SHU, laying the foundations for a constitutional argument against its imposition. One of the proposed grounds of attack was that, by imposing SHU on mentally ill inmates, states ‘forget the teachings of the Eighth Amendment [and] permit sick people to be punished for being sick’,292 the *Robinson* principle.

To substantiate the claim that SHU offends that principle and the *Gregg-Plata* condition of respect for dignity,293 a final indicator of political morality must be analysed. By

292 *Robinson* (n 14) 678.
293 *Gregg* (n 2) 173; *Plata* (n 1).
reflecting on a developing professional consensus regarding solitary confinement, throughout this final section it will be argued that the Eighth Amendment mandates curtailment of SHU. As earlier chapters have emphasised, while professional consensus is not a principal determinant of evolving standards, it certainly should factor in the calculation.

7.5.1 THE EXPERTISE OF NON-PROFIT ORGANISATIONS AND PROFESSIONAL BODIES

While Benjamin Franklin and his fellow framer Benjamin Rush had called for limited punishments in the new Union, their support for the first SHU-style prison in Pennsylvania (Walnut Street) was somewhat misguided. Rush, the ‘father of American psychiatry’, viewed the solitude afforded to Walnut Street prisoners as providing them with a moral cure. Just three decades into the 19th Century the first signs of professional sentiment regarding SHU materialised, and early reports of hallucinations and dementia of those confined in SHU were noted. The history of imprisonment and the shift in penology was traced in Chapter VI, Section 6.2. Martinson’s famous rejection of rehabilitation, the Marion riots, and the advent of mass-incarceration all led to a firm belief that Walnut Street-style SHU was the only remaining option for “the worst of the worst”. As a result of a more oppressive and far-reaching use of SHU starting to emerge in the US, it is hardly surprising that lobbying has taken a new turn. Non-profit organisations and professional bodies have directed resources to the scrutiny of and opposition to the revival of such a severe punishment, which is now the reality for tens of thousands of prisoners.

The condemnation of SHU in 2015 is harmonious. Amnesty International (AI), the American Civil Liberties Union (ACLU) and Human Rights Watch (HRW), large civil liberties organisations based in the US, have been quick to endorse a variety of improvements. All three organisations recommend more access to meaningful rehabilitation in prisons; daily

295 O’Donnell (n 146) 39.
296 Lisa Guenther, Solitary Confinement (University of Minnesota Press 2013) 10.
outdoor exercise; and less frequent use of restraints. HRW has noted that social isolation results in a greater likelihood of rule violations, and use of force subsequently increases, a by-product of SHU. In addition, these organisations have made clear that they oppose any long-term SHU for prisoners who are mentally ill, with the ACLU emphasising further concern surrounding juvenile imprisonment in solitary.

The record generated by professional organisations reads in a similar way. First, the American Public Health Association (APHA) stated in 2003 that isolation increases the chance of suicide in custody. As such, the APHA cautions, SHU should be used only with extreme care. A psychiatric review of the damage SHU can do will illustrate these concerns in Section 7.5.2. In the same year, the American Bar Association (ABA) released its most recent edition of its Standards for Criminal Justice. Standard 23 outlines the guarantees which the ABA views as necessary for prisoners’ protection from ‘cruel, inhuman or degrading’ treatment, containing similar protections to those envisaged by the various international and regional human rights documents assessed in Section 7.4. Specifically, s23 mandates that SHU is used only ‘for the briefest term and under the least restrictive conditions practicable’. In addition, prisoners with serious mental illness are not to be placed in long-term SHU, and an individualised assessment should take place of any juvenile. More specific SHU-related protections are incorporated into the ABA Standards. One example is

\[\text{298 AI, } \text{Entombed (AI 2014) 18; HRW, } \text{Callous and Cruel (HRW 2015) 122; ACLU, } \text{‘We Can Stop Solitary’ <https://www.aclu.org/feature/we-can-stop-solitary> accessed 13th May 2015.}\]
\[\text{299 HRW (ibid) 34-36.}\]
\[\text{300 ibid 122 (if a ban is not forthcoming, HRW states that mentally ill inmates ‘should receive at least 20 hours a week of out-of cell time for structured and unstructured activities’).}\]
\[\text{301 ACLU, ‘It’s practically torture and we’re doing it to our youth?’ <https://action.aclu.org/secure/stop-juvenile-solitary> accessed 13th May 2015.}\]
\[\text{302 APHA, } \text{Standards for Health Care in Correctional Institutions (APHA 2003) 60.}\]
\[\text{303 ABA, Standards for Criminal Justice: Treatment of Prisoners (ABA 2003) (ABA Standards).}\]
\[\text{304 ibid S23-1.1(d).}\]
\[\text{305 UDHR (n 174); UNCAT (n 195); ICCPR (n 196); Mandela Rules (n 183).}\]
\[\text{306 ECHR (n 228); CPT Standards (n 262); ACHR (n 271).}\]
\[\text{307 ABA Standards (n 303) S23-2.6(a).}\]
\[\text{308 ibid S23-2.8(a).}\]
\[\text{309 ibid S23-2.6(a).}\]
the requirement that prisoners are always provided with ‘reasonable darkness during the sleeping hours’, and that no cell should ever be smaller than 80 square-feet.

Whilst assessing US conditions under every single minimum standard is not the present aim, it is worth pausing to note that the ABA Standards, redolent of the UN’s Standard Minimums and the Council of Europe’s equivalent, are much more aspirational than descriptive of true conditions. Chapter V noted that SHU cell sizes reported by the ACLU varied from 60 to 90 square-feet in different forms. In Marion, the prison subjected to the longest lockdown in US history and that which started modern solitary confinement, SHU cells were reported as being just 48 square-feet, far below the ABA Standards. In addition, some cells across the US have been reported as subjecting prisoners to unrelenting artificial lighting, sometimes for 24 hours per day, again contradicting the ABA’s guidelines.

The ABA is in a unique position in the US with respect to its ability to represent the views of all stakeholders, providing the present discussion with a ‘consensus view of representatives from all segments of the criminal justice system’. Moreover, the citation of the ABA Standards in over 120 US Supreme Court decisions, in addition to 700 federal circuit and more than 2,400 state supreme court judgments places them high in the informative hierarchy. Nonetheless, broader bodies of professional consensus aid the present analysis with its aim to interpret ESD in light of the strongest base of political morality possible, striving for the best moral outcome. The World Medical Association (WMA) became the latest prominent organisation to single out solitary confinement in

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310 ABA Standards (n 303) §23-3.7(a)(i).
311 ibid 23-2.8(e).
312 Mandela Rules (n 183); CPT Standards (n 262), both discussed in Section 7.4.
313 ACLU, A Death Before Dying (ACLU 2013) 5.
314 ibid 5.
particular, urging in 2014 that SHU ‘should be imposed only as a last resort’. In addition, the WMA wrote, ‘[a]dverse health consequences should lead to the immediate cessation of solitary confinement’, including mental health. As the next subsection will show, these consequences are reasonably inevitable in SHU.

7.5.2 PSYCHIATRY AND THE LAW

In 2014 Miller and Fluent sought to draw attention to the ‘rapidly evolving landscapes in the neurosciences and social sciences’. An expansion of this emerging interdisciplinary field was acknowledged by the majority Justices in Hall, who remarked that ‘psychiatric and professional studies’ informed their interpretation of the Eighth Amendment, citing the American Psychiatric Association (APA) as the vanguard of this task. Published in the same volume as Miller and Fluent, Kapoor observed that, ‘as a profession, we have stated with clarity that persons with mental illness deserve high-quality treatment...and the use of the most extreme forms of punishment should be avoided with them.’ Talking specifically about SHU, Kapoor based this conclusion on a 2013 Position Statement by the APA, which she viewed as representing a professional consensus against the solitary confinement of mentally ill inmates.

7.5.2.1 MENTAL HEALTH

There are two principal grounds of attack on which psychiatric commentators denounce SHU. The first of these grounds is the punishment’s impact on mental health. These

319 ibid Conclusion 3.
320 ibid Conclusion 5.
322 Hall (n 291) 1993.
323 ibid.
‘psychopathological’ effects, located by the study of mental disorders, have been observed for decades. Grassian undertook the earliest contemporary study of SHU, finding in 1983 that psychopathological symptoms reported among solitarily confined inmates in a Massachusetts prison ‘were strikingly consistent’. Of the participants, who were held in SHU for an average of two months, a majority experienced perceptual changes including hallucinations and ‘derealisation’, significant anxiety and tachycardia (extreme over-pulsation of the heart), partial amnesia, primitive fantasies such as mutilation and torture, and problems with impulse control. All prisoners who were interviewed experienced rapid diminution of symptoms when removed from SHU, demonstrating that long-term impact can be alleviated. Grassian’s study evoked a generation of psychiatric study into solitary confinement, and reports were published with consistent results in the ensuing decades.

Haney carried out one of the most comprehensive psychiatric studies in 2003, where prisoners held by the California Department of Corrections in Pelican Bay were examined by a variety of methods. Direct studies (case studies and personal accounts) were combined with correlational analysis (housing type versus psychiatric outcomes). Haney found 90% of prisoners in SHU experiencing extreme anxiety; 80% suffering headaches and interrupted sleep, and 70% demonstrated a potential for ‘impending breakdown’. ‘[T]here is not a single published study of solitary or Supermax-like confinement’, Haney concluded, ‘in which nonvoluntary confinement lasting for longer than 10 days...failed to result in negative psychological effects.’ In addition Shalev has noted that, while the psychological effects outlined above are the most consistently observed and therefore widely reported, further
consequences have been found regarding physiological consequences of long-term SHU. Grassian first described the combination of ill effects experienced by SHU prisoners as ‘SHU Syndrome’ in 2006. Symptoms include ‘delirium-like effects’ such as EEG abnormalities, heart palpitations, and even deterioration of eyesight.

That professionals are in agreement regarding the psychiatric consequences of SHU is a compelling charge. Kupers raised these concerns in federal court testimony in 1993, attesting that all SHU prisoners will, without exception, deteriorate psychologically. That contention has been supported by a preponderance of studies into solitary, and is compounded by a widespread lack of psychiatric care in US prisons. Arrigo and Bullock’s point that inmates react differently to solitary confinement, introduced when discussing individualisation in Section 7.3, is poignant here. Sensory deprivation, for example, has been shown to affect inmates with mental illnesses and personality disorders more acutely than those without. In addition, O’Donnell observed that inmates most able to cope with SHU had developed good attachments during childhood. Given that prisoners, especially those likely to find themselves in SHU, are usually those with pre-existing psychiatric disorders and those who experienced troubled childhoods, mental health effects are felt disproportionately from the outset. Concern does not end with medicine, however, and the social effects of SHU are another area to be considered.

7.5.2.2 SOCIAL EFFECTS

As well as psychopathological concerns arising from SHU, a second ground of attack views consciousness as something that relates more intricately to social interaction. Guenther

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338 ibid 338.
339 Electroencephalogram, which observes the electrical activity essential to healthy brain functioning. ibid 331.
340 Grassian and Friedman (n 138).
341 Declaration of Dr Terry A Kupers, *Jones v El v Berge*, No 00-C-421-C (WD Wis 1993).
342 One of the concerns which arose in *Plata* (n 1).
343 Arrigo and Bullock (n 137) 629.
344 Grassian and Friedman (n 138).
345 O’Donnell (n 146) 97.
takes this approach, noting that, unlike Rush’s early view of the mind as a tabula rasa which can be wiped clean by penance, the social view conceptualises consciousness as formed out of noesis (intentional acts) and noemata (intentional objects). By depriving inmates of everyday encounters with people and objects, ‘many inmates become unhinged from reality.’ Guenther uses this approach to explain the suffering which SHU causes, insisting that the results are far deeper than mental illness. A person’s existence, her ‘social, phenomenological, and ontological pathology’ is ‘beyond the language of the clinic’. The implication of this approach to an inmate held in SHU is he is denied his full personhood.

While this social line of attack is difficult to sustain as it is measurable only by first-hand accounts, it offers pause for thought. When a prisoner is locked away in the deepest, most oppressive corner of a prison, hidden from the rest of the inmate population and far from the outside reality, his concept of social depth is removed. The most relevant impact of such detachment is the risk to prisoners’ rights in these situations. Gregg, and more recently Plata, emphasised the importance of dignity to the Eighth Amendment. For dignity to prevail in the subjugated corners of the criminal justice system, it is essential for all parties to appreciate the oppression which SHU can cause. Effects are measurable not just medically but socially; not just in terms of health, but in terms of personhood.

7.5.2.3 Positive Outcomes?

While medical and sociological professional consensus might seem harmonious regarding the concerns arising from SHU, a different view does exist. O’Donnell has added a new category to the solitary confinement literature, noting ‘a miscellany of positive effects’. Examples include clarity of thought, heightened feelings of internal life, and the chance for prisoners ‘to grow in maturity and wisdom’ while confined. O’Donnell quotes

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346 Maestro (n 294) 18-19.
347 Guenther (n 296) 24.
348 ibid 145.
349 ibid 194.
350 O’Donnell (n 146) 62.
351 ibid.
Prochnik, who described silence as a ‘fertile pause’,\(^{352}\) where virtues of solitude such as reflective perspective, ‘attunement’\(^{353}\) to self, and to nature can be pursued uninterrupted. That said, O’Donnell’s positive findings from solitude are almost exclusively dependent on the experiences of voluntary hermits, such as monks and other self-isolating introverts.\(^{354}\) He admits that, while silence might provide mental benefits, when forcibly imposed and ‘uninterrupted for too long, its fecundity threatens to overwhelm.’\(^{355}\) Further, while O’Donnell might have tried to shed light on the positives of isolation, his attempt ends with an acknowledgement that SHU ‘is insidious because there are no appropriate points of reference, no benchmarks of sanity.’\(^{356}\)

Nonetheless, there is one final point of reference to consider in this subsection. That point, arising from the “Colorado Study”\(^{357}\) was met with vociferous responses across the combined field of law and psychiatry.\(^{358}\) With results indicating that a generation of professional consensus might be false, such a rejoinder was unsurprising. The Study investigated mental illness in SHU prisoners, testing whether mental illness was in fact caused by the solitary confinement they endured, the theory re-emphasised throughout the extant literature. The alternative hypothesis posed by O’Keefe and her team in Colorado maintained that mentally ill inmates were inherently less able to cope in prison, so were more likely to be placed in SHU. The study found in favour of this hypothesis, claiming that the mental condition of 20% of inmates held in SHU even improved.\(^{359}\) Rather than turning a quarter-century of consensus on its head, the study was met with condemnation throughout the field, the reasons for which will now be considered in order to apply the post-interpretivist stage to this indicator of political morality.


\(^{353}\) ibid 85.

\(^{354}\) ibid 67, discussing the Trappist monk Thomas Merton who wrote of blissful isolation where one ‘sits on the door-step of his own being’ (quoted in Colum Kenny, The Power of Silence (Karnac 2011) 224).

\(^{355}\) ibid.

\(^{356}\) ibid 220.

\(^{357}\) Maureen O’Keefe, Kelli Klebe, Alysha Stucker, Kristin Sturm and William Leggett, One Year Longitudinal Study of the Psychological Effects of Administrative Segregation (Colorado Department of Corrections 2010).

\(^{358}\) Discussed in Subsection 7.5.3.

\(^{359}\) O’Keefe et al (n 357).
7.5.3 Post-Interpretive Stage and Conclusions

As was inevitable, numerous psychiatrists who had spent their careers warning Boards of Correction and federal judges about SHU were quick to voice opposition to the Colorado Study, and with good reason. To begin with, Shalev and Lloyd attacked the study, noting numerous methodological issues, which render the results unreliable and unrepresentative.\textsuperscript{360} The participants all had extensive history of prior imprisonment;\textsuperscript{361} meaning results were at risk of over-generalisation. In addition, between 50 and 66\% of participants were recorded as providing inconsistent self-reports,\textsuperscript{362} the sole means of data collection in the study. Shalev and Lloyd concluded that it would be a ‘tragic’\textsuperscript{363} result if the flawed Colorado Study resulted in a greater use of SHU.

Similar concern was raised in the 2011 iteration of the Annual Correctional Mental Health Report, where a member of the advisory committee for the Colorado Study itself voiced her apprehensions.\textsuperscript{364} That member, Jamie Fellner, emphasised that, although the control group (of non-mentally ill inmates) deteriorated at a similar rate to the mentally ill inmates in Colorado, many members of both groups ‘were already highly symptomatic at the start of the study’.\textsuperscript{365} She concluded that, if O’Keefe et al ‘had assessed the impact [on] inmates who did not already have such symptoms, the results might well have been different,’\textsuperscript{366} raising questions around the claims made by the study. Kupers has added similar criticisms, noting that the researchers excluded two groups to whom SHU can be most damaging.\textsuperscript{367} By including only prisoners who were willing to volunteer, and those with a minimum level of education, the results were made less generalisable by excluding ‘the

\textsuperscript{360} Sharon Shalev and Monica Lloyd, ‘Though this be Method, yet there is Madness in’’ [2011] Corrections & Mental Health 1, 2
\textsuperscript{361} ibid 2.
\textsuperscript{362} ibid 4.
\textsuperscript{363} ibid 5.
\textsuperscript{365} ibid.
\textsuperscript{366} ibid.
groups most likely to be adversely affected by solitary confinement’, namely prisoners who refuse to socialise and those who cannot be stimulated by reading and writing.

The methodological issues surrounding this professional consensus do not end with the Colorado Study, however. A number of authors have warned against equating expert testimony with law for constitutional interpretation purposes in general. Godwin provides the testimony of James Grigson as an example. Grigson was a psychiatrist who frequently suggested in capital trials that his predictions were ‘medical opinion[s]’ and were 100% accurate. He was criticised in the Barefoot v Estelle dissent, where Justice Blackmun warned that ‘the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist’s words, equates with death itself.’ Indeed, if a high level of credibility is granted to professional consensus, caution must be urged. Professional consensus cannot be taken as the sole indicator of political morality, and nor has such a claim been made.

Scharff Smith has summarised the main methodological issues arising in SHU studies. Examples include response-bias; the unrepresentativeness of laboratory based studies; lack of control-groups; and error. In addition, Bennion has highlighted the impact of small sample sizes and the ‘Hawthorne effect’, where studying isolation itself leads to an amelioration of the situation: by being studied, the inmate is no longer alone. As such, the test results might even under-estimate the negative effects of SHU. Nonetheless, a substantial body of professional consensus, arising from both non-profit organisations and the hybrid field of psychiatry and the law is unfailing in its persistent and consistent expression of

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368 ibid.
371 ibid 680-681.
372 ibid.
374 Scharff Smith (n 297) 450-453.
Concern for the deleterious effects of SHU. Sample sizes give rise to further concern. As noted with respect to opinion polls, the representativeness of results can be determined – in part – by the sample’s population size. Since the number of inmates in SHU stands at around 81,000, and a number of the studies discussed in this section examined as few as 14 inmates, the reliability of the resultant data is questionable. Financial and ethical concerns surrounding access to inmates are of course a practical reality, but this does not eliminate accusations of poor data. Nonetheless, the consonant condemnation of SHU from the psychopathological profession remains a compelling indicator of ESD, at least insofar as it affirms the trajectory of the transnational consensus discussed earlier, even if not providing dispositive evidence.

Research into human phenomena falls short of fully explaining situations; sometimes only first-person statements can give a true account of the full extent. Even then, subjective accounts are as fallible as any other measure. Jack Abbott, whose descriptions of lengthy confinement in SHU have been labelled ‘the most powerful prison narrative in American literature’ gives one of several personal insights into the effects of SHU. In In The Belly of the Beast, Abbott recalled that ‘[s]ometimes I doubt that anyone with a philosophical turn of mind is fit to judge anyone’. Nonetheless, psychiatric studies can attempt to frame medical consensus, and reviewing relevant bodies creates a barometer for professional opinion.

For an Eighth Amendment interpreter to include all aspects of political morality, an objective review of relevant professional consensus is instructive to this venture. As jurisdictions across the US continue to subject prisoners to the extraordinary conditions created by SHU, they swim further against a rising tide. Long-term solitary confinement, especially of juveniles and those with mental illness, is unfailing in its ability to unite the views of professionals, who are resolute in their unified opposition.

376 ibid.
377 See Chapter V, (nn 32-36) and accompanying text.
378 Ferguson (n 315) 140.
Chapter VIII: Conclusion

CHAPTER VIII

CONCLUSION

‘We must’, Dworkin insisted, ‘do our best...to make our community’s fundamental law what our sense of justice would approve’.1 The US Supreme Court’s Eighth Amendment jurisprudence has been shown to embrace this interpretivist approach to adjudication, with the ESD principle pervading interpretation of the punishments clause. 2014 and 2015 saw numerous landmarks for the scrutiny of solitary confinement, with the most active nationwide reforms in recent decades, and high-profile exposés in the national and international media. In July 2015 President Obama became the first US President to visit a federal prison while in office, following his experience with comments that solitary confinement (SHU) was ‘not smart’, and ‘an environment...that is often more likely to make inmates [worse]’.2

Just one month later, and despite Obama’s call for an executive review of ‘the overuse of solitary confinement across American prisons’,3 US Board of Prisons director Charles Samuels denied the existence of solitary confinement before a Senate oversight committee.4 As has been shown throughout the previous chapters, Samuels’s statement is emphatically false, and Obama’s prudent – albeit overdue – call for judicial scrutiny of SHU is timely. The foregoing analysis provided a framework for this scrutiny, and suggested how best the court should go about adjudicating it. During the discussions engaged with throughout this thesis a number of recurring themes arose, and it is those that will provide the driving force for this final chapter.

1 Ronald Dworkin, Taking Rights Seriously (Gerald Duckworth 1977) 415.
3 ibid.
1. Commitment to Proportionality and Individualisation

Since Justice McKenna declared it in 1910, and Chief Justice Warren after him, the principle of decency within the Eighth Amendment has markedly transformed the scope and application of the punishments clause. Since *Gregg v Georgia*, the Court has narrowed capital punishment to a near vanishing point. Recent, non-capital punishment has also faced similar, albeit not so conclusive judicial activism. Personal vengeance has been conflated with the distinct rationale retributivism, an error displayed consistently by the Supreme Court. Morality plays no role when the ‘effects of occasional ill humors in the society’, such as those created by penal populism, are provided with citation by the Court. Vengeance, an archaic and illegitimate penological goal, which aligns with a punitive populace, finds no place in the principles that underlie the punishments clause. To ensure that respect is paid to proportionality, a vital tenet of the Eighth Amendment, the Framers’ warning against the ‘tyranny of the majority’ is urged.

The model of proportionality refined by Robinson as ‘deontological desert’ embodies principles found throughout the Court’s punishments jurisprudence. Consistency (derived from the holdings in *Furman v Georgia* and *Gregg*) and individualisation (required by the *Lockett v Ohio* and *Eddings v Oklahoma* doctrines) are reconciled by such an approach. The Court’s commitment to proportionality in *Graham v Florida* and *Miller v Alabama*, for example, also demonstrate a willingness further to evolve the punishments clause in the non-capital sphere. With respect to imprisonment conditions, specifically those in SHU, the treatment and suffering of individuals is the touchstone for Eighth Amendment

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5 *Weems v US* 217 US 349 (1910) 373.
analysis. Again, the Court’s commitment to proportionality in that area of punishment, applied most recently in *Brown v Plata*, is promising for future claims.

2. Human Rights Framework for ESD Claims

When selected in an unprincipled and seemingly arbitrary, empirical fashion, as shown to be the case in *Furman* and *Atkins v Virginia*, polls are a source of political morality not sieved rationally in the way interpretivism understands law. Such an argument also applies to the selection of states for ESD analysis, which also undercuts the counter-majoritarian approach to political morality facilitated by interpretivism. While majoritarian analysis can be informative of national consensus, indeed state counting and polling data regarding contemporary SHU was provided to show that SHU is gradually being restricted across the US, the Court has also shown a willingness to move away from those strictly majoritarian bases. *Plata* gave rise to a wider element of the ESD principle, attaching a human rights framework to the Court’s confinement conditions precedents for the first time. In conclusion, it can be contended that evolutive assessments of SHU, and its associated political moral principles, should be informed by the normative standards of transnational legal institutions and agreements.

The US can be concluded as swimming against a growing tide in opposition of its SHU practices. By delving further into the background of the law than simply reflecting on the policies of elected representatives, transnational analysis compels the conclusion that SHU neglects the *Gregg* condition that punishments must ‘accord with “the dignity of man”’. Whether critiqued according to the UN Standard Minimum Rules for the Treatment of

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16 131 S Ct 1910 (2011).
18 Novel data was provided, compiling contemporary state counting previously demonstrated on a much smaller scale (See Jacobs and Lee provided limited data about solitary confinement in Ryan Jacobs and Jaeah Lee, *(MotherJones* November/December 2012) ‘Maps: Solitary Confinement, State by State’ <www.motherjones.com/politics/2012/10/map-solitary-confinement-states> accessed 1st July 2014) and a review of contemporary opinion polls on SHU was carried out. As a result, a clearer picture of the maximum stays in solitary, state-by-state, was drawn. See Chapter VII for a discussion of this data and its application, when sieved rationally.
19 *Gregg* (n 7) 173, citing *Trop* (n 6) 100.
Prisoners,\(^\text{20}\) the new Mandela Rules,\(^\text{21}\) the Basic Principles for the Treatment of Prisoners,\(^\text{22}\) UN Convention Against Torture’s Optional Protocol,\(^\text{23}\) or an abundance of declarations and decisions by the HRC, ECtHR, and IACtHR, the US falls short of transnational human rights standards. Immediate cessation of the incarceration in SHU of mentally ill or juvenile inmates should be followed by closer scrutiny of this practice, at least at a domestic level.

3. **Professional Consensus: Unified Against SHU**

In addition to the transnational analysis, America’s use of SHU has also united psychiatric and medico-legal professionals, whose condemnation of this punishment forms a consensus. The interpretivist’s aim to fill the gap left open by positivism by appealing to community practices and understandings benefits from additional, expert information regarding community values of political morality. Rational interpretive safeguards, including the adoption of stricter scrutiny, ensure that *amicus* facts are not provided with blind-faith credence, something the Court should honour when reviewing challenges to punishment. This element of ESD, professional consensus, was cited in an unprecedented way in 2014, where the Court in *Hall v Florida* relied heavily on scientific briefs for its analysis of intellectual disability in capital trials.\(^\text{24}\) *Hall* provides a ripe challenge for further constitutional attacks on punishment through professional medical consensus.

While such an attack was abandoned in May 2015 where the Justices saw fit to deny *Bower v Texas*,\(^\text{25}\) a case challenging *inter alia* the practice of executing a defendant ‘who has already served more than 30 years on death row while exercising his legal rights in a non-abusive manner’,\(^\text{26}\) the chance for review has not been missed. The ‘ever-increasing fear and

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\(^\text{22}\) UNGA Res 45/111 (1990) UN Doc A/45/49, 45 UN GAOR Supp (No 49A) 200.

\(^\text{23}\) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 22 June 2006) UNGA RES/57/199 (2002).


\(^\text{25}\) *Bower v Texas* (2015 No 14-292) cert denied.

\(^\text{26}\) Petition for Writ of Certiorari, *Bower v Texas* (No 14-292) i.
distress" condemned in *Trop* is applicable to contemporary SHU conditions, as is the principle in *Robinson v California*, in which the Court noted that society ‘would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick.’ By confining juveniles and mentally ill inmates in SHU, often for indefinite periods of time, a vast majority of states offend the principles of dignity vital to the punishments clause. Given the Court’s commitment to dignity in *Plata*, especially in the context of prison conditions, the outlook for further judicial review is promising.

4. Avenues for Future Research

Optimism on the part of prisoners seeking an alleviation of their conditions should be guarded by reality. *Glossip v Gross*, the Court’s final Eighth Amendment decision of the 2014-15 term, fell short of Kennedy’s earlier hope in *Plata*. The outcomes of this research have implications for theorists hoping to bolster their understanding of the Eighth’s evolutive decency principle, extending it to other areas of punishment, and to petitioners attempting to sustain such a constitutional claim. Mass incarceration remains a further route of analysis, which Simon began in 2015, but the Court has yet to revisit since its condemnation of the Californian system in 2011.

Additionally, the meteoric rise of African-American overrepresentation in prison (and on death row) continues, and the Court’s reluctance to examine this issue in *McCleskey v Kemp* has not been alleviated. A further examination into the racial disparities found in SHU is an additional route of analysis which this author would intend to carry out in the future, and one which would further contribute to the proportionality assessment of this punishment. Kirchmeier’s disbeliefs at the Justices’ failure to heed the warnings of the statistical evidence

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27 *Trop* (n 6) 102.
29 ibid 678.
31 *Plata* (n 16).
they cited favourably in 1987 could be rectified in the 2015-16 term, where SCOTUS will consider *Foster v Chatman*, which asks whether the Georgia Supreme Court failed to recognise racial discrimination in a capital appeal when it had become apparent that, at trial, prosecutors wrongly offered ‘race-neutral’ justifications for what could in fact be deemed wilful and unconstitutional discrimination.

Another area of judicial scrutiny of SHU is one which was scoped out of the present discussion, for its exclusion from the punishments clause’s purview. That area, pre-trial confinement, is a practical concern for the suffering of inmates who have not yet been sentenced, but may still be held in severe conditions of long-term SHU. A recent example was Kalief Browder, who was held in New York solitary confinement for three years, whilst a juvenile. Despite being released when his charge of theft was eventually abandoned, Browder committed suicide in June 2015, aged 22. His case was cited by Justice Kennedy in a lone concurrence announced the same month. While pre-trial confinement might be better suited to due process claims in the US setting, since the Eighth Amendment extends only to post-sentencing punishment, its careful examination is nonetheless warranted, and the human rights model of *Plata* provides a starting point.

The conclusions drawn by this analysis also consider the professional literature. In particular, O’Donnell’s musings over ‘a miscellany of positive effects’ arising from solitary confinement are not evidenced by the extensive psychiatric review carried out. O’Donnell admits that solitude may only be a positive experience if self-imposed, and the situation in American SHU has been shown to be, in reality, far more sinister. In addition the Colorado

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34 ibid.
35 See Chapter II, (n 279).
37 ibid.
39 An assessment of this separate issue, which is now dated, can be found in Peter Scharff Smith, ‘The Effects of Solitary Confinement on Prison Inmates’ (2006) 34 Crime and Justice 441, 445.
41 ibid 67.
Chapter VIII: Conclusion

Study, led by O'Keefe, left gaps which, if filled, could benefit professional knowledge of SHU. For example, a more rigorous investigation into the effects of solitary confinement could provide novel insight into the effects on the confined. Such rigour would be provided by a multi-disciplinary, collaborative approach where different participants were studied. Those with no or little history of prior imprisonment and prior mental illness would be assessed in order to determine the impact on inmates who were not already symptomatic at the start of their solitary confinement. In addition, the groups excluded by the Colorado Study (prisoners unwilling to volunteer, and those without a minimum level of education) would be studied in this future research to understand the effects on those most likely to be adversely affected. Naturally, further practical and ethical concerns may arise in this instance, but the suggestion is not implausible.

Jefferson’s statement in 1816 that ‘[w]e might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors’ is pertinent at this point of departure. We might as well condemn a man, or indeed a boy, to the conditions of imprisonment found in Cherry Hill – inspired by a 1751 English solitary confinement statute – as civilised society to forget the evolving standards of decency of the Eighth Amendment. To overlook the contemporary injustice proliferated by SHU is to neglect ‘the essence of human dignity inherent in all persons’, and to ignore the moral principles that permeate the Constitution’s punishments clause.

42 Maureen O’Keefe, Kelli Klebe, Alysha Stucker, Kristin Sturm and William Leggett, One Year Longitudinal Study of the Psychological Effects of Administrative Segregation (Colorado Department of Corrections 2010).
44 Plata (n 16) 1928.
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<td>Anti-Drug Abuse Act of 1986 Pub L 99-570, 100 Stat 3207</td>
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<td>Chinese Exclusion Act (CEA) 1882</td>
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<td>Civil Rights Act of 1960 74 Stat 89, Pub L 86–449</td>
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<td>Habeas Corpus Act 14 Stat 385 (39th Cong) (1867)</td>
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<td>USA PATRIOT Act of 2001 HR 3162 (107th Cong)</td>
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— —, Art I, Section 9  
— —, Art II  
— —, Art II, Section 2, Clause 2  
— —, Art III  
— —, Art V  
— —, Art VI  
— —, Art VI, Clause 2  
— —, Art VI, Clause 3  
Voting Rights Act of 1964 79 Stat 437, Pub L 89-110

9.2.2 US STATE LAW

2 SJ Res 93, 2012 Leg (Va 2012)  
6 Va Admin Code §35-140-560(E)  
9 Del Admin Code 105-9.6.1.3  
37 Tex Admin Code §343.288  
55 Pa Code § 3800.206  
—— §13A-6-2(c) (1982)  
Ala Admin Code R 950-1-6-05(3)(d)-(h)  
Alaska Admin Code, tit 7 §52.900(16)  
Ariz Rev Stat Ann 13.703.02 (2001)  
—— §13-703(F)(6) (1988)  
—— §13-757(B) (2013)  
Ark Code Ann §5-4-104(b) (1997)  
—— §5–4–618 (1993)  
—— § 5-10-102 (2010)  
Ark Admin Code 016.01.9-3-C  
Cal Code Regs, tit 15 §3341.5(c)(9) (2013)
— —, tit 15 §4634
Cal Penal Code §190-3-1 (2012)
— — §3604 (2013)
— — §17(b)(1) (West 1999)
— — §17(b)(5) (West 1999)
— — §3700 (1949)
— — §3701 (1949)
— — §667(b) (West 1999)
CGSA §46b-133(e)(6) (Connecticut)
Chapter 352 of the Laws of New York of 1888
Chapter 489 of the Laws of New York of 1888
Code Wyo R, Department of Family Services, Certification of Providers of Substitute
Care Services ch 3, §2(a)(iv)
Colorado Department of Human Services Division of Youth Corrections Policies §§
14.3B(II)(A); (C)(1)(c)
Conn Gen Stat §53a.46a (2001)
Del Code § 3902 (2015)
DJJ Policy 3.18.3(III)(A) (Kentucky)
Fla Admin Code RR 63G-2.012.4(a); 4(j)(5)(d)
— — §921.137 (2001)
— — §921.137(1) (2012)
— — §921.141(2) (1981)
— — §921.141(3) (1983)
— — §17-7-131(j) (Supp.1988)
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Georgia Department of Juvenile Justice, Policies 16.5(I)(3); (L)(2)
Idaho Admin Code R 05.01.01.244
Ind Code §§35.36.9.2-6 (1993)
Indiana Department of Corrections Policies and Procedures 03-02-101 (III)(F)-(I)
Iowa Admin Code 441-105.10(3)(g)
Kan Admin Regs §§123-12-1301(b)(1); 1308
— — §532.135 (1990)
— — §532.140 (1990)
La Admin Code, tit 67, Pt V, §§7505; 7515(E)(4)
La Stat Ann §14:42 (West Supp. 1996)
Mass Regs Code, tit 109, §§5.01-5.04
— — Human Services Code Ann §9-227(b)(2)
Mich Admin Code R 400.10176
— — Public Act No 59 of 2013 (97th Legislature, 2013)
Minn R 2911.2850
— — §565.030 (2001)
Mont Admin R 20.9.629
NC Department of Juvenile Justice and Delinquency Prevention Policy R&P/DC 2.3
NCDOC Rules and Policies (2010) §§(8)(a)(1); (b)(1); (c)(1); (d)(1)
Neb Admin Rules & Regs, Tit 83, Ch 13, §005
NC Gen Stat §14-17 (Cum Supp 1975)
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Ohio Rev Code Ann §2929.04(B) (1975)
— — — tit 10, §7115(K) (2007)
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Oklahoma Const, Art VII §1(C)
Or Rev Stat Ann §169.750(2)(A)
Policy 4061(12)(d)(x); 4061(13)(b)(i)) (Arizona)
RI Code R 14-2-1200.1307(A)
SD Codified Laws §22-7-8 (1979) (amended 1981)
South Dakota Department of Corrections Policy 1.3.C(IV)(10)
Tenn Comp Rules & Regs 14-03-.08(4)-(6)
Tex Penal Code Ann §12.42(c)(3) (West Supp. 2007)
— — §21.06(a) (2003)
— — Tit. 3 §12.42(d) (1974)
— — Sess Law Serv, Ch 1184 (SB 1003/HB 1266) (2013)
Utah Department of Human Services, Division of Juvenile Justice Services, Policy No
05-05(IV)(E)(4)
Va Code Ann §18.10(e) (1975)
Vt Admin Code 12-3-508:659-664
Washington Juvenile Rehabilitation Administration Policy 22-500(3)(D)
— — §10.95.180(1) (2013)
— — §10.95.030 (1993)
Wis Admin Code DOC §346.47
Wyo Stat Ann §7-13-904 (b) (2013)
9.2.2.1 Bills

Constitution Restoration Act of 2005 S520, HR1070 (109th Cong) (Federal)
LC 2085/ HB 536: Montana Solitary Confinement Act 2013 (Montana)
Bill 36, 148th General Assembly of the State of Delaware (2015-16) Tit 11 §3902, §6535(c) (Delaware)
Cal SB No 61 2013 (California)
NH HB 480-FN 2013:Relative to Solitary Confinement (New Hampshire)
Senate Bill 14-064, Colorado Revised Statutes 17-1-113.8 (2014) (Colorado)
Senate Bill No 2588 of New Jersey (213th Legislature) (New Jersey)

9.2.3 Model Codes

Model Penal Code 1981 § 1.02(2)(a)-(e) (Federal)

9.2.4 Transnational Statutory Sources

9.2.4.1 International Conventions

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (Adopted 10 December 1984, entered into force 26 June 1987) UN Doc A/39/51
International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 22 June 2006) UNGA RES/57/199 (2002)
UN Basic Principles for the Treatment of Prisoners UNGA Res 45/111 (1990) UN Doc A/45/49, UN GAOR Supp (No 49A) 200
UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment UNGA Res 43/173 (1988), UN Doc A/43/49
UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Adopted 10 December 1984, entered into force 26 June 1987) UN Doc A/39/51
UN Laws Concerning Nationality, (1954) UN Doc ST/LEG SER B/4
UN Rules for the Protection of Juveniles Deprived of their Liberty UNGA Res 45/111 (1990) UN Doc A/45/49, UN GAOR Supp (No 49A) 205
Universal Declaration of Human Rights (1948) UNGA Res 217A(III), UN Doc A/810 71

9.2.4.2 REGIONAL AGREEMENTS
American Convention on Human Rights, OAS TS No 36, 1144 UNTS 123 (entered into force 18 July 1978) (Organisation of American States)
American Declaration of the Rights and Duties of Man, OAS Res XXX (1948)
OEA/Ser L V/II 82 doc 6 rev 1, 17 (1992) (Organisation of American States)
Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (Council of Europe)

9.2.4.3 FOREIGN NATIONAL LAW
Abortion Act (1967) c 87 (United Kingdom)
Act 25 Geo II c37 (1751) (England)
Act 6 & 7 Wm IV c30 (1836) (England)
Act 9 Geo I c22 (1723) (Waltham Black Act) (England)
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## APPENDICES

### 10.1 APPENDIX 1

**Figure 7.1a**

US Solitary Confinement Polls Excluded from Analysis

<table>
<thead>
<tr>
<th>Poll</th>
<th>Source</th>
<th>Justification for Exclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Debate.org</td>
<td>Debate.org, ‘Is solitary confinement constitutional?’ &lt;www.debate.org/opinions/is-solitary-confinement-constitutional&gt; accessed 1st June 2015.</td>
<td>The only data provided was &quot;40% say no&quot; and &quot;60% say yes&quot;. No sample size was available so any generalisation is irresponsible.</td>
</tr>
<tr>
<td>Elev8</td>
<td>Elev8, ‘Solitary Confinement: Should It End?’ <a href="http://http://elev8.hellobeautiful.com/1118407/solitary-confinement-should-it-end-poll/">http://http://elev8.hellobeautiful.com/1118407/solitary-confinement-should-it-end-poll/</a> accessed 1st June 2015.</td>
<td>While this poll did provide some background context, the sample size was small (46).</td>
</tr>
</tbody>
</table>
FIGURE 7.2A

Solitary Confinement State Counting Data: Column (A) – Maximum reported duration in SHU in the stated jurisdiction (full references).

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Max duration in SHU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas</td>
<td>12 years Williams v Norris 277 Fed Appx 647-649 (8th Cir 2008)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Max duration in SHU</td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------</td>
</tr>
<tr>
<td>Delaware</td>
<td>3 months (Del Code § 3902). NB this provides for SHU to be imposed at sentencing, a form of additional punishment and therefore directly related to the punishments clause under even the most originalist or literal reading.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>5 days (Hope Metcalf, Jamelia Morgan, Samuel Oliker- Friedland, Judith Resnik, Julia Spiegel, Haran Tae, Alyssa Work, and Brian Holbrook, Administrative Segregation, Degrees of Isolation, and Incarceration: A National Overview of State and Federal Correctional Policies (Liman Public Interest Program 2013). Hereafter &quot;Metcalf et al&quot;)</td>
</tr>
<tr>
<td>Idaho</td>
<td>3 months (Metcalf et al)</td>
</tr>
<tr>
<td>Illinois</td>
<td>3 months (Metcalf et al)</td>
</tr>
<tr>
<td>Indiana</td>
<td>5-10 years (ASCA)</td>
</tr>
<tr>
<td>Iowa</td>
<td>5-10 years (ASCA)</td>
</tr>
<tr>
<td>Kansas</td>
<td>5-10 years (ASCA)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>2-5 years (ASCA)</td>
</tr>
<tr>
<td>Louisiana</td>
<td>40 years When Woodfox’s release was ordered in June 2015 it was reported that he could have spent as long as 43 years in SHU, though wide reports state 40 years, so that record is adopted by this thesis. Woodfox v Cain 3:06-cv-00789-JJB-RLB (MD Louisiana 2015).</td>
</tr>
<tr>
<td>Maine</td>
<td>1-2 years (ASCA)</td>
</tr>
<tr>
<td>Maryland</td>
<td>5-10 years (ASCA)</td>
</tr>
</tbody>
</table>
### Jurisdiction | Max duration in SHU
--- | ---
Michigan | 1 month+ ( Metcalf et al)
Minnesota | 2-5 years ( ASCA)
Mississippi | 5-10 years ( ASCA)
Missouri | 1 year ( Metcalf et al)
Montana | 10 years+ ( ASCA)
Nebraska | 10 years+ ( ASCA)
New Hampshire | 6 months+ ( Metcalf et al)
North Carolina | 10 years+ ( ASCA)
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Max duration in SHU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ohio</td>
<td><strong>2.6 years average</strong> (Peter Davis, <em>Inspection Report: Ohio State Penitentiary</em> (OH Correctional Institution Inspection Committee of the 123rd General Assembly, 1999) 13).</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1 month+ (Metcalf et al)</td>
</tr>
<tr>
<td>Oregon</td>
<td>1 month+ (Metcalf et al)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>8 years *(Shoats v Horn, 213 F3d 140 (3rd Cir 2000) 143-144).</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>3 months+ (Metcalf et al)</td>
</tr>
<tr>
<td>South Carolina</td>
<td><strong>10 years+</strong> (ASCA) See also <strong>37.5 years</strong> (Dave Maass, (Electronic Frontier Foundation, 12 February 2015) 'Hundreds of South Carolina Inmates Sent to Solitary Confinement Over Facebook’ <a href="https://www.eff.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook%3E">https://www.eff.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook&gt;</a> accessed 15th April 2015).</td>
</tr>
<tr>
<td>South Dakota</td>
<td>2-5 years (ASCA)</td>
</tr>
<tr>
<td>Tennessee</td>
<td>10 years+ (ASCA)</td>
</tr>
<tr>
<td>Vermont</td>
<td>1 month+ (Metcalf et al)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Max duration in SHU</td>
</tr>
<tr>
<td>-------------------------</td>
<td>----------------------------------------</td>
</tr>
<tr>
<td>Washington</td>
<td>10 years+ (ASCA)</td>
</tr>
<tr>
<td>West Virginia</td>
<td>1 month+ (Metcalf et al)</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>10 years+ (ASCA)</td>
</tr>
<tr>
<td>Wyoming</td>
<td>2-5 years (ASCA)</td>
</tr>
<tr>
<td>Military</td>
<td>9 years+</td>
</tr>
</tbody>
</table>

NB Information is scarce and records are not made public for the US Military Prison at Fort Leavenworth (Kansas). It is possible to deduce that James Barker's current sentence to that institution, since 2006, will have been entirely in solitary confinement as that is the level of security afforded to all inmates. Longer stays are possible but difficult to find.

Solitary Confinement State Counting Data: Column (B) – Recent reforms of SHU policy or legislation in the reported jurisdiction (full detail and references)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Recent Mental Illness Reforms to SHU¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td><strong>Limited in 2014</strong></td>
</tr>
</tbody>
</table>
|              | The ACLU settled with the Arizona Department of Corrections, resolving a class-action on behalf of thirty thousand prisoners. Mental health provision to those held in SHU is strengthened, and greater recreation time for mentally ill (MI) inmates is provided.  
  
  *Parsons v Ryan* (No CV 12-00601-PHX-DJH) Settlement Stipulation (14 October 2014)  
| California   | **Limited in 2015**                  |
|              | In response to numerous federal rulings, the California Department of Corrections commits to the release of MI prisoners held in solitary confinement into general population prisons. New regulations also provide for careful review of isolation practices.  
  
| Colorado     | **Prohibited in 2014**               |
|              | Legislation comes into force banning the solitary confinement of seriously MI inmates.  
  
  Senate Bill 14-064, Colorado Revised Statutes 17-1-113.8 (2014). |
| Delaware     | **Pending 2015**                     |
|              | A House Bill for the protection of seriously MI inmates is currently pending.  
  

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Recent Mental Illness Reforms to SHU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td><strong>Limited in 2013</strong></td>
</tr>
<tr>
<td></td>
<td>A significant super-maximum security prison was closed in 2013, limiting the provision of solitary confinement across the state, significantly impacting the proportion of MI prisoners held in SHU.</td>
</tr>
<tr>
<td>Indiana</td>
<td><strong>Limited in 2014</strong></td>
</tr>
<tr>
<td></td>
<td>The Indiana Department of Corrections Division of Youth Services confirmed in 2014 that the state has reduced the maximum stay in solitary confinement to 24 hours.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td><strong>Prohibited in 2012</strong></td>
</tr>
<tr>
<td></td>
<td>A 2012 settlement agreement from the state DOC (with the Disability Law Center) provided for the exclusion of severely MI prisoners from SHU.</td>
</tr>
<tr>
<td></td>
<td><em>Disability Law Center v Massachusetts Department of Corrections</em> (Case 1:07-cv-10463-MLW) (District of Massachusetts 2012).</td>
</tr>
<tr>
<td>Michigan</td>
<td><strong>Prohibited in 2013</strong></td>
</tr>
<tr>
<td>Minnesota</td>
<td><strong>Limited in 2014</strong></td>
</tr>
<tr>
<td></td>
<td>Inmates defined as having Serious MI are now prioritised to move to general population cells.</td>
</tr>
<tr>
<td></td>
<td>ASCA.</td>
</tr>
<tr>
<td>Montana</td>
<td><strong>2013 Failed Attempt</strong></td>
</tr>
<tr>
<td></td>
<td>A Bill to restrict SHU for seriously MI inmates (LC 2085/ HB 536: Montana Solitary Confinement Act 2013) died in Standing Committee in March 2013.</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Recent Mental Illness Reforms to SHU</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------------------------------</td>
</tr>
<tr>
<td>Nebraska</td>
<td><strong>Very limited in 2014</strong></td>
</tr>
<tr>
<td></td>
<td>A bipartisan legislative commission reported in December 2014 that SHU-use should be significantly limited, including the removal from solitary confinement of MI inmates and those with cognitive impairments. Nebraska Department of Correctional Services Special Investigative Committee, <em>Report to the Legislature</em> (LR 424-2014) <a href="https://www.documentcloud.org/documents/1381329-nebraska-solitary.html">https://www.documentcloud.org/documents/1381329-nebraska-solitary.html</a> accessed 27th April 2015.</td>
</tr>
<tr>
<td>New Jersey</td>
<td><strong>Pending 2015</strong></td>
</tr>
<tr>
<td></td>
<td>At the time of writing, an attempt to ban MI inmates from SHU is currently pending at committee stage. Senate Bill No 2588 of New Jersey (213th Legislature) (referred to Senate Law and Public Safety Committee in 2008).</td>
</tr>
<tr>
<td>New Mexico</td>
<td><strong>Reduced in 2014</strong></td>
</tr>
<tr>
<td>New York</td>
<td><strong>Prohibited in 2008</strong></td>
</tr>
<tr>
<td></td>
<td>NY Correctional Law §§137, 401, 401(a) (2008). Moreover, the use of SHU was further limited in 2012, where a federal decision resulted in a settlement to protect prisoners with developmental disabilities from SHU. <em>Peoples v Fischer</em> 898 FSupp 2d 618 (SD NY 2012).</td>
</tr>
<tr>
<td>Oklahoma</td>
<td><strong>Limited in 2013</strong></td>
</tr>
<tr>
<td></td>
<td>In Oklahoma solitary confinement is a “serious and extreme measure to be imposed only in emergency situations.” Okla Admin Code § 377:35-11-4 (2013).</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Recent Mental Illness Reforms to SHU</td>
</tr>
<tr>
<td>--------------</td>
<td>-----------------------------------</td>
</tr>
<tr>
<td>Texas</td>
<td><strong>2013 Review</strong></td>
</tr>
<tr>
<td></td>
<td>In 2013 the Texas Legislature passed a reform to review the state’s use of SHU. Results of this review are pending (2015).</td>
</tr>
<tr>
<td></td>
<td>Tex Sess Law Serv, Ch 1184 (SB 1003/HB 1266) (2013).</td>
</tr>
<tr>
<td>Virginia</td>
<td><strong>2012 Review</strong></td>
</tr>
<tr>
<td></td>
<td>The Virginia legislature resolved in 2012 to study their state’s use of SHU, and to investigate alternatives to extreme confinement. In particular, the resolution requires an investigation into the impact of SHU on prisoners with mental illness.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td><strong>Limited in 2014</strong></td>
</tr>
<tr>
<td></td>
<td>In 2014, Wisconsin Corrections Secretary Ed Wall released a memo to all employees with a view to reforming solitary confinement, with pending legislation intended to “affect a positive change in how [the state] handle[s] inmates and create[s] better outcomes for all involved”.</td>
</tr>
<tr>
<td>Federal Government</td>
<td><strong>(Prohibited long-term)</strong></td>
</tr>
<tr>
<td></td>
<td>Mental Health clearance is required before inmates are placed in SHU, and regular review is provided.</td>
</tr>
<tr>
<td></td>
<td>28 CFR §541.20-33. (ASCA 17)</td>
</tr>
</tbody>
</table>
# FIGURE 7.2C

Solitary Confinement State Counting Data: Column (C) – 2015 status of jurisdictional limitations to the imposition of SHU on juvenile (under-18 year old) offenders (full references)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Status of Juvenile SHU³</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juveniles can be subjected to isolation subject to checks and ‘the opportunity to have the violation reviewed by an uninvolved supervisor.’ (Ala Admin Code R 950-1-6-05(3)(d)-(h).</td>
</tr>
<tr>
<td>Alaska</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU can be imposed, not for punitive reasons, but for ‘secure confinement…for the purposes of safety, security, or discipline.’ (Alaska Admin Code, tit 7 §52.900(16)).</td>
</tr>
<tr>
<td>Arizona</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU can be extended beyond 24 hours at a hearing (Policy 4061(12)(d)(x)) and beyond 120 hours with Department of Corrections director approval (Policy 4061(13)(b)(i)).</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juveniles may be confined in SHU, but only with administrative approval after eight hours. (Ark Admin Code 016.01.9-3-C).</td>
</tr>
<tr>
<td>California</td>
<td>Permitted</td>
</tr>
<tr>
<td>Colorado</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>In Colorado juvenile SHU cannot be punitive (Colorado Department of Human Services Division of Youth Corrections Policies §§ 14.3B(II)(A); (C)(1)(c)).</td>
</tr>
</tbody>
</table>

## Jurisdiction | Status of Juvenile SHU
---|---
Connecticut | **Prohibited**

‘[N]o child shall at any time be held in solitary confinement.’ (CGSA §46b-133(e)(6)).

Delaware | **Prohibited**

Some juvenile solitary confinement is permitted only for periods of 2 hour slots, for a maximum three slots in one 24-hour period. Under the definition adopted by this thesis, this is not SHU. (9 Del Admin Code 105-9.6.1.3).

Florida | **Permitted**

Without authorisation, SHU can be applied to juveniles for 5 days or longer when approved (Fla Admin Code RR 63G-2.012.4(a); 4(j)(5)(d)).


Georgia | **Permitted**

Administrative approval is required for punitive isolation beyond 3 days. (Georgia Department of Juvenile Justice, Policies 16.5(I)(3); (L)(2)).

Hawaii | **Permitted**


Idaho | **Prohibited**

Some juvenile solitary confinement is permitted only for periods of 8 hours. Under the definition adopted by this thesis, this is not SHU. (Idaho Admin Code R 05.01.01.244).

Illinois | **Prohibited**

## Jurisdiction

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Status of Juvenile SHU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Indiana</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to 3-5 days. (Indiana Department of Corrections Policies and Procedures 03-02-101 (III)(F)-(I)).</td>
</tr>
<tr>
<td>Iowa</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Iowa is a borderline case in this table – juvenile SHU is limited to 24 hours, so just fits into the definition of SHU accepted by this thesis, but is one of the least restrictive states of those with juvenile SHU (with New Jersey). (Iowa Admin Code 441-105.10(3)(g)).</td>
</tr>
<tr>
<td>Kansas</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>30 days of SHU is permitted for juveniles, with no due process. Approval can extended this well beyond that period. (Kan Admin Regs §§123-12-1301(b)(1); 1308).</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Confinement in SHU can be applied to juveniles for a ‘major rule violation’, with up to 5 days per offense. (DJJ Policy 3.18.3(III)(A)).</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Varying forms of juvenile SHU are permitted for up to 3 days at a time. (La Admin Code, tit 67, Pt V, §§7505; 7515(E)(4)).</td>
</tr>
<tr>
<td>Maine</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>(Me Rev Stat, tit 34-A §3032(5) (2006)).</td>
</tr>
<tr>
<td>Maryland</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>(Md Human Services Code Ann §9-227(b)(2)).</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>(Mass Regs Code, tit 109, §§5.01-5.04)</td>
</tr>
<tr>
<td>Michigan</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to 3 days at one time, before due process. Written approval of chief administrator can extend this. (Mich Admin Code R 400.10176).</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>There is no special rule for juveniles. SHU can be imposed so long as it is reviewed every 30 days. (Minn R 2911.2850).</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Status of Juvenile SHU</td>
</tr>
<tr>
<td>--------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Mississippi</td>
<td><strong>Prohibited</strong></td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to such an extent in Mississippi that it is listed as “prohibited” (SHU is less than 22 hours here, the limit accepted by this thesis).</td>
</tr>
<tr>
<td></td>
<td>(Consent Decree, <em>CB v Walnut Grove Correctional Authority</em> (No 3:10cv663 (SD Miss 2012) 9).</td>
</tr>
<tr>
<td>Missouri</td>
<td><strong>Permitted</strong></td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is permitted, but is most regularly used for just several hours.</td>
</tr>
<tr>
<td>Montana</td>
<td><strong>Permitted</strong></td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is permitted for four days in a row. (Mont Admin R 20.9.629).</td>
</tr>
<tr>
<td></td>
<td>A 2013 attempt to restrict the use of SHU for juveniles failed. (LC 2085/ HB 536: Montana Solitary Confinement Act).</td>
</tr>
<tr>
<td>Nebraska</td>
<td><strong>Permitted</strong></td>
</tr>
<tr>
<td></td>
<td>Juveniles can be held in SHU for 7 days. (Neb Admin Rules &amp; Regs, Tit 83, Ch 13, §005).</td>
</tr>
<tr>
<td>Nevada</td>
<td><strong>Permitted</strong></td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is permitted for up to 3 days. (Nev Rev Stat §62B (2013)).</td>
</tr>
<tr>
<td>New Hampshire</td>
<td><strong>Permitted</strong></td>
</tr>
<tr>
<td></td>
<td>An attempt to restrict juvenile SHU failed in 2014.</td>
</tr>
<tr>
<td></td>
<td>(NH HB 480-FN 2013:Relative to Solitary Confinement).</td>
</tr>
</tbody>
</table>
# Jurisdiction of Juvenile Solitary Confinement (SHU)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Status of Juvenile SHU</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Jersey</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Another borderline case. Juvenile SHU is limited to 24 hours, so just fits into the definition, but is one of the least restrictive states of those with juvenile SHU (with Iowa). (NJ Admin Code §§13:92-7.4; 13:101-6.16(b)(2)).</td>
</tr>
<tr>
<td></td>
<td>A prohibition has been pending at the committee stage since 2008. (Senate Bill No 2588, of New Jersey (213th Legislature) (referred to Senate Law and Public Safety Committee 2008)).</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to 3 days of non-punitive confinement. (NM Admin Code 8.14.14.19(B)).</td>
</tr>
<tr>
<td>New York</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>Two settlements, following Peoples v Fischer 898 FSupp 2d 618 (SD NY 2012); Cookhorne v Fischer (PC-NY-0065) (2014) have resulted in a settlement to hurry the legislative process and to prohibit juvenile SHU. While juvenile SHU is still being phased out of the state, and 2015 reports note staff finding loopholes and imposing SHU on juveniles, (Alysia Santo, (Marshall Project, 2 June 2015) ‘Who Runs Rikers?’ <a href="https://www.themarshallproject.org/2015/06/02/who-runs-rikers">https://www.themarshallproject.org/2015/06/02/who-runs-rikers</a> accessed 27th August 2015.) the legislation qualifies New York for a “prohibited” tick on this table.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to three days. (NC Department of Juvenile Justice and Delinquency Prevention Policy R&amp;P/DC 2.3).</td>
</tr>
<tr>
<td>North Dakota</td>
<td>Permitted</td>
</tr>
<tr>
<td>Ohio</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to 48 continuous hours. (Ohio Admin Code 5139-35-19(6)(e)(v.).)</td>
</tr>
<tr>
<td></td>
<td>The state Department of Justice (DOJ) agreed with the federal government to reduce their use of SHU in February 2014, with a view to eventually eliminating the use of juvenile SHU entirely. (Philip Victor, (Al Jazeera America, 21 May 2014) ‘Ohio agrees to reform, eventually eliminate juvenile solitary confinement’ <a href="http://alj.am/1obj1tg">http://alj.am/1obj1tg</a> accessed 20th February 2015).</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Status of Juvenile SHU</td>
</tr>
<tr>
<td>---------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>(Okla Admin Code § 377:35-11-4(a) (2014)).</td>
</tr>
<tr>
<td>Oregon</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to such an extent in Oregon (to 6 hours) that it is listed as “prohibited”. SHU is defined by this thesis as confinement for at least 22 hours per day. (Or Rev Stat Ann §169.750(2)(A)).</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>(55 Pa Code § 3800.206).</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is permitted for up to 3 days (RI Code R 14-2-1200.1307(A)).</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Permitted</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to 5 days (South Dakota Department of Corrections Policy 1.3.C(IV)(10)).</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU available without due process for 3 days, then indefinitely after review. (Tenn Comp Rules &amp; Regs 14-03-.08(4)-(6)).</td>
</tr>
<tr>
<td>Texas</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU available without due process for 24 hours, then indefinitely after review. (37 Tex Admin Code §343.288).</td>
</tr>
<tr>
<td>Utah</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is available but can only be extended beyond three hours after facility director approval. (Utah Department of Human Services, Division of Juvenile Justice Services, Policy No 05-05(IV)(E)(4)).</td>
</tr>
<tr>
<td>Vermont</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>(Vt Admin Code 12-3-508:659-664).</td>
</tr>
</tbody>
</table>
# Jurisdiction Status of Juvenile SHU

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Status of Juvenile SHU</th>
</tr>
</thead>
<tbody>
<tr>
<td>Virginia</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is limited to 5 days (6 Va Admin Code §35-140-560(E)).</td>
</tr>
<tr>
<td>Washington</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is available but can only be extended beyond five hours after supervisory staff review, and only up to 3 days after senior approval. (Washington Juvenile Rehabilitation Administration Policy 22-500(3)(D)).</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>In 2012 the Director of West Virginia Juvenile Services Division ordered an end to juvenile SHU. (See Associated Press, (26 April 2012) 'State ends solitary confinement for juveniles' &lt;www.wvgazette.com/News/201204260017&gt; accessed 27th April 2015).</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is permitted, but must be subject to a hearing to extend this beyond 6 hours. (Wis Admin Code DOC §346.47).</td>
</tr>
<tr>
<td>Wyoming</td>
<td>Permitted</td>
</tr>
<tr>
<td></td>
<td>Juvenile SHU is permitted for offenders over 12 years old. (Code Wyo R, Department of Family Services, Certification of Providers of Substitute Care Services ch 3, §2(a)(iv)).</td>
</tr>
<tr>
<td>Federal Govt</td>
<td>Prohibited</td>
</tr>
<tr>
<td></td>
<td>(DC Mun Regs tit 29, §6273.12).</td>
</tr>
<tr>
<td>Military</td>
<td>No juveniles: N/A</td>
</tr>
</tbody>
</table>
Figure 7.2D

Example diagram of a federal super maximum-security prison “USP-ADX”, demonstrative of a typical 7ft x 12ft cell used in federal and state solitary confinement.³

**Figure 7.2E**: Additional data for Figure 7.2, this time arranged by value. Columns i and ii are both arranged according to ascending value of Column ii (maximum duration in SHU, in months, rounded and averaged where appropriate). Columns iii, iv, and v are arranged according to the ascending value of Column iii (maximum juvenile SHU without due process or some form of review, in hours).

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Max duration in SHU (months)</th>
<th>Juvenile SHU without review (hours)</th>
<th>After review</th>
<th>Jurisdiction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>0.17</td>
<td>1</td>
<td>Indefinite</td>
<td>Washington</td>
</tr>
<tr>
<td>Michigan</td>
<td>1</td>
<td>2</td>
<td>5days</td>
<td>Florida</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1</td>
<td>3</td>
<td>Indefinite</td>
<td>Utah</td>
</tr>
<tr>
<td>Oregon</td>
<td>1</td>
<td>6</td>
<td>6days</td>
<td>Wisconsin</td>
</tr>
<tr>
<td>Vermont</td>
<td>1</td>
<td>8</td>
<td>Indefinite</td>
<td>Alabama</td>
</tr>
<tr>
<td>West Virginia</td>
<td>1</td>
<td>8</td>
<td>Indefinite</td>
<td>Arkansas</td>
</tr>
<tr>
<td>Alaska</td>
<td>2</td>
<td>8</td>
<td>72hrs</td>
<td>Louisiana</td>
</tr>
<tr>
<td>Delaware</td>
<td>3</td>
<td>8</td>
<td>48hrs</td>
<td>Ohio</td>
</tr>
<tr>
<td>Idaho</td>
<td>3</td>
<td>12</td>
<td>24hrs</td>
<td>Iowa</td>
</tr>
<tr>
<td>Illinois</td>
<td>3</td>
<td>23</td>
<td>4days</td>
<td>Montana</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>3</td>
<td>24</td>
<td>5days</td>
<td>Alaska</td>
</tr>
<tr>
<td>Alabama</td>
<td>6</td>
<td>24</td>
<td>Indefinite</td>
<td>Arizona</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>6</td>
<td>24</td>
<td>90days</td>
<td>California</td>
</tr>
<tr>
<td>New Jersey</td>
<td>6</td>
<td>24</td>
<td>Indefinite</td>
<td>Georgia</td>
</tr>
<tr>
<td>North Dakota</td>
<td>6</td>
<td>24</td>
<td>5days</td>
<td>Indiana</td>
</tr>
<tr>
<td>Missouri</td>
<td>12</td>
<td>24</td>
<td>5days</td>
<td>Kentucky</td>
</tr>
<tr>
<td>Connecticut</td>
<td>16</td>
<td>24</td>
<td>Indefinite</td>
<td>Massachusetts</td>
</tr>
<tr>
<td>Georgia</td>
<td>18</td>
<td>24</td>
<td>Indefinite</td>
<td>Missouri</td>
</tr>
<tr>
<td>Maine</td>
<td>18</td>
<td>24</td>
<td>Indefinite</td>
<td>Nebraska</td>
</tr>
<tr>
<td>Utah</td>
<td>20</td>
<td>24</td>
<td>72hrs</td>
<td>Nevada</td>
</tr>
<tr>
<td>New Mexico</td>
<td>22</td>
<td>24</td>
<td>10days</td>
<td>New Jersey</td>
</tr>
<tr>
<td>Nevada</td>
<td>24</td>
<td>24</td>
<td>72hrs</td>
<td>New Mexico</td>
</tr>
<tr>
<td>Ohio</td>
<td>31</td>
<td>24</td>
<td>Indefinite</td>
<td>North Carolina</td>
</tr>
<tr>
<td>Kentucky</td>
<td>42</td>
<td>24</td>
<td>5days</td>
<td>South Dakota</td>
</tr>
<tr>
<td>Minnesota</td>
<td>42</td>
<td>24</td>
<td>5days</td>
<td>Virginia</td>
</tr>
<tr>
<td>South Dakota</td>
<td>42</td>
<td>24</td>
<td>Indefinite</td>
<td>Wyoming</td>
</tr>
<tr>
<td>Wyoming</td>
<td>42</td>
<td>72</td>
<td>Indefinite</td>
<td>Michigan</td>
</tr>
<tr>
<td>Arizona</td>
<td>72</td>
<td>72</td>
<td>Indefinite</td>
<td>Tennessee</td>
</tr>
<tr>
<td>Indiana</td>
<td>90</td>
<td>72</td>
<td>Indefinite</td>
<td>Texas</td>
</tr>
<tr>
<td>Iowa</td>
<td>90</td>
<td>720</td>
<td>Indefinite</td>
<td>Kansas</td>
</tr>
<tr>
<td>Kansas</td>
<td>90</td>
<td>720</td>
<td>Indefinite</td>
<td>Minnesota</td>
</tr>
<tr>
<td>Maryland</td>
<td>90</td>
<td>-</td>
<td>-</td>
<td>Illinois</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Max duration in SHU (months)</td>
<td>Juvenile SHU without review (hours)</td>
<td>After review</td>
<td>Jurisdiction</td>
</tr>
<tr>
<td>----------------------</td>
<td>------------------------------</td>
<td>-------------------------------------</td>
<td>--------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>Mississippi</td>
<td>90</td>
<td>-</td>
<td>60days</td>
<td>Colorado</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>96</td>
<td>-</td>
<td>-</td>
<td>Connecticut</td>
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<td>Military</td>
<td>108</td>
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<td>-</td>
<td>Delaware</td>
</tr>
<tr>
<td>Colorado</td>
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<td>Hawaii</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>120</td>
<td>-</td>
<td>-</td>
<td>Idaho</td>
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<tr>
<td>Montana</td>
<td>120</td>
<td>-</td>
<td>-</td>
<td>Maine</td>
</tr>
<tr>
<td>Nebraska</td>
<td>120</td>
<td>-</td>
<td>-</td>
<td>Maryland</td>
</tr>
<tr>
<td>North Carolina</td>
<td>120</td>
<td>-</td>
<td>-</td>
<td>Mississippi</td>
</tr>
<tr>
<td>South Carolina</td>
<td>120</td>
<td>-</td>
<td>-</td>
<td>New Hampshire</td>
</tr>
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<td>-</td>
<td>New York</td>
</tr>
<tr>
<td>Washington</td>
<td>120</td>
<td>-</td>
<td>Indefinite</td>
<td>North Dakota</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>120</td>
<td>-</td>
<td>-</td>
<td>Oklahoma</td>
</tr>
<tr>
<td>Arkansas</td>
<td>144</td>
<td>-</td>
<td>-</td>
<td>Oregon</td>
</tr>
<tr>
<td>Virginia</td>
<td>168</td>
<td>-</td>
<td>-</td>
<td>Pennsylvania</td>
</tr>
<tr>
<td>Federal Govt</td>
<td>264</td>
<td>-</td>
<td>3days</td>
<td>Rhode Island</td>
</tr>
<tr>
<td>New York</td>
<td>312</td>
<td>-</td>
<td>Indefinite</td>
<td>South Carolina</td>
</tr>
<tr>
<td>Florida</td>
<td>324</td>
<td>-</td>
<td>-</td>
<td>Vermont</td>
</tr>
<tr>
<td>Texas</td>
<td>360</td>
<td>-</td>
<td>-</td>
<td>West Virginia</td>
</tr>
<tr>
<td>Louisiana</td>
<td>$480^4$</td>
<td>-</td>
<td>-</td>
<td>Federal Govt</td>
</tr>
<tr>
<td>California</td>
<td>504</td>
<td>-</td>
<td>N/A</td>
<td>Military</td>
</tr>
</tbody>
</table>

In Column ii, values which provided ranges (1-2years; 2-5years; and 5-10years, for example, see Figure 7.2A) have been averaged to the mid-point in months (18months; 42months; and 90months, respectively). 10years+ is represented by a minimum point of 120months. As such, these averages represent a minimum and not a maximum or even a representative average.

$4$ Note that this estimate could in fact be as high as 516, though early records are unclear as to when the inmate in question entered SHU. Woodfox v Cain 3:06-cv-00789-JJB-RLB (MD Louisiana 2015).
### 10.2 APPENDIX 2

**FIGURE 7.3: US Resident Population Estimates (2010 and 2014).**

<table>
<thead>
<tr>
<th>State</th>
<th>2010 Census</th>
<th>2014 Estimates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>4,779,736</td>
<td>4,849,377</td>
</tr>
<tr>
<td>Alaska</td>
<td>710,231</td>
<td>736,732</td>
</tr>
<tr>
<td>Arizona</td>
<td>6,392,017</td>
<td>6,731,484</td>
</tr>
<tr>
<td>Arkansas</td>
<td>2,915,918</td>
<td>2,966,369</td>
</tr>
<tr>
<td>California</td>
<td>37,253,956</td>
<td>38,802,500</td>
</tr>
<tr>
<td>Colorado</td>
<td>5,029,196</td>
<td>5,355,866</td>
</tr>
<tr>
<td>Connecticut</td>
<td>3,574,097</td>
<td>3,596,677</td>
</tr>
<tr>
<td>Delaware</td>
<td>897,934</td>
<td>935,614</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>601,723</td>
<td>658,893</td>
</tr>
<tr>
<td>Florida</td>
<td>18,801,310</td>
<td>19,893,297</td>
</tr>
<tr>
<td>Georgia</td>
<td>9,687,653</td>
<td>10,097,343</td>
</tr>
<tr>
<td>Hawaii</td>
<td>1,360,301</td>
<td>1,419,561</td>
</tr>
<tr>
<td>Idaho</td>
<td>1,567,582</td>
<td>1,634,464</td>
</tr>
<tr>
<td>Illinois</td>
<td>12,830,632</td>
<td>12,880,580</td>
</tr>
<tr>
<td>Indiana</td>
<td>6,483,802</td>
<td>6,596,855</td>
</tr>
<tr>
<td>Iowa</td>
<td>3,046,355</td>
<td>3,107,126</td>
</tr>
<tr>
<td>Kansas</td>
<td>2,853,118</td>
<td>2,904,021</td>
</tr>
<tr>
<td>Kentucky</td>
<td>4,339,367</td>
<td>4,413,457</td>
</tr>
<tr>
<td>Louisiana</td>
<td>4,533,372</td>
<td>4,649,676</td>
</tr>
<tr>
<td>Maine</td>
<td>1,328,361</td>
<td>1,330,089</td>
</tr>
<tr>
<td>Maryland</td>
<td>5,773,552</td>
<td>5,976,407</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>6,547,629</td>
<td>6,745,408</td>
</tr>
<tr>
<td>Michigan</td>
<td>9,883,640</td>
<td>9,909,877</td>
</tr>
<tr>
<td>Minnesota</td>
<td>5,303,925</td>
<td>5,457,173</td>
</tr>
<tr>
<td>Mississippi</td>
<td>2,967,297</td>
<td>2,994,079</td>
</tr>
<tr>
<td>Missouri</td>
<td>5,988,927</td>
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</tr>
<tr>
<td>Montana</td>
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<td>1,023,579</td>
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<tr>
<td>Ohio</td>
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<th>2010 Census</th>
<th>2014 Estimates</th>
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**TOTALS** | 308,745,538  | 318,857,056  |

_Rounded totals_ | 309m (2010)  | 319m (2014)  |