THE EVOLUTION OF “Evolving Standards”:
ACCOUNTING FOR THE MEDICAL AND PSYCHOLOGICAL EFFECTS OF PRISON CONDITIONS AND PUNISHMENTS

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I. INTRODUCTION

In July 2009, Emmett Graham, Jr.—who was then incarcerated in the Federal Medical Center located in Ayer, Massachusetts—notified prison staff that one of the prison doctors at the facility had sexually assaulted him and requested an investigation into the doctor’s conduct.1 Prison staff placed Graham in the Special Housing Unit (SHU) while the administration decided whether to grant protective custody.2 The placement was purportedly for Graham’s protection, but he asked to leave the SHU in August 2009 and June 2010.3 During his isolation, Graham asserts that he was “locked down [twenty-three] or [twenty-four] hours a day” under the following conditions: he had no access to outdoor recreation, could only shower three times per week, was in a cell missing the handrails and raised toilet seat he required, and had lights in his eyes for up to twenty hours daily.4 All in all, Graham claims he was in segregation for a minimum of two years and that officials denied him outdoor exercise for several months during that period, “causing him extreme painful and emotional injury.”5 Ultimately, the District Court for the District of Massachusetts granted summary judgment for the respondents in Graham’s Eighth Amendment case.6

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2 Id.

3 Id. at *15–16.

4 Id. at *17.

5 Id. at *17, *28.

6 Id. at *35–36.
Cases like Emmett Graham’s, which involve depriving incarcerated people of outdoor exercise opportunities, have resulted in a circuit split. Specifically, there is disagreement regarding: (1) whether denial of outdoor exercise, as opposed to out-of-cell exercise, is independently objectionable; and (2) the conditions under which the denial becomes a constitutional issue.\footnote{See discussion infra Part II.B.} These disagreements pertain to the objective element of Eighth Amendment claims challenging prison conditions, which requires that the deprivation complained of be “sufficiently serious.”\footnote{Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)) (citing Hudson v. McMillian, 503 U.S. 1, 5 (1992)).} The prison official’s conduct must deny “the minimal civilized measure of life’s necessities.”\footnote{Id. (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).}

This Comment applies the existing views of how the Eighth Amendment should apply to punishments imposed for criminal convictions to demonstrate why denying incarcerated people outdoor exercise should satisfy the objective prong of the Eighth Amendment, as applied to prison conditions, as a matter of law.\footnote{Although the Eighth Amendment applies to prison conditions, courts assess these cases differently from cases assessing the constitutionality of punishments imposed after criminal convictions. Compare, e.g., Atkins v. Virginia, 536 U.S. 304, 311–17, 321 (2002) (looking to the trends in state legislative enactments prohibiting the execution of the intellectually disabled in order to assess the constitutionality of this practice under the “evolving standards” test), with Apodaca v. Raemisch, 864 F.3d 1071, 1077 (10th Cir. 2017) (assessing whether the incarcerated person’s allegations plausibly showed (1) conditions that were “sufficiently serious” and (2) deliberate indifference of prison officials to the health of the incarcerated person in a deprivation of outdoor exercise case). But in the absence of a clear consensus over how sufficient severity is shown to satisfy the objective prong of the Eighth Amendment in cases involving denial of outdoor exercise—an absence evident in the circuit split—the theories of how the Eighth Amendment applies to punishments can be used to bridge the gap.} This Comment shows how the Supreme Court’s historically preferred test for assessing punishments—the “evolving standards” test—might be tweaked to more appropriately ensure that incarcerated people live in civilized conditions. This test, which posits that courts should assess the Eighth Amendment in accordance with the “evolving standards of decency that mark the progress of a maturing society,”\footnote{Trop v. Dulles, 356 U.S. 86, 101 (1958).} currently examines objective evidence—mainly state legislative enactments—to determine whether there is a national consensus for or against specific
punishments. But expanding this test to account for medical and psychological research regarding the effects of various punishments and prison conditions on incarcerated individuals will promote the humanity of their confinement by ensuring that their treatment reflects such “evolving standards,” regardless of any lag in their codification in state legislation. This expansion also has important implications for the practice of denying incarcerated people outdoor exercise because there is strong evidence that regular exercise and exposure to sunlight are associated with myriad positive psychological and physical health effects.

Part II of this Comment more broadly introduces the practice of denying outdoor exercise and the circuit split regarding the constitutionality of that practice. Part III presents the evidence of the positive effects of exercise and of exposure to sunlight to demonstrate the importance of outdoor exercise to human mental and physical health. Part IV discusses the prevailing views of how the Eighth Amendment should apply to punishments: the “evolving standards” test, the originalist view, and what this Comment calls the “long usage” test. This Comment applies each approach to the practice of denying incarcerated people outside exercise. Part V analyzes a hypothetical Supreme Court review of the constitutionality of this practice, both from a predictive and a normative standpoint. This review will demonstrate that the “evolving standards” test can and should be expanded to account for the prevailing research on the effects of punishments and prison conditions to ensure that courts make informed decisions when determining whether these practices align with modern standards. Using the expanded conception of this test, the Supreme Court can strike down denials of outdoor exercise for incarcerated people and other unduly harmful prison conditions and punishments. Part VI concludes by summarizing the merits of adopting this broader strain of the “evolving standards” test.

II. THE PRACTICE OF DENYING INCARCERATED PEOPLE OUTDOOR EXERCISE

In the absence of easily discoverable records of the history of the denial of outdoor exercise in prison, case law can help set some temporal boundaries. The litigation of the constitutionality of outdoor

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13 See discussion infra Part III.
exercise deprivation stretches back to at least 1971.\textsuperscript{14} From 1971 to the present day, approximately 1,272 cases have at least mentioned the issue of the constitutionality of the deprivation of outdoor exercise.\textsuperscript{15} These cases began to increase in number around 2011, and they peaked around 2017.\textsuperscript{16} The history of the practice—particularly when prisons first began to use it—becomes relevant when considering how proponents of various Eighth Amendment interpretations would assess its constitutionality. To provide a well-rounded understanding of this practice, this Part presents the case of Charles Pona, an incarcerated person who was subjected to this punishment, to demonstrate its real-world effects on actual people. Then, cases illustrating its differential reception among the circuits frame the controversy over its constitutionality.

