

EVOLVING STANDARDS AS A JUDICIAL MANDATE: NECESSARY OR SUPERFLUOUS?*

I. DEMOCRATIC EVOLUTION OF “STANDARDS OF DECENCY” IN CRIMINAL PUNISHMENT

Judicial regulation of criminal punishment is fairly uncontroversial, although few have seriously considered how an alternative system, one in which the state legislatures and enacted statutes predominantly controlled the law of criminal punishment, would differ.¹ Upon comparison to the law of corporal punishment, an area controlled by the legislature, it appears that the public naturally uses a form of progressive civility without being forced to do so as judges compel in Eighth Amendment law. Some criminal punishments clearly fall within Eighth Amendment prohibitions, violating the Cruel and Unusual Punishments Clause;² certainly, courts should address and forbid such punishments. Whether other, less extreme punishments violate the clause, however, is more controversial.³ The Supreme Court addressed many such punishments through its evolving standards of decency test.⁴

Much of the change in what the law forbids as “cruel and unusual,” however, comes not through the Court and its evolving standards of decency test but instead through legislative

* The author wishes to express thanks to Professor Bill Stuntz for providing invaluable input, advisement, and feedback on drafts.

1. *But see, e.g.*, Douglas A. Berman, *Foreword: Addressing Capital Punishment Through Statutory Reform*, 63 OHIO ST. L.J. 1, 7–14 (2002).

2. For example, crucifixion and boiling in oil. *See* Jan Wishingrad, *Books for Lawyers*, 69 A.B.A. J. 198, 198 (1983) (reviewing RAOUL BERGER, *DEATH PENALTIES: THE SUPREME COURT’S OBSTACLE COURSE* (1982)) (stating that these are the only two punishments that were considered “unusual” in 1791).

3. For example, the execution of mentally retarded individuals and those under eighteen years of age at the time they committed the relevant crime. The constitutionality of the death penalty in general is highly controversial; for a discussion of some of the history of its controversy, see Linda L. Bruin, *A Court Divided*, 14 UPDATE ON L. RELATED EDUC. 51, 55 (1990).

4. The Court used the method to declare unconstitutional the execution of mentally retarded individuals as well as those who were minors when they committed the relevant crime. *See infra* notes 61–67 and accompanying text.

changes that are often driven by evolving public opinion.⁵ The changes in criminal punishment that have resulted from court opinions were based on several factors, notably including public opinion.⁶ The Court's determination of public opinion, however, is complex: it examines statutory law, applications of statutes in jury sentences, general public views, and recent state trends.⁷ In addition to considering public opinion, the Court considers the opinions of its members, the views of expert organizations (professional and religious), and, occasionally, international norms.⁸ Judicial emphasis on sources other than public opinion drives the "evol[ution of] standards of decency" at a faster rate than would simple reliance on general public opinion, frequently outpacing societal views on which punishments should be prohibited.⁹

An examination of state laws indicates that states are increasingly banning corporal punishment, thereby rendering inconsequential judicial standards of decency. Because the Eighth Amendment does not forbid noncriminal corporal punishment of children by parents and teachers,¹⁰ and because state courts generally defer to the legislature in determining the legality of such punishment,¹¹ development of this area of law is primarily statutory¹² and therefore driven in great part by changes in public opinion. Hence, allowing the legislature to determine

5. Introduction of the electric chair, gas chamber, and lethal injection—each introduced by states rather than courts—all ostensibly had the purpose of providing more humane forms of execution. See *infra* notes 37–50 and accompanying text.

6. See *Atkins v. Virginia*, 536 U.S. 304, 315–16 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (plurality opinion); *id.* at 387 n.3 (Brennan, J., dissenting).

7. *Atkins*, 536 U.S. at 314–16.

8. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (explicitly considering the Court's own judgment to determine whether a punishment violated the Eighth Amendment); *Atkins*, 536 U.S. at 316–17 n.21 (consulting professional organizations, religious organizations, and international norms to determine the propriety of a punishment under the evolving standards of decency inquiry).

9. See Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 46–55 (2007) (discussing public backlash against Court decision holding Georgia's death penalty statute unconstitutional).

10. *Ingraham v. Wright*, 430 U.S. 651, 671 (1977). See generally *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (discussing the deference the state gives to matters within the "private realm of family life").

11. See *infra* notes 104–05 and accompanying text.

12. See Kyli L. Willis, *Willis v. State: Condoning Child Abuse as Discipline*, 14 U.C. DAVIS J. JUV. L. & POL'Y 59, 76–78 (2010) (discussing the statutory regulation of corporal punishment in several states, including New York and Pennsylvania).

the legality of punishment does not hamper the evolution of standards of decency. Instead, legislative determinations provide a more natural change in law, occurring at a rate that more closely corresponds to the change in public opinion. In light of the natural change in public opinion about the legality of noncriminal corporal punishment, judicial interference in borderline-objectionable punishments has proven less necessary than proponents of the judicial regulation approach predicted.

Even in the absence of judicial mandates, the legality of criminal punishments would not stagnate, forbidding only those punishments proscribed in 1791. Public opinion gradually has moved in favor of more humane forms of criminal punishment. Much as it has effected change in the realm of noncriminal corporal punishment, the democratic process likely would yield changes in the law of criminal punishments similar to those brought by the courts' doctrine of evolving standards of decency, but at a pace more consistent with the actual evolution of public standards of decency.¹³

II. CRIMINAL PUNISHMENT AND THE EIGHTH AMENDMENT

Supreme Court evaluations of the legality of criminal punishment focus on the Eighth Amendment. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁴ Certain forms of criminal punishment undoubtedly fall within the Eighth Amendment's prohibition.¹⁵ The status of other punishments, particularly of those that were considered humane at, or after, the Amendment's ratification, but that now are frowned upon, is less clear. Some commentators assert that a change in societal views should render a given punishment cruel and unusual,¹⁶ while others believe that, although other, more humane forms of punishment may—and likely should—be used, such controversial punishment does not violate the

13. The benefit of the law changing at a rate consistent with, rather than preceding, the change of public opinion is itself up for debate.

14. U.S. CONST. amend. VIII.

15. See, e.g., *Baze v. Rees*, 553 U.S. 35, 98–99 (2008) (Thomas, J., concurring) (citing a nineteenth-century commentator for the proposition that punishments such as flaying alive and breaking at the wheel are cruel and unusual); *supra* note 2.

16. See, e.g., Erwin Chemerinsky, *Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201, 222 (2003).

Eighth Amendment.¹⁷ Currently, the Supreme Court examines all criminal punishments under its evolving standards of decency framework, creating what may be considered premature evolution of punishment illegality in the United States.

The history of Eighth Amendment law, especially regarding the death penalty, provides important background regarding the Court's current jurisprudence and the factors it considers in determining the constitutionality of a form of criminal punishment. In *Wilkinson v. Utah*,¹⁸ the Supreme Court held that certain punishments are cruel and unusual regardless of the crime committed.¹⁹ However, the Court held that death by shooting was permissible because it was a common historical method of execution in the territory at the time.²⁰ In *Weems v. United States*,²¹ the Court rejected the proposition that the Eighth Amendment reaches only inhuman, barbarous, or torturous punishments;²² it stated in its 1910 opinion, "time works changes, brings into existence new conditions and purposes."²³ The Court held that the Cruel and Unusual Punishments Clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."²⁴ Even in the early twentieth century, the Court already deemed it necessary to consider modern standards in determining whether a punishment would be considered cruel and unusual, rather than relying on what punishments were considered to violate the Eighth Amendment in 1791.

Weems shows that the notion of evolving standards existed in Eighth Amendment law even before the Court explicitly adopted the phrase. The phrase itself was not coined until 1958, when Chief Justice Earl Warren wrote in *Trop v. Dulles*²⁵ that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a ma-

17. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 862-63 (1989).

18. 99 U.S. 130 (1878).

19. *Id.* at 135-36.

20. *Id.* at 135.

21. 217 U.S. 349 (1910).

22. *Id.* at 368.

23. *Id.* at 373.

24. *Id.* at 378.

25. 356 U.S. 86 (1958).

turing society."²⁶ This line is the basis for the Court's evolving standards of decency analysis, which has become its standard way to examine punishments.

Chief Justice Warren's evolving standards of decency analysis quickly gained strong support on the Court. In *Furman v. Georgia*,²⁷ Justice Brennan's concurring opinion discussed the manner in which the Court once interpreted the Eighth Amendment as prohibiting merely those punishments that were considered cruel and unusual in 1791 when the Amendment was ratified.²⁸ Justice Brennan then stated that the *Weems* Court "decisively repudiated the 'historical' interpretation of the Clause."²⁹ Justice Marshall's concurrence proposed that any punishment abhorred by the population must be held unconstitutional.³⁰ But not all members of the Court agreed with Justices Brennan and Marshall. In dissent, Justice Blackmun, though he did not repudiate the Court's determination that what punishments are cruel and unusual may change over time, disagreed with how the Court analyzed the situation: He stated that insufficient time had passed and not enough evidence existed to justify a change in what the Eighth Amendment permitted.³¹

Although the Court in *Furman* overturned the defendant's death sentence,³² it did not hold that the death penalty was per se unconstitutional. Following *Furman*, thirty-seven states re-enacted statutes to ensure that their death penalty procedures complied with the Court's recent decision.³³ These states' actions reveal that, at the time, public opinion remained strongly in favor of the death penalty. After examining Georgia's rewritten death penalty laws, the Court determined that they passed scrutiny in *Gregg v. Georgia*³⁴ because "a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction."³⁵ The Court

26. *Id.* at 101.

27. 408 U.S. 238 (1972).

28. *Id.* at 264 (Brennan, J., concurring).

29. *Id.* at 266.

30. *Id.* at 332 (Marshall, J., concurring).

31. *Id.* at 408–09 (Blackmun, J., dissenting).

32. *Id.* at 239–40 (majority opinion).

33. Sara L. Golden, *Constitutionality of the Federal Death Penalty Act: Is the Lack of Mandatory Appeal Really Meaningful Appeal?*, 74 TEMP. L. REV. 429, 433 (2001).

34. 428 U.S. 153 (1976).

35. *Id.* at 179.

did hold that a constitutionally permissible penalty cannot be excessive: it must not involve unnecessary infliction of pain nor be grossly out of proportion to the crime's severity.³⁶

The methods of execution used in the United States constitute an area of law that, although regulated by courts, has experienced significant development because of changes in public opinion. Five methods of execution are generally used in at least one state.³⁷ Lethal injection has become the most popular form of execution in the country, permitted in thirty-six states.³⁸ Although no state has any other primary method of execution, nine states also permit electrocution, four permit usage of the gas chamber, three states permit hanging, and three permit a firing squad.³⁹ Until the 1890s, hanging was the primary means of execution in the United States.⁴⁰ Other permissible methods in the nation's early years included beheading, breaking at the wheel, drowning, and burning.⁴¹ New York introduced the electric chair in 1888, ostensibly as a more humane alternative to hanging,⁴² although the state likely had other motivations for its new method as well, including minimizing the unruliness and sympathy for the criminal offender that sometimes occurred during hangings.⁴³ The introduction of the electric chair thus began a transformation from public executions, predominantly hangings, to more private executions with far fewer witnesses, signifying a change in purpose from warning the community to exacting retribution against a particular offender.⁴⁴ The introduction also marked a transformation toward a view of execution as an operation requiring specialized knowledge and preparation.⁴⁵

36. *Id.* at 173.

37. Dawinder S. Sidhu, *On Appeal: Reviewing the Case against the Death Penalty*, 111 W. VA. L. REV. 453, 463 (2009).

38. *Baze v. Rees*, 553 U.S. 35, 42 (2008).

39. *Methods of Execution*, THE CLARK COUNTY PROSECUTING ATT'Y, <http://www.clarkprosecutor.org/html/death/methods.htm> (last visited Jan. 3, 2011).

40. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 24 (2002).

41. Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 563 (1994).

42. See *In re Kemmler*, 136 U.S. 436, 444 (1890).

43. See BANNER, *supra* note 40, at 148.

44. Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 791 (2008).

45. *Id.*

As the years passed, states began to compete with one another to find more humane methods of execution. In 1931, Nevada introduced capital punishment by gas chamber, ostensibly as a more humane form of execution;⁴⁶ eventually, ten other states followed suit.⁴⁷ In 1977, Oklahoma became the first state to adopt lethal injection as a means of execution.⁴⁸ Texas conducted the first actual execution by lethal injection when it executed Charles Brooks in 1982.⁴⁹ Lethal injection has since become the most commonly used means of execution in the United States.⁵⁰ Notably, none of these developments in methods of execution were because of Court mandates. Instead, they resulted from the public's desire to provide criminal offenders with more humane forms of punishment.

Another important area of Eighth Amendment law, and one on which the Supreme Court also has placed various restrictions, is the question of who may be executed without violating the Eighth Amendment. In *Coker v. Georgia*,⁵¹ the Court declared that punishment by death for a rape conviction is cruel and unusual punishment.⁵² Expanding on *Coker's* holding, in *Kennedy v. Louisiana*⁵³ the Court held capital punishment for rape unconstitutional even in a case of child rape in which the defendant did not kill or intend to assist in killing the child.⁵⁴ In *Roper v. Simmons*,⁵⁵ the Court held that a violation of the Eighth Amendment results from imposing the death penalty upon a defendant who was under the age of eighteen when he committed the relevant crime.⁵⁶ In *Atkins v. Virginia*,⁵⁷ the Court

46. LARRY CHARLES BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 29 (1975).

47. Robert J. Sech, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381, 394 (1995).

48. STEPHEN TROMBLEY, *THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY* 73 (1992).

49. *Id.*

50. Amie L. Clifford, *Death Penalty in America*, 21 UPDATE ON L. RELATED EDUC. 42, 43 (1997).

51. 433 U.S. 584 (1977).

52. *Id.* at 600.

53. 554 U.S. 407 (2008).

54. *Id.* at 421.

55. 543 U.S. 551 (2005).

56. *Id.* at 578.

57. 536 U.S. 304 (2002).

held that the death penalty for a mentally deficient defendant violates the Eighth Amendment.⁵⁸

In analyzing whether a punishment violates the Eighth Amendment using the evolving standards of decency test, the Supreme Court considers four primary factors: its own judgment, opinions of professional organizations, public opinion as reflected by state legislation and jury behavior, and international norms.⁵⁹ Regarding the first factor, the Court frequently exercises its independent judgment regarding whether a punishment is cruel and unusual. In *Coker v. Georgia*, the Court first explicitly declared that its own judgment may be used to identify modern standards of decency.⁶⁰ Later, in *Roper v. Simmons*, the Court explained that it must “determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”⁶¹ In *Kennedy v. Louisiana*, the Court further explained that public consensus does not suffice to determine whether a punishment is cruel or unusual, but that its own judgment is valuable in making such determinations, stating that “[w]hether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.”⁶² The Court’s analysis, however, does not stop with its own judgment.

Although the Court was initially unclear about whether the views of professional and religious organizations were reliable indicators of modern standards of decency,⁶³ it solidified its view in *Atkins v. Virginia*.⁶⁴ There, the Court included the views

58. *Id.* at 321.

59. Carrie Martin, *Spare the Death Penalty, Spoil the Child: How the Execution of Juveniles Violates the Eighth Amendment’s Ban on Cruel and Unusual Punishments in 2005*, 46 S. TEX. L. REV. 695, 703–04 (2005).

60. 433 U.S. 584, 597 (1977).

61. *Roper*, 543 U.S. at 564 (holding that the death penalty, as punishment for crimes committed when the defendant was under the age of eighteen, violates the Eighth Amendment).

62. 554 U.S. 407, 423–24 (2003).

63. See *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989) (plurality opinion) (concluding that such evidence did not suffice to indicate public opinion).

64. 536 U.S. 304, 316–17 & n.21 (2002) (citing, as evidence of societal consensus, inter alia, margins of legislative votes, trends of state changes in position, official positions of professional and religious organizations, opinion of the world com-

of professional organizations in its evolving standards of decency inquiry.⁶⁵ Additionally, the Court in *Atkins* explicitly permitted using views of religious organizations to determine whether punishments violate the Eighth Amendment. The Court cited in a footnote an amicus curiae brief submitted by various religious communities (including Christian, Jewish, Buddhist, and Muslim traditions) stating that “even though their views about the death penalty differ, they all ‘share a conviction that the execution of persons with mental retardation cannot be morally justified.’”⁶⁶ The appearance of a unified view among major religious groups against a particular form of punishment, however, probably distinguishes *Atkins* from cases concerning more marginal forms of punishment, on which major religious groups’ opinions differ.

Public opinion is a major factor in the Court’s analysis. In *Roper v. Simmons*, the Court explicitly considered the opinions of and trends in the states before concluding that public opinion disfavored the death penalty for juveniles.⁶⁷ In *Stanford v. Kentucky*,⁶⁸ the plurality and dissenting opinions noted two primary categories of evidence on which to rely as objective indicators of the nation’s standards of decency: statutes enacted by state legislatures⁶⁹ and the application of those statutes in jury sentences.⁷⁰ In *Atkins*, the Court added that evidence of a strong and consistent trend in a particular direction is more important than the sheer number of states with a particular opinion.⁷¹ The Court considered state trends in holding that the death penalty for a mentally retarded defendant violated the Eighth Amend-

munity, and public opinion polling data; the Court, however, noted that this evidence was not dispositive).

65. *Id.* at 316 n.21 (citing Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner, *Atkins*, 536 U.S. 304 (No. 00-8727)).

66. *Id.* (quoting Brief for United States Catholic Conference et al. as Amici Curiae Supporting Petitioner, *Atkins*, 536 U.S. 304 (No. 00-8452)).

67. 543 U.S. 551, 563–67 (2005) (stating that the Court is guided by “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions”).

68. 492 U.S. 361, 370 (1989) (holding that capital punishment for individuals convicted of murders committed at age sixteen does not constitute cruel and unusual punishment).

69. *Id.* at 370 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987)).

70. *Id.* at 387 n.3 (Brennan, J., dissenting).

71. *Atkins*, 536 U.S. at 315.

ment.⁷² It later distinguished *Atkins* from a case in which six states made child rape a capital offense, declaring those states' views insufficient to constitute a trend similar to that shown in *Roper*.⁷³ In short, state trends, although not alone sufficient to define public opinion, are indicators of public opinion to which the Court has given significant value.

In some cases, the Court explicitly has embraced the views of other nations, particularly European nations, as a part of its "societal consensus" determination. In *Atkins*, the Court cited the European Union's amicus brief, which stood for the proposition that the world community "overwhelmingly disapprove[s]" of executing mentally retarded criminal offenders.⁷⁴ In *Thompson v. Oklahoma*, the Court recognized that "other nations that share our Anglo-American heritage" and "leading members of the Western European community" have expressed opposition to executing juvenile criminal offenders; in addition, the Court cited in a footnote numerous other cases in which it considered the views of other nations.⁷⁵ Consideration of and deference to international norms is controversial and appears infrequently in the Court's analysis; when international norms are cited, they are usually relegated to footnotes. Thus, although international norms do seem to warrant some consideration by the Court, they are not a primary driver of Supreme Court standards of decency jurisprudence.

III. CORPORAL PUNISHMENT OF CHILDREN

The Supreme Court declared that the Eighth Amendment prohibits only cruel and unusual criminal punishments, and therefore does not proscribe noncriminal punishment.⁷⁶ Thus, corporal punishment is permitted under the Eighth Amendment, and state legislatures are solely responsible for determining the legality of corporal punishment. In so doing,

72. *Roper*, 543 U.S. at 567–68.

73. *Kennedy v. Louisiana*, 554 U.S. 407, 431–32 (2008).

74. *Atkins*, 536 U.S. at 316–17 n.21.

75. *Thompson v. Oklahoma*, 487 U.S. 815, 830 & n.31 (1988) (citing *Enmund v. Florida*, 458 U.S. 782, 796–797 & n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 & n.10 (1977); *Trop v. Dulles*, 356 U.S. 86, 102 & n.35 (1958)) (providing evidence of the Court's earlier consideration of international norms in determining whether a punishment violates the Eighth Amendment).

76. *Ingraham v. Wright*, 430 U.S. 651 (1977).

legislatures consider factors that are nearly identical to those that have influenced courts in determining whether a particular punishment is permitted under the Eighth Amendment.

Corporal punishment may be defined in various ways. Many statutes define it as "a means of discipline involving physical force to restrain or strike a child absent an emergency requiring protection of others."⁷⁷ Human Rights Watch uses a somewhat more specific definition: use of force intended to cause a child pain or humiliation.⁷⁸ The two primary settings in which corporal punishments occur are at home and at school.

Corporal punishment at school is currently on the decline, both internationally and domestically. Although corporal punishment was once common in schools around the world, most European nations and many other countries, including New Zealand, Canada, and Japan, have outlawed it, many beginning in the 1980s.⁷⁹ Currently, 106 nations forbid the practice.⁸⁰ It remains legal in schools in parts of Africa, Asia, and the Middle East. The United States is the only country in the Western world that still allows corporal punishment in any of its schools.⁸¹ In 1977, only two of the twenty-three states that had addressed corporal punishment in schools through legislation forbade it.⁸² New Jersey was the first to ban it in 1867 and remained the only state to do so for the next 120 years until Massachusetts followed suit.⁸³ Today, however, corporal punishment in schools remains permissible in only twenty states, primarily in the South.⁸⁴ Proportionally, Mississippi is the state that uses corporal punishment most frequently in its schools, having punished seven and a half percent of its public school students with this method in

77. Timothy John Nolen, *Smacking Lesson: How the Council of Europe's Ban on Corporal Punishment Could Serve as a Model for the United States*, 16 *CARDOZO J.L. & GENDER* 519, 520 (2010).

78. HUMAN RIGHTS WATCH, *A VIOLENT EDUCATION* 14 (2008).

79. Angela Bartman, *Spare the Rod and Spoil the Child? Corporal Punishment in Schools Around the World*, 13 *IND. INT'L & COMP. L. REV.* 283, 297 n.88 (2002).

80. HUMAN RIGHTS WATCH, *supra* note 78, at 2.

81. Pam Skokos, *Legislative Update: A Trend Toward Abolition of Corporal Punishment in the United States*, 30 *CHILD. LEGAL RTS. J.* 107, 107 (2010).

82. *Ingraham v. Wright*, 430 U.S. 651, 662 (1977).

83. David J. Messina, *Corporal Punishment v. Classroom Discipline: A Case of Mistaken Identity*, 34 *LOY. L. REV.* 35, 52 (1988).

84. Skokos, *supra* note 81, at 108.

the 2006–07 school year.⁸⁵ Texas is the state using corporal punishment the most in absolute numbers: in the 2006–07 school year, the state accounted for 49,197 of the 223,190 occurrences of corporal punishment of students in the United States.⁸⁶ Even states that permit corporal punishment encounter a great deal of debate surrounding the issue, and its use in schools nationwide has been on the decline.⁸⁷

In contrast to the parallel international and domestic decline in the permissibility of corporal punishment at school, domestic legislation has not followed international example by regulating corporal punishment in the home. Twenty-nine countries have outlawed corporal punishment in homes;⁸⁸ Sweden was the first to do so in 1979.⁸⁹ In the United States, however, it remains legal in all fifty states for parents to use corporal punishment on their children.⁹⁰ This has not been without controversy: bans on all corporal punishment of children have been proposed in Massachusetts and California, but both were defeated.⁹¹ This defeat, even in what are considered two of the more liberal states in the nation, is not a surprise in light of research revealing that, as recently as 1991, over ninety percent of American parents spanked their toddlers.⁹² Public opinion on this issue is consistent.

Although the Supreme Court has declared that children's First and Fourteenth Amendment rights are not suspended while they are in public school,⁹³ in 1977 it held in *Ingraham v. Wright*⁹⁴ that corporal punishment in schools is exempt from the Eighth Amendment's proscription of cruel and unusual

85. HUMAN RIGHTS WATCH, *supra* note 78, at 3.

86. *Id.*

87. Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment's Constitutionality under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1377 (2009).

88. *Countdown to Universal Prohibition*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT, <http://endcorporalpunishment.org/pages/progress/countdown.html> (last visited Dec. 12, 2010).

89. Klaus A. Ziegert, *The Swedish Prohibition of Corporal Punishment: A Preliminary Report*, 45 J. MARRIAGE & FAM. 917, 917 (1983).

90. Nolen, *supra* note 77, at 530.

91. Jason M. Fuller, *The Science and Statistics Behind Spanking Suggest that Laws Allowing Corporal Punishment are in the Best Interests of the Child*, 42 AKRON L. REV. 243, 245 (2009).

92. Murray A. Straus, *Discipline and Deviance: Physical Punishment of Children and Violence and Other Crimes in Adulthood*, 38 SOC. PROBS. 133, 136 (1991).

93. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

94. 430 U.S. 651 (1977).

punishment.⁹⁵ The Court stated that the “prevalent rule in this country today privileges such force as a teacher . . . reasonably believes necessary.”⁹⁶ Most states, however, have forbidden such punishment by legislation.⁹⁷

The Supreme Court has also ruled that corporal punishment in the home is permissible. The Court held in *Meyer v. Nebraska*⁹⁸ that the liberties protected by the Due Process Clause of the Fourteenth Amendment include the rights to “marry, establish a home and bring up children.”⁹⁹ The Court further held in *Prince v. Massachusetts*¹⁰⁰ that:

the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . [a]nd it is in recognition of this that [*Meyer* and *Pierce v. Society of Sisters*¹⁰¹] have respected the private realm of family life which the state cannot enter.¹⁰²

These cases essentially settled the current law regarding corporal punishment in the home. Parents may use such punishment so long as the punishment does not constitute physical abuse.¹⁰³ Like the Supreme Court, state courts generally have left the determination of the legality of corporal punishment to the legislature.¹⁰⁴ State courts are not completely removed from the determination, but their role in the process has been limited to

95. *Id.* at 671.

96. *Id.* at 661.

97. See *supra* notes 82–84 and accompanying text.

98. 262 U.S. 390 (1923).

99. *Id.* at 399.

100. 321 U.S. 158 (1944).

101. 268 U.S. 510 (1925).

102. *Prince*, 321 U.S. at 166.

103. See David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147, 152 (1998) (discussing restrictions on permissibility of corporal punishment by parents).

104. See, e.g., *Raford v. Florida*, 828 So. 2d 1012, 1021 (Fla. 2002) (stating that the “difficult task [of determining a line between permissible corporal punishment and proscribed child abuse] is principally a legislative function, better left to the Legislature”); *Raboin v. North Dakota Dep’t. of Human Servs.*, 552 N.W.2d 329, 335–36 (N.D. 1996) (Neumann, J., concurring) (stating that “[a]ccordingly, our legislature has defined ‘child abuse’ and ‘harm’ to forbid only *excessive* corporal punishment that results in injury. It is that legislative definition which this court is obligated to apply, and which the majority has properly applied in this case”).

interpreting corporal punishment statutes and determining legislative intent regarding the enactment of such statutes.¹⁰⁵

Thus, corporal punishment in homes, unlike that in schools, has not been declared illegal by legislatures. However, the future of this area remains uncertain, and changing public opinion may eventually result in at least some states proscribing all forms of corporal punishment on children.

Public opinion is a major factor in enacting legislation, likely even more important than it is in judicial decisions.¹⁰⁶ Indeed, public opinion is considered one of the most important factors in determining whether a piece of legislation will be enacted.¹⁰⁷ In the 1970s, for example, public opinion concerning domestic violence changed because of the emergence of grassroots movements and support groups, which sought to bring the issue to public attention, and also because of the rise of the women's liberation movement of the late 1960s.¹⁰⁸ Americans' support for spanking also is decreasing.¹⁰⁹ This change in public opinion almost certainly was a major factor in the prohibition of corporal punishment in schools by several states.

Similarly, fewer parents now approve of and practice corporal punishment on their own children, and a smaller percentage of the public approves of corporal punishment in schools or in homes.¹¹⁰ The statistics regarding public opinion on corporal punishment support the view that society increasingly favors banning corporal punishment in schools and, although less certain, may support banning it in homes in certain states. Both the absolute number of states that have banned corporal punishment in schools and the trend against using it even in

105. See, e.g., *Connecticut v. Nathan J.*, 982 A.2d 1067, 1076 (Conn. 2009) (deferring to legislative intent to protect parents from "reprisal for reasonable physical discipline of their children" as evidenced in the relevant statute); *Ex parte T.D.T.*, 745 So. 2d 899, 903 (Ala. 1999) (declaring that, in passing the relevant statute, the legislature intended to protect parents from prosecution for using reasonable physical discipline).

106. Paul Burstein, *Bringing the Public Back in: Should Socialists Consider the Impact of Public Opinion on Public Policy?*, 77 SOC. F. 27, 29–30 (1998).

107. Anita S. Krishnakumar, *Process Problem*, 46 HARV. J. ON LEGIS. 1, 39 (2009).

108. Sarah Brady Brundage, *Spare the Rod, Save the Child: Reviewing Corporal Punishment Through the Lens of Domestic Violence*, 8 WHITTIER J. CHILD & FAM. ADVOC. 83, 88 (2008).

109. Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 583 (2003).

110. Orentlicher, *supra* note 103, at 151.

states in which it is legal, together with public opinion data increasingly in favor of forbidding spanking in schools and homes, are given as potential reasons that corporal punishment should be forbidden by every state.

Expertise might also play a role in legislative decisions. Those thought to be "experts" in determining the propriety of corporal punishment of children are most often psychologists, psychiatrists, and sociologists who study the issue and its positive and negative effects on children upon whom it is used. These experts, like similar experts with opinions on the propriety of capital punishment, have no authority to make law in this area; they are, however, a major force in popular opinion and legislation that is likely to be enacted.¹¹¹

Over the years, professionals increasingly have spoken out against child corporal punishment.¹¹² Experts frequently cite research suggesting that such punishment causes children to become more violent or aggressive and to develop emotional and behavioral problems to support their denunciation of corporal punishment.¹¹³ Both the American Psychological Association and the National Association of School Psychologists have taken official positions opposing corporal punishment in all forms.¹¹⁴ The American Academy of Pediatrics (AAP) officially opposes the use of corporal punishment for children, having released a statement that corporal punishment "may affect adversely a student's self-image and school achievement and that it may contribute to disruptive and violent student behavior." The AAP adds that "[a]lternative methods of behavioral management have proved more effective."¹¹⁵ The National Association of Social Workers also has spoken out against all forms of corporal punishment of children in any setting, including the home and the school.¹¹⁶ Other major organizations officially opposed to all forms of cor-

111. See, e.g., James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451, 480 (1993).

112. Lynn Sametz, *Children, Law and Child Development: The Child Developmentalist's Role in the Legal System*, 30 JUV. & FAM. CT. J. 49, 62-64 (1979).

113. Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1217 (2009).

114. See Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 1020-21 n.263 (1996).

115. Am. Acad. of Pediatrics Comm. on Sch. Health, *Corporal Punishment in Schools*, 106 PEDIATRICS 343, 343 (2000).

116. Fuller, *supra* note 91, at 263 n.95.

poral punishment of children include the American Bar Association, American Medical Association, American Public Health Association, National Education Association, and National Association of Pediatric Nurse Associates and Practitioners.¹¹⁷

International norms, although rarely considered openly in legislative decisions, often inform experts and therefore influence legislation.¹¹⁸ Experts point to the absolute number of nations who prohibit corporal punishment of children as a reason that the United States should join them.¹¹⁹ Additionally, they point to the particular nations that actually ban or favor banning all corporal punishment as a persuasive factor.¹²⁰ For instance, experts imply that the United States should aim to be like the European nations and the rest of the Western world in forbidding corporal punishment, rather than remaining like nations in Africa and Asia by permitting corporal punishment in all homes and in some schools.¹²¹ Several international organizations oppose corporal punishment, including the United Nations and Save the Children, both of which oppose all corporal punishment of children.¹²² Thus, because legislators might rely on expert opinions in crafting laws, international norms might influence the statutes they enact.

IV. ANALYSIS

The desire for more humane methods of execution is neither new nor particular to the United States. Fyodor Dostoevsky noted in the late nineteenth century:

You know we prefer beating—rods and scourges—that's our national institution. Nailing ears is unthinkable for us, for we are, after all, Europeans. But the rod and the scourge we have always with us and they cannot be taken from us. Abroad now they scarcely do any beating. Manners are

117. Pollard, *supra* note 109, at 593–94.

118. *See, e.g., id.* at 587–88.

119. *Id.*

120. *See* Michael P. Matthews, *Caning and the Constitution: Why the Backlash Against Crime Won't Result in the Back-Lashing of Criminals*, 14 N.Y.L. SCH. J. HUM. RTS. 571, 612 (1998).

121. *Id.* (listing nations permitting corporal punishment).

122. Pollard, *supra* note 109, at 591–92.

more humane, or laws have been passed, so that they don't dare to flog men now.¹²³

As Dostoevsky noted, a societal desire to shift toward less painful, more humane forms of criminal punishment obviates the need for artificial, court-enforced evolving standards of decency. Instead, left to state legislatures, this desire would naturally influence the legality of various forms of criminal punishment. Thus, even without the evolving standards of decency doctrine, Eighth Amendment law would not stagnate. As noted, much of the change in execution methods has occurred not through judicial mandates, but through political and social desires to execute criminals in less painful ways.¹²⁴ Following the introduction of the more modern, and ostensibly more humane, forms of execution, many states enacted legislation forbidding the earlier forms, because they seemed to be antiquated and unnecessarily harsh.¹²⁵

The development of the laws of corporal punishment reinforces this hypothesis.¹²⁶ Without any court forcing the nation to adopt evolving standards of decency regarding punishment of children, the majority of states, and a growing percentage of the public at large, have turned against permitting school officials to exercise corporal punishment on students. This occurred despite the Supreme Court's holding that students are not protected against corporal punishment by the Eighth Amendment. Although no states have forbidden corporal punishment by parents, laws against child abuse prevent excessively harsh punishment. Given shifts in public opinion, it seems at least possible that states may begin banning corporal punishment in homes as well. The evolution of laws restricting forms and targets of the death penalty, just like that of laws restricting corporal punishment, arguably would have developed naturally without court-mandated evolving standards of decency.

Although international norms probably play a minor and only indirect role in both legislative and judicial decisions, domestic public opinion has a much more direct impact on legislatures than on courts. So, if legislatures, rather than courts,

123. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 221 (Maire Jaanus ed., Constance Garnett trans., Barnes & Noble Classics 2004) (1879).

124. See *supra* notes 37–50 and accompanying text.

125. *Id.*

126. See *supra* Part III.

were the primary decision makers regarding whether to permit a particular criminal punishment, public opinion against harsh criminal punishments would provide an even stronger incentive to forbid harsh punishments.

Also, the rate of change in public opinion, sometimes more important than actual public opinion in judicial determinations,¹²⁷ is less important to legislators than the absolute percentage of a legislator's constituents who favor proscribing a punishment. Courts' emphasis on the rate of change may lead to proscribing a punishment when public opinion has begun to move in opposition to it, although the majority of the public still deems the punishment acceptable. Therefore, leaving regulation of criminal punishment to legislatures would better represent public opinion without overemphasizing how quickly it changes.

Of course, legislators, like judges, allow their own opinions to play a part in their decisions. Moreover, the public probably reasonably expects that legislators make decisions at least partially based on their personal beliefs or opinions. Yet, because legislators are elected, their views are more reflective of public opinion than are those of courts. Indeed, judges frequently have been accused of having opinions in accord with societal "elites" rather than the general public.¹²⁸ Unlike appointed federal judges, legislators must remain in touch with, and be more respectful of, their constituents' views. Thus, pure public opinion plays a larger role in legislators' decisions than it does in courts' opinions. And, because public opinion has steadily moved in favor of less harsh criminal punishments, allowing legislators to determine the appropriate legality of criminal punishment would not pose a serious risk of halting the evolution of criminal punishment.

Although expert organizations' opinions only indirectly influence legislative decision making, they remain a major factor in the legislature's direction. Psychologists, psychiatrists, and their peers play a significant role in informing the public of the potential harms that may result from the use of particular punishments. Before making laws on a subject like punishment, legislators typically hold hearings that include testimony from

127. See *supra* notes 71–73 and accompanying text.

128. See, e.g., Daniel A. Farber, *Disarmed by Time: The Second Amendment and the Failure of Originalism*, 76 CHI.-KENT L. REV. 167, 185 n.78 (2000).

such experts.¹²⁹ Their impact on public opinion and on legislators’ decisions renders their influence under legislative lawmaking potentially greater than it is under current jurisprudence. Because expert organizations oppose many forms of criminal punishment, a heavier emphasis on their opinions in the criminal context would further prevent stagnancy in the law.

CONCLUSION

Abandoning the Supreme Court’s evolving standards of decency approach and leaving criminal punishments to state legislatures, within the traditional boundaries of the Eighth Amendment, would not have the effect of stagnancy that many fear. Much of the change in criminal punishment has been driven by public desire to make such punishment more humane. Public opinion, one of the driving factors in the Court’s analysis, steadily has moved the country toward more humane forms of criminal punishment. The Court’s current method of analysis takes into account public opinion, the Court’s own opinion, views of professional and religious organizations and, occasionally, international norms, the same factors typically considered by legislatures. The Court’s consideration of public opinion, however, focuses on the rate of change in opinion rather than its absolute value, and thus often causes a judicially mandated “evolution” of the law before overall public opinion is equally evolved. In contrast, the Court’s treatment of corporal punishment indicates that legislatures would reach the same or similar results as Court-mandated evolving standards of decency, but that the law would change at a rate that better corresponds with public opinion. Change in law would not precede change in opinion as it does under the Supreme Court’s forced evolving standards of decency doctrine. Permitting legislatures to address criminal punishment would benefit society by yielding a body of law far more indicative of public desire than the law currently made by the Court.

Katheryn Klimko

129. See, e.g., Robert S. Chang & Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community To Support Marriage Equality*, 14 ASIAN PAC. AM. L.J. 22, 22 (2009).