A. Charles Pona: A Case Study in the Severity of Outdoor Exercise Deprivation

In May 2014, Charles Pona, an incarcerated person in the Rhode Island Adult Correctional Institution, received notice of a narcotics trafficking charge against him and pled not guilty.\textsuperscript{17} When Pona sought access to the evidence against him, the hearing officer told Pona that he was not required to disclose any evidence and that the investigator’s report alone—which Pona did not see or receive information about—supported the finding of guilt against him.\textsuperscript{18} The officer punished Pona with one year’s disciplinary segregation and loss of one year’s good time credit.\textsuperscript{19} On appeal, Pona received a second hearing at which he, again, pled not guilty and at which, again, the hearing officer provided no evidence or information regarding his

\textsuperscript{15} This number was generated through the following Lexis+ search: (“outdoor recreation” or “outdoor exercise” or “outside recreation” or “outside exercise”) w/10 (“Eighth Amendment” or “cruel and unusual”).
\textsuperscript{16} This information is estimated from the timeline filter graph that Lexis+ generates for searches.
\textsuperscript{18} Id. at *5.
\textsuperscript{19} Id.
alleged conduct. The only change was that the hearing officer added a new punishment—one year without visits.

Pona was in a combination of disciplinary and administrative segregation for almost twenty-one months. While in disciplinary segregation, he was celled constantly, with the exceptions of a half hour of inside exercise and a fifteen-minute shower each weekday. He was denied the following: visits; phone calls; storage of books, photographs, magazines, a television, and an MP3 player in his cell; employment; commissary privileges; and access to religious services, prison programs, the gym, and the law library. Conditions were somewhat less restrictive in administrative segregation. Pona claimed that his time in segregation deprived him of almost all human contact and resulted in “severe depression, anxiety, lethargy, paranoia, weight loss, and . . . ongoing antisocial issues.” The District Court for the District of Rhode Island dismissed Pona’s Eighth Amendment case, encompassing his complaints regarding outdoor recreation, for failure to state a claim.

B. Circuit Disagreement Regarding the Constitutionality of the Denial of Outdoor Exercise

The circuit courts are split regarding the point at which depriving incarcerated people of outdoor exercise becomes unconstitutional under the Eighth Amendment. Eighth Amendment claims have an objective and a subjective prong:

Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, “sufficiently serious[.]” . . . The second requirement follows from the principle that “only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.” To violate the Cruel

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20 Id. at *6.
21 Id.
22 Id. at *20.
24 Id.
25 Id. at *8.
26 Id.
and Unusual Punishments Clause, a prison official must have a “sufficiently culpable state of mind.”

The standards that plaintiffs must meet to satisfy each prong depend on the type of claim at issue. The circuit split addressed in this Comment concerns the conditions under which plaintiffs can satisfy the objective prong. Cases from the Ninth and Tenth Circuits demonstrate the two-part disconnect; it is unclear (1) whether deprivation of outdoor exercise—as opposed to denial of out-of-cell exercise—is independently objectionable under the Eighth Amendment and (2) under what conditions a denial of outdoor exercise has constitutional implications.

In Apodaca v. Raemisch, the Tenth Circuit considered whether two incarcerated people who had spent approximately eleven months in administrative segregation, allegedly without outdoor exercise, had a viable Eighth Amendment claim. During the segregation, prison officials permitted the incarcerated individuals access to a “recreation room” five times per week. The case turned on fulfillment of the objective prong, dealing with the objective severity of the eleven-month deprivation. The plaintiffs relied on a previous Tenth Circuit case, Perkins v. Kansas Department of Corrections, in which an incarcerated person challenged a deprivation of out-of-cell exercise that lasted over nine months. The Tenth Circuit, in Perkins, reversed the district court’s dismissal of the case, holding that prisons could not deny incarcerated people outdoor exercise for extended periods.


29 See Farmer, 511 U.S. at 834 (“For a claim . . . based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm . . . . In prison-conditions cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety . . . .” (citing Helling v. McKinney, 509 U.S. 25, 35 (1993); and then citing Wilson, 501 U.S. at 302–03)).

30 See, e.g., Apodaca v. Raemisch, 864 F.3d 1071, 1074, 1077–78 (10th Cir. 2017); Keenan v. Hall, 83 F.3d 1083, 1088–89 (9th Cir. 1996); Ajaj v. United States, 293 F. App’x 575, 577, 583–84 (10th Cir. 2008); Allen v. City & County of Honolulu, 39 F.3d 936, 937 & n.1, 939–40 (9th Cir. 1994).

31 Apodaca, 864 F.3d at 1074.

32 Id.

33 Id. at 1077.

34 165 F.3d 803 (10th Cir. 1999).

35 Apodaca, 864 F.3d at 1077.

36 Id.
But the court, in *Apodaca*, explained that the *Perkins* holding was ambiguous; although the court couched its holding in terms of “outdoor exercise,” the incarcerated person in *Perkins* had alleged a denial of all out-of-cell recreation, not just exercise that would occur physically outside of the prison.\(^{37}\) Thus, a reasonable person could be unsure of whether *Perkins* proscribed “extended denial” of outside exercise or out-of-cell exercise.\(^{38}\) The *Apodaca* court therefore ruled against the incarcerated individuals because, even if the outdoor exercise prohibition violated the Eighth Amendment, prison officials were covered by qualified immunity since the “underlying constitutional right” was not clearly established.\(^{39}\) *Apodaca* also cited another Tenth Circuit decision, *Ajaj v. United States*,\(^{40}\) in which the court ruled that a one-year outdoor exercise deprivation, during which the incarcerated person was indefinitely segregated, did not implicate the Eighth Amendment.\(^{41}\)

It is worth noting that the *Apodaca* court indicated that if the holding in *Perkins* extended to outdoor exercise, it would clearly prohibit an eleven-month denial of outdoor exercise.\(^{42}\) As the Tenth Circuit found in *Despain v. Uphoff*, conditions of confinement cases are fact sensitive: “the ‘circumstances, nature, and duration’ of the challenged conditions must be carefully considered.”\(^{43}\) This approach is presumably identical—or at least, similar—to that of the Ninth Circuit, since *Despain* quoted a Ninth Circuit decision for this proposition.\(^{44}\) Indeed, the following cases make clear that the Ninth Circuit considers factors other than the deprivation length when deciding cases in which prison officials denied incarcerated people outdoor exercise.

\(^{37}\) *Id.*

\(^{38}\) *Id.* at 1074, 1077.

\(^{39}\) *Id.* at 1074. Qualified immunity “applies when a public official’s conduct does not violate clearly established rights that a reasonable person would have known about.” *Id.* at 1076 (citing Shwartz v. Booker, 702 F.3d 573, 579 (10th Cir. 2012)).

\(^{40}\) 293 F. App’x 575 (10th Cir. 2008).

\(^{41}\) *Apodaca*, 864 F.3d at 1078; see also *Ajaj*, 293 F. App’x at 577, 584 (citing Fogle v. Pierson, 435 F.3d 1252, 1260 (10th Cir. 2006)). Although *Ajaj* is unpublished and generally does not constitute precedent, it is still indicative of the Tenth Circuit’s reasoning and has value to demonstrate the unsettled nature of Eighth Amendment jurisprudence.

\(^{42}\) *Apodaca*, 864 F.3d at 1074.

\(^{43}\) 264 F.3d 965, 974 (10th Cir. 2001) (quoting Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000)).

\(^{44}\) *Id.* (quoting Lewis, 217 F.3d at 731).
In Keenan v. Hall, the Ninth Circuit reviewed the case of an incarcerated person who challenged his confinement conditions under the Eighth Amendment, in part because prison officials denied him outdoor exercise for six months.\footnote{83 F.3d 1083, 1088 (9th Cir. 1996).} Citing another Ninth Circuit case, the court reasoned that, when incarcerated people are in “continuous and long-term segregation,” the Eighth Amendment prohibits depriving them of \textit{outdoor} exercise.\footnote{Id. at 1089 (citing Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979)).} The court held that the incarcerated individual had produced enough evidence to overcome summary judgment and continue to trial.\footnote{Id.}

In Allen v. City & County of Honolulu, the Ninth Circuit heard the case of John Allen, an incarcerated individual who spent four months in disciplinary segregation in the Special Holding Unit (SHU) at the Halawa Medium Security Facility and then remained in the SHU indefinitely until he could demonstrate that his behavior was in accordance with prison rules.\footnote{39 F.3d 936, 937 & n.1, 939 (9th Cir. 1994).} In the SHU, incarcerated people were usually in their cells unless they were in the infirmary, law library, or recreation area.\footnote{Id. at 939.} But some procedural complications existed—these individuals could only access the law library and the outdoor recreation space during specific hours and required a prison guard chaperone when travelling between the two.\footnote{Id. at 937.} Allen asserted that he was often forced to skip outdoor recreation on a day he went to the law library, effectively making him choose between them.\footnote{Id.} The Ninth Circuit held that, based on “the highly restrictive conditions of confinement and the indeterminate length of incarceration under these conditions, a reasonable prison official should have known that [precedent] required him to provide Allen with regular outdoor exercise.”\footnote{Id. at 939.} The court sustained the district court’s conclusion that the prison official was “not entitled to qualified immunity at the summary judgment stage” because Allen’s right to exercise outdoors and his right to use the law library had both been clearly established—a reasonable official would have known he could not make Allen choose between them.\footnote{Id. at 940.}
Together, these cases indicate a disconnect between the Ninth and Tenth Circuits regarding: (1) whether lack of access to outdoor exercise is independently objectionable and (2) under what conditions the deprivation has constitutional implications. As to the former, in Apodaca, the Tenth Circuit stated that its previous case, Perkins, left unclear whether it prohibited the long-term denial of outdoor exercise or the long-term denial of out-of-cell exercise. But in Keenan, the Ninth Circuit held that, “[d]epprivation of outdoor exercise violates the Eighth Amendment rights of [incarcerated people] confined to continuous and long-term segregation.”

As to the circumstances required to implicate the Eighth Amendment, there is most notably a divide in how long each circuit will allow the deprivation to proceed, with courts also considering the conditions of the confinement. For example, in Ajaj, the Tenth Circuit indicated that an outdoor exercise deprivation lasting one year, during which the incarcerated individual was indefinitely segregated, did not run afoul of the Eighth Amendment. But, in Allen, the Ninth Circuit held that a reasonable official would have known that an incarcerated individual was due outdoor exercise after four months of an indefinitely long segregation and during which he was made to skip outdoor recreation on some days that he accessed the law library. Thus, in the Ninth Circuit, during indefinite segregation, prison officials cannot make an incarcerated person choose between outdoor exercise and access to the law library for four months. But in the Tenth Circuit, during indefinite segregation, prison officials apparently may entirely withhold outdoor exercise for a year. This stark disparity in approaches across the circuits results in incarcerated people in different regions having different legal limits on their access to beneficial outdoor exercise.

54 Apodaca v. Raemisch, 864 F.3d 1071, 1077 (10th Cir. 2017).
55 Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996) (citing Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979)).
56 Ajaj v. United States, 293 F. App’x 575, 584 (10th Cir. 2008) (citing Fogle v. Pierson, 435 F.3d 1252, 1260 (10th Cir. 2006)).
57 Allen, 39 F.3d at 937, 939.
III. Outdoor Exercise as a Panacea: Evidence of the Effects of Exercise and of Sunlight Exposure on Physical and Mental Health

Considerable evidence exists regarding the positive physical and mental health outcomes associated with exercise and exposure to sunlight. This research highlights the inhumanity of denying outdoor exercise to incarcerated people. The evidence on exposure to sunlight is particularly relevant because of the circuit split regarding whether lack of access to outdoor exercise, as opposed to out-of-cell exercise, is independently objectionable. This Part outlines the positive health effects associated with exercise, and with sunlight exposure, in turn.

A. The Positive Health Effects of Exercise

The Physical Activity Guidelines for Americans, published in the Journal of the American Medical Association, indicates that “[b]eing physically active is one of the most important actions individuals . . . can engage in to improve their health.”\(^{58}\) This piece, meant to provide guidelines for healthcare professionals seeking to increase their patients’ physical activity to better their health, explains that health benefits accrue to adults who spend less time sitting down and perform any amount of moderate-to-vigorous exercise.\(^{59}\) Remarkably, one episode of such activity may, on the same day the exercise occurs, “improve sleep, reduce anxiety symptoms, improve cognition, reduce blood pressure, and improve insulin sensitivity.”\(^{60}\) Regular exercise at the same intensity builds on many of these benefits and adds new ones.\(^{61}\)

The Physical Activity Guidelines for Americans grew out of a report prepared on behalf of the Department of Health and Human Services that synthesized existing scientific literature regarding physical


\(^{59}\) Id. at 2021, 2025. The article provides the following as examples of moderate-intensity activities: “walking briskly at 2.5 to 4.0 mph, playing volleyball, or raking the yard.” Id. at 2022. The article provides the following as examples of vigorous-intensity activities: completing a strenuous fitness class, jogging or running, and bringing in heavy groceries. Id. Finally, light-intensity exercise might include walking at or slower than two miles per hour or completing light chores in the house. Id.

\(^{60}\) Id. at 2027.

\(^{61}\) Id.
activity. This report provides further insight into the benefits of exercise. Moderate-to-vigorous exercise has myriad impacts on sleep, such as reducing the time it takes to fall asleep, increasing deep sleep duration, and decreasing sleepiness during the day. Consistent exercise lessens depressive symptoms and anxiety generally and decreases the risk of developing clinical depression. Increased physical activity also impacts cognitive functioning; for example, it can lower the risk of developing dementia. Powerfully, consistent exercise also has positive effects on one’s subjective views of their quality of life.

Exercise also affects a variety of diseases. Consistent moderate-to-vigorous exercise decreases the risk of the following cancers: breast, colon, bladder, endometrial, esophageal, kidney, lung, and stomach. When people who do not perform moderate or higher intensity exercise begin replacing sedentary behavior with even light-intensity activity, their risks of all-cause mortality, cardiovascular disease, and type-two diabetes decrease. Finally, stroke and hypertension appear less frequently in people who are physically active or who increase their physical activity.

A study published in the Lancet sought to estimate the extent to which physical inactivity contributes to the prevalence of major noncommunicable diseases. Strikingly, physical inactivity is associated with about 9 percent of worldwide premature mortality. It also strongly correlates with approximately 6 to 10 percent of cases of coronary heart disease, type-two diabetes, breast cancer, and colon

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64 Id.
65 Id. at A-3.
66 Id. at A-2.
67 Id. at A-4.
68 Id.
70 I-Min Lee et al., Effect of Physical Inactivity on Major Non-Communicable Diseases Worldwide: An Analysis of Burden of Disease and Life Expectancy, 308 Lancet 219, 219 (2012), https://doi.org/10.1016/S0140-6736(12)61031-9. Note that the authors indicated that their estimates are likely “very conservative.” Id. at 228.
71 Id. at 219.
cancer. Hypothetically, if physical inactivity were eliminated, the worldwide life expectancy would increase by about 0.68 years. This improvement might seem relatively small, but it is a gain the entire population would experience, not just those people who make the jump from inactivity to activity. Thus, the gain in years would be larger in the previously inactive population. The authors provide context from an American study, which estimated that, from age fifty years, inactive people would add 1.3 to 3.7 years onto their lives by becoming physically active. These results indicate that, as a risk factor, physical inactivity has comparable effects to smoking and obesity.

B. The Positive Health Effects of Sunlight Exposure

Although the evidence is less concrete than that for exercise, research suggests that exposure to sunlight has beneficial health effects. Inspired by the COVID-19 pandemic and its interference with people’s ability to go outside, researchers undertook a review of existing studies to examine the effects of “external environmental factors[,] such as sunlight exposure and green space use[,] on mental health.”

The results showed that exposure to sunlight, spending leisure time in green spaces, and physical activity each had a positive impact on people’s mental health, including depression, anxiety, and stress states. Specifically, moderate physical activity in an external environment with sunlight exposure or green space was . . . an important factor.

A study of United Kingdom adults revealed a correlation between getting an extra hour of outdoor sun exposure during the day and the following: “a lower lifetime risk of depression . . . , less frequent use of antidepressant medication . . . , less loss of pleasure and lower mood . . . , [and] greater self-reported happiness.” Other studies found an

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72 Id. at 227.
73 Id. at 219.
74 Id. at 227.
75 Id. at 227–28.
76 Lee et al., supra note 70, at 228.
77 Id. at 227.
79 Id.
80 Id. at 103–04.
association between lowered levels of vitamin D—the vitamin produced in humans when they are exposed to the sun—in the bloodstream and depressive symptoms. This research suggests that sunlight may help prevent depression or improve symptoms once they begin. In fact, all of the studies included in the scientific review, save one, demonstrated that sunlight exposure may benefit mental health.

Another study sought to create a model capable of predicting suicide rates at the county level in the United States. The average daily sunlight rate was one of ten variables discovered to be central to that prediction. These studies, taken together, suggest that sunlight exposure is an important factor in mental health, over and above the positive effects of exercise on health.

It is an interesting detail that COVID-19 prompted the scientific review pertaining to the effects of staying inside. Society predicted—and continues to discover—that the pandemic and the resultant isolation would have dramatic effects. But that isolation, drastic as it was, pales in comparison to the plight of incarcerated people who are denied outdoor exercise for extended periods of time. They are cut off from “normal life” in a prison system that already is itself a separate society from the outside world. Surely, those who commit criminal offenses deserve to forfeit some freedoms in exchange for their transgressions; a proper criminal legal system demands such a trade-off. But the cumulative beneficial effects of exercise and of sunlight exposure cannot be ignored as the court system considers the rights that incarcerated individuals should maintain once they enter prison.

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81 Id. at 107.
82 Id.
83 Id.
84 Kate Mobley & Gita Taasoobshirazi, Predicting Suicide in Counties: Creating a Quantitative Measure of Suicide Risk, 19 Int’l J. Env’t Rsch. & Pub. Health 1, 1 (2022), https://doi.org/10.3390/ijerph19138173.
85 Id. at 3, 11.
IV. FRAMING THE LEGAL ISSUE: THEORETICAL APPROACHES TO ANALYZING PUNISHMENTS UNDER THE EIGHTH AMENDMENT

There are several competing approaches to analyzing the Eighth Amendment, and the Supreme Court’s Cruel and Unusual Punishments Clause jurisprudence has been historically inconsistent. This Part introduces three main theories: the “evolving standards” approach, the originalist approach, and what this Comment calls the “long usage” approach. Each is a potential framework for examining how the Court might respond and should respond to an argument that long-term deprivations of outdoor exercise are unconstitutional.

A. The “Evolving Standards of Decency” Approach

To provide a comprehensive explanation of the “evolving standards” test, this Part explores it in three ways. First, it describes the analysis conducted under the test. It then demonstrates this analysis in practice, using two Supreme Court cases. Finally, it evaluates the practice of denying outdoor exercise to incarcerated people under the “evolving standards” test.

1. The “Evolving Standards” Analysis

The “evolving standards” framework first appeared in the Supreme Court’s Cruel and Unusual Punishment Clause jurisprudence in 1958 in *Trop v. Dulles*. As the name suggests, the test grew out of the idea that the Constitution is a living document, the precise protections of which can and should change as society does. Under this view, “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” In ascertaining what those standards are at any given point, the Court relies on objective evidence—namely,

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87 See id. at 1740 (“Legal commentators . . . have described the Court’s treatment of the Cruel and Unusual Punishments Clause as ‘embarrassing,’ ‘ineffectual and incoherent,’ a ‘mess,’ and a ‘train wreck.’” (footnotes omitted)).


89 See *Trop*, 356 U.S. at 100–01, 103 (referring to constitutional provisions as “vital, living principles,” as opposed to “time-worn adages or hollow shibboleths” and noting that the scope of the Eighth Amendment is not static).

90 Id. at 101.
nationwide legislative actions regarding the punishment at issue—to see if there is a national consensus for or against it.\footnote{Bessler, supra note 12, at 316.} It also may consider how the punishment is used in practice across the states, including through a review of jury verdicts involving the punishment, how frequently the punishment is administered, and trends in all of this data, including the direction of the trend and how consistent it is.\footnote{Id. at 316–17.} Ultimately, the Court uses this data to inform its “independent judgment” regarding the constitutionality of the challenged practice.\footnote{See id. at 316.}

There are variations within this general living-Constitution framework. For example, various Supreme Court justices have disagreed about the appropriate way to “count” for the purpose of assessing the presence of a national consensus.\footnote{Id. at 318.} Constitutional law professor and legal scholar Akhil Amar analogizes two of the approaches to the two different forms of representation in the US Senate and House: “Should the norms and practices of Wyoming’s half-million inhabitants be given the same weight, Senate-style, as those of California’s thirty-six million residents? Or should a proper tally reflect the population differential, House-style?”\footnote{Id. at 313 (quoting Akhil Reed Amar, America’s Lived Constitution, 120 Yale L.J. 1734, 1778 (2011)).} Amar argues that a House-style accounting squares better with the modern, colloquial meaning of the word “unusual.”\footnote{Id. at 318.} As his argument goes, if considerably more Americans live in an environment where a punishment is not practiced, then that punishment should be considered unusual, regardless of whether a higher number of states have preserved it.\footnote{Bessler, supra note 12, at 318.} Thus, although there are certain outcome-determinative disagreements about methodology, the strains of the “evolving standards” theory share the view that the Cruel and Unusual Punishments Clause should progress with the times so that its application reflects modern sensibilities.

\footnotesize{\textit{COMMENT} 519}
2. The “Evolving Standards” Approach Demonstrated:
   \textit{Trop v. Dulles} and \textit{Atkins v. Virginia}

In the twentieth century, the Supreme Court embraced the “evolving standards” framework.\textsuperscript{98} \textit{Trop v. Dulles}—the genesis of the framework\textsuperscript{99}—and \textit{Atkins v. Virginia}\textsuperscript{100} both demonstrate this theory in practice. In \textit{Trop v. Dulles}, the Court considered whether a punishment of denationalization—that is, loss of US citizenship—for wartime desertion was cruel and unusual under the Eighth Amendment.\textsuperscript{101} Under the statute depriving deserters of their citizenship, this penalty only applied if the convicted deserter was dismissed or dishonorably discharged from service, but the deserter could reassume their citizenship if, with military permission, they were restored to wartime active duty.\textsuperscript{102} As the Court highlighted, this scheme essentially placed the decision over whether individual deserters would remain American citizens entirely in the military’s hands.\textsuperscript{103} This was especially troubling in light of the frequency of the crime of desertion; its only elements are “absence from duty” and an “intention not to return,” which can appear together under a variety of circumstances.\textsuperscript{104}

The Court explained that the Eighth Amendment’s premise was the preservation of the “dignity of man”; it ensures that punishments remain within the boundaries of “civilized standards.”\textsuperscript{105} After determining that the Eighth Amendment was a living provision of the Constitution, the Court announced the now famous command that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{106}

Ultimately, the Court determined that denationalization was a cruel and unusual punishment, noting that the world’s “civilized” countries generally agree that it is not an appropriate punishment.\textsuperscript{107} A stateless individual is not owed rights by any nation and, even within

\textsuperscript{98} See Stinneford, \textit{supra} note 86, at 1749 ("[In 2008], [t]he evolving standards of decency test . . . dominated the Supreme Court’s Cruel and Unusual Punishments Clause jurisprudence over the past fifty years . . . ").
\textsuperscript{99} Bessler, \textit{supra} note 12, at 314.
\textsuperscript{100} 536 U.S. 304 (2002).
\textsuperscript{101} 356 U.S. 86, 87 (1958).
\textsuperscript{102} \textit{Id.} at 89–90.
\textsuperscript{103} \textit{Id.} at 90.
\textsuperscript{104} \textit{Id.} at 90–91.
\textsuperscript{105} \textit{Id.} at 100.
\textsuperscript{106} \textit{Id.} at 101.
\textsuperscript{107} \textit{Trop}, 356 U.S. at 101–02.
the United States, would only have those diminished rights of a foreigner, which could be taken away through deportation—denationalization deprives a person of the “right to have rights.”

This was too severe a fate to stand up to constitutional scrutiny.

In Atkins v. Virginia, the Court considered whether the application of the death penalty to intellectually disabled criminal offenders violated the Cruel and Unusual Punishments Clause. Daryl Atkins was convicted of capital murder and sentenced to death after he, at gunpoint, abducted Eric Nesbitt, robbed him, and removed him to a secluded location before shooting him eight times. A forensic psychologist testified that Atkins was mildly intellectually disabled, in part based on his IQ score of fifty-nine.

The Court explained that “[a] claim that punishment is excessive is judged not by the standards that prevailed . . . when the Bill of Rights was adopted[,] but rather by those that currently prevail.” It added that the evolving standards of the day should be assessed based on objective evidence, with a preference for legislative enactments from across the nation. Finally, it noted that the objective indicators of contemporary standards were highly important, but not dispositive—the constitutionality of the death penalty should ultimately rest on the Court’s “own judgment.”

Specifically, when a national consensus is evident based on the objective evidence in a particular case, the Court’s role is to determine whether it has reason to disagree with that consensus of the people.

In 1989—thirteen years before the Atkins decision—the Court found no national consensus against the imposition of the death penalty on intellectually disabled offenders. The Court in Atkins reviewed the relevant developments since that determination: seventeen states had passed laws that prohibited execution of

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108 Id.
109 See id. at 103.
111 Id. at 307, 309.
112 Id. at 308–09.
113 Id. at 311.
114 Id. at 312 (quoting Harmelin v. Michigan, 501 U.S. 957, 1000 (1991)).
115 Id. (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
116 Atkins, 536 U.S. at 312 (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).
117 Id. at 312–13.
118 Id. at 314 (quoting Penry, 492 U.S. at 334).
intellectually disabled individuals.\textsuperscript{119} The Court considered “the consistency of the direction of change” to be more relevant than the number of states making changes.\textsuperscript{120} The Court also highlighted that the legislative enactments passed by wide margins and that, in states allowing execution of intellectually disabled criminals, it did not occur frequently.\textsuperscript{121} Based on all of this evidence, these executions were “truly unusual.”\textsuperscript{122} The Court noted it had no reason to disagree with the national consensus against them; execution of intellectually disabled people was cruel and unusual punishment in contravention of the Eighth Amendment.\textsuperscript{123} Thus, the “evolving standards” test allows the constitutionality of punishments to change quickly—in this case, in less than fifteen years’ time—in accordance with the shifts in national attitudes toward them.

3. Application of the “Evolving Standards” Test to the Practice of Denying Incarcerated People Outdoor Exercise

As currently formulated, “evolving standards” theories would generally not consider deprivations of outdoor exercise—even long-term ones—to be cruel and unusual. In \textit{Pona v. Weeden},\textsuperscript{124} the District Court for the District of Rhode Island wrote that:

\begin{quote}
[T]he need for outdoor exercise has not morphed into the mainstream consciousness, based on “evolving standards of decency,” is also confirmed by the many courts that have assumed that the long-term deprivation of outdoor exercise may be a constitutional violation, yet do not conclude that it is clearly established, so that prison officials are entitled to qualified immunity.\textsuperscript{125}
\end{quote}

This makes sense in light of relevant state legislative developments; it appears that no states have passed a law requiring

\textsuperscript{119} See id. at 314–15.
\textsuperscript{120} Id. at 315.
\textsuperscript{121} Id. at 316.
\textsuperscript{122} Atkins, 536 U.S. at 316.
\textsuperscript{123} Id. at 321.
\textsuperscript{125} Id. at *22–23 (first citing Lowe v. Raemisch, 864 F.3d 1205, 1208 (10th Cir. 2017); then citing Carter v. Yarborough, 465 F. App’x 605, 606 (9th Cir. 2012); and then citing Thomas v. Ramos, 130 F.3d 754, 762 (7th Cir. 1997)).
outdoor exercise or recreation.\textsuperscript{126} Montana does regulate exercise for incarcerated adults: “[a]n adult inmate in restrictive housing or protective custody must be allowed a minimum of [one] hour of exercise each day outside of the inmate’s cell, [five] days a week, unless security or safety considerations dictate otherwise.”\textsuperscript{127} But this statute neither requires that the exercise take place outside nor imposes an unqualified requirement that the incarcerated person have access to recreation. If no state has seen fit to codify access to outdoor exercise under any conditions, a true “evolving standards” theorist would likely not consider deprivations of outdoor exercise to be cruel and unusual.

B. The Originalist Approach

As with the “evolving standards” test, this Part will outline the originalist approach to the Eighth Amendment by, first, explaining its analysis; second, using a Supreme Court case to demonstrate its use; and third, applying it to the practice of withholding outdoor exercise from incarcerated individuals.

1. The Originalist Conception of the Eighth Amendment

The originalist view of the Eighth Amendment looks to the meaning of the Cruel and Unusual Punishments Clause at the time of its ratification in 1791\textsuperscript{128} to frame the analysis of modern punishments.\textsuperscript{129} Under this view, the Eighth Amendment was only meant to outlaw torturous punishments that society had already condemned at the time of the Eighth Amendment’s ratification.\textsuperscript{130} One of the more well-known proponents of this theory is the late Supreme Court Justice Antonin Scalia, whose dissent in \textit{Atkins} exemplifies the application of the originalist framework.\textsuperscript{131}

\textsuperscript{126} Searching "((outdoor or outside) w/5 (recreation or exercise)) and (inmate or prisoner or offender)," within Statutes & Legislation on Lexis+ and narrowing by “Public Laws/ALS” and “Codes” yielded no such law in the first fifty results.

\textsuperscript{127} \textsc{Mont. Code Ann.}, § 53-30-718(1) (2021).

\textsuperscript{128} Bessler, supra note 12, at 511.

\textsuperscript{129} Stinneford, supra note 86, at 1742–43.

\textsuperscript{130} Id. at 1742.

\textsuperscript{131} See id. (citing Atkins v. Virginia, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting)).
2. “I respectfully dissent.”: The Originalist Approach as Demonstrated Through the Atkins Scalia Dissent

In Atkins, Scalia explains that the Court’s Eighth Amendment precedent has produced two categories of cruel and unusual punishments: those that were already cruel and unusual when the Eighth Amendment was ratified and those “that are inconsistent with modern ‘standards of decency,’ as evinced by objective indicia, the most important of which is ‘legislation enacted by the country’s legislatures.’” The latter category implicates the “evolving standards” test, which Scalia likely felt obligated to apply in order to comply with precedent. The first category, however, expresses the originalist view, so this analysis focuses on this portion of the dissent.

Scalia begins—and essentially ends—with the fact that those who were mildly intellectually disabled were not protected from execution in 1791; in order to have special legal protections at the time of the Eighth Amendment’s ratification, one had to be profoundly mentally disabled. The establishment of that history ends the originalist inquiry, leaving only the “evolving standards” test as a mechanism to declare unconstitutional the execution of people who are intellectually disabled. Thus, although the originalist approach is certainly harsher and less protective of offenders—at least at this point in history—than the “evolving standards” test, it is much more straightforward in its application when the requisite historical information is available.

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132 Atkins, 536 U.S. at 339 (Scalia, J., dissenting) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).
133 Id. at 339–40 (Scalia, J., dissenting) (quoting Penry v. Lynaugh, 492 U.S. 302, 330–31 (1989)).
134 Id. at 340–41 (Scalia, J., dissenting).
135 Id. at 341 (Scalia, J., dissenting).
136 Note that Scalia himself has indicated that in extreme cases, he might be forced to set aside his originalist views, explaining that he “cannot imagine [him]self . . . upholding a statute that imposes the punishment of flogging.” Stinneford, supra note 86, at 1765–66 (quoting Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 864 (1989)).
3. Application of the Originalist Approach to the Practice of Denying Incarcerated People Outdoor Exercise

It seems highly unlikely that depriving incarcerated individuals of outdoor exercise was considered cruel and unusual in 1791. In an era where the First Congress decided to punish “running away with . . . any goods or merchandise to the value of fifty dollars” with death by hanging, it borders on inconceivable that there would be enough widespread moral condemnation of the denial of outdoor exercise for incarcerated people for it to have been considered unacceptable. Solitary confinement, in fact, dates back to 1790 in the Walnut Street Prison in Philadelphia, Pennsylvania, and it is still in use today. Once again, this begins and ends the inquiry; originalists would consider the denial of outdoor exercise—for any length of time—constitutional.

C. The “Long Usage” Approach

This Part demonstrates the “long usage” approach by first, explaining its analysis; then, using a Supreme Court case to show its real-world application; and, finally, applying it to the practice of preventing incarcerated people from exercising outdoors.

1. The Concept of the “Long Usage” View

The “long usage” approach to the Eighth Amendment stems from law professor and legal scholar John Stinneford’s uncovering of the original meaning of “unusual” in the Eighth Amendment. He claims both “evolving standards” and originalism proponents ignore this

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137 Although research could not confirm this suspicion, the author of this Comment expects that is because it is not worth researching.


139 Rex A. Skidmore, Penological Pioneering in the Walnut Street Jail, 1789–1799, 39 J. CRIM. L. & CRIMINOLOGY 167, 167 (1948), https://doi.org/10.2307/1138147 (“During the years 1790 to 1835, many international dignitaries visited [the Walnut Street Prison], made careful observations and established modified replicas of it in their various countries. This famous Pennsylvania institution was . . . important in the development of solitary confinement, which influenced the treatment of prisoners in America and particularly in Europe for many decades, being used today in some instances . . .”).

140 See Jacob Leon, Bucklew v. Precythe’s Return to the Original Meaning of “Unusual”: Prohibiting Extensive Delays on Death Row, 68 CLEV. ST. L. REV. 487, 487–88 (2020) (explaining that Stinneford is responsible for uncovering the original meaning of “unusual” in eighteenth-century common law and creating what this Comment calls the “long usage” approach).
original meaning.\textsuperscript{141} Stinneford explains that “unusual” was a term of art used to describe “government practices that are contrary to ‘long usage’ or ‘immemorial usage.’”\textsuperscript{142} At the time, three general types of “unusual” punishments existed: those that were completely new or new to common law—as opposed to civil law—systems; those that were imposed for crimes with which they were not historically associated; and those historically implemented but reinstituted after falling completely out of use.\textsuperscript{143} Stinneford describes the Eighth Amendment test that grows out of this information as a complete inversion of the “evolving standards” test: “[t]he evolving standards of decency test asks courts to judge traditional punishment practices in light of current standards of decency. By contrast, the word ‘unusual’ directs courts to judge new punishment practices in light of our longstanding traditions.”\textsuperscript{144}

Stinneford outlines the steps for applying this new test to determine whether a punishment is constitutional: First, one determines if the punishment in question “is contrary to long usage.”\textsuperscript{145} If it is not, the punishment is not unusual and, logically, cannot be “cruel and unusual.”\textsuperscript{146} If it is, one assesses its cruelty by asking whether the new punishment is significantly harsher than ones historically utilized.\textsuperscript{147} If it is, the punishment may be cruel and unusual.\textsuperscript{148}

2. “Long Usage” on the High Court: The Supreme Court Case Citing Stinneford

There is one Supreme Court case that has cited Stinneford’s article defining “unusual” since its publication in 2008. In \textit{Bucklew v. Precythe}, the Court considered a method-of-execution Eighth Amendment claim.\textsuperscript{149} When explaining the original meaning of the Eighth Amendment, the Court adopted Stinneford’s discovered, ratification-era meaning of “unusual.”\textsuperscript{150} Ironically, however, the Court still appeared to ignore this meaning’s impact on the relevant legal

\begin{itemize}
\item \textsuperscript{141} Stinneford, supra note 86, at 1743.
\item \textsuperscript{142} \textit{Id.} at 1745.
\item \textsuperscript{143} \textit{Id.} at 1745–46.
\item \textsuperscript{144} \textit{Id.} at 1746 (emphasis added).
\item \textsuperscript{145} \textit{Id.} at 1817.
\item \textsuperscript{146} \textit{See id.}
\item \textsuperscript{147} Stinneford, supra note 86, at 1817.
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} 139 S. Ct. 1112, 1118 (2019).
\item \textsuperscript{150} \textit{See id.} at 1123.
\end{itemize}
test. The test for methods-of-execution claims when cruelty is at issue requires the challenger to present “a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.” The Court later added that traditionally accepted execution methods are not per se unconstitutional the moment a potentially more humane method is available, explaining that there are legitimate, constitutionally acceptable reasons for not immediately switching to a new method. But under Stinneford’s formulation of his own test, a court could almost never require a state to switch from a traditionally accepted punishment under the Eighth Amendment, because they presumably would enjoy long usage and thus be incapable of being “unusual.” Due to this tension, when applying the “long usage” test, Stinneford’s own formulation is more appropriate for application.

3. Application of the “Long Usage” Approach to the Practice of Denying Incarcerated People Outdoor Exercise

The first step in Stinneford’s “long usage” test is to determine whether the punishment at issue “is contrary to long usage.” Due to the difficulty of ascertaining the history of the denial of outdoor exercise to incarcerated people, this Comment will skip this step in the analysis. Ultimately, the answer is of no consequence, since a finding of unconstitutionality based on this test would require the deprivation to be significantly harsher than traditional punishments. As compared to this traditional prison condition, denial of outdoor exercise is not significantly harsher—in fact, the two are conceptually very similar—so a “long usage” theorist would very likely not consider denials of outdoor exercise to be cruel and unusual.

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151 Id. at 1125 (first citing Glossip v. Gross, 576 U.S. 863, 877 (2015); and then citing Baze v. Rees, 553 U.S. 35, 52 (2008)).
152 Id.
153 Stinneford, supra note 86, at 1817.
154 Id.
155 Skidmore, supra note 139.
D. A Comparative Look at the Three Approaches to the Eighth Amendment

There is an evident tradeoff among the three approaches between simplicity of application and flexibility. At one end of the spectrum is the “evolving standards” test, which is the most flexible in terms of its ability to absorb and reflect societal change. When a majority of state legislatures adopt measures outlawing a particular punishment, the punishment essentially becomes “unusual” under the “evolving standards” test.\(^{156}\) But the test can also require a considerable amount of information to apply. The Court considers the legislative enactments, but it may also weigh how the punishment is used in practice among the states, including assessing jury verdicts involving the punishment, how frequently the punishment is used, and trends in all of this data, including the direction of the trend and its consistency.\(^{157}\) That is a significant amount of information to compile and analyze. On the other end of the spectrum is the originalist approach. Although very easy to apply—only requiring the applier to ascertain whether the punishment was used in 1791\(^ {158}\)—it has no ability to adjust for societal change at all.\(^ {159}\)

The “long usage” approach lies in the middle. Its two-step process requires ascertaining (1) whether a punishment is contrary to long usage and, if it is, (2) whether it is considerably harsher than punishments historically used.\(^ {160}\) Additionally, this methodology will reflect societal change, but it will take a lot longer than it does under the “evolving standards” test. For example, if all state legislatures outlaw a punishment, it could theoretically become cruel and unusual immediately under the “evolving standards” test. But those laws would have to stand for a considerable amount of time before the punishment would be considered to contradict long usage. Thus, it lies in the middle both in terms of straightforwardness of application and reception to change.

\(^{156}\) See Bessler, \textit{supra} note 12, at 316–17.

\(^{157}\) Id.

\(^{158}\) See Stinneford, \textit{supra} note 86, at 1742.

\(^{159}\) To be fair, originalists themselves would consider the test’s resistance to change a strength, given that they believe the Eighth Amendment was only supposed to prevent the imposition of punishments that were already considered inappropriate when the amendment was ratified. \textit{Id.}; see also discussion \textit{supra} Part IV.B.

\(^{160}\) Stinneford, \textit{supra} note 86, at 1817.
V. A Hypothetical Supreme Court Review of the Constitutionality of Withholding Outdoor Exercise from Incarcerated People

As outlined above, under the “evolving standards” test, the originalist approach, and Stinneford’s “long usage” test, denying incarcerated people outdoor exercise would likely be constitutional. Thus, there is no reason to think that, under these tests as currently formulated, the Supreme Court would strike down this prison condition as cruel and unusual under the Eighth Amendment. But expanding the concept of the “evolving standards” test to account for the significant association that exercise and sunlight exposure have with physical and mental health might be outcome determinative. Regardless of which test is the “best” for examining Eighth Amendment challenges, it appears the “evolving standards” test is the Court’s choice jurisprudentially, at least for the time being.\textsuperscript{161} Additionally, it is the test most primed to evolve with societal change\textsuperscript{162} and the only forward-thinking test,\textsuperscript{163} making it the most malleable methodologically. Therefore, the “evolving standards” test is best suited to absorb medical and psychological research. To remedy the inconsistency of the Court’s Cruel and Unusual Punishment Clause jurisprudence—and improve the safety of prison living conditions—the scope of the “evolving standards” test can be widened to accommodate these prevailing research conclusions.

The current test takes the temperature of evolving standards mainly by using state legislative enactments to assess whether a consensus has developed for or against a particular punishment. It is not designed to consider evidence-based scientific conclusions society has drawn about the punishments that, for one reason or another, have not influenced legislative enactments. But if the Cruel and Unusual Punishments Clause is truly going to move with the times, the Court receives an incomplete picture when it ignores the scientific evidence of punishments’ effects on incarcerated people. It defies logic to determine whether punishments comply with modern conceptions of

\textsuperscript{161} See Stinneford, supra note 86, at 1749 (“[I]n 2008, [t]he evolving standards of decency test... dominated the Supreme Court’s Cruel and Unusual Punishments Clause jurisprudence over the past fifty years...”).

\textsuperscript{162} See discussion supra Part IV.D.

\textsuperscript{163} That is, the other two approaches look to historical information to analyze punishments, with originalists looking to the state of the world in 1791 and “long usage” theorists considering past trends. The “evolving standards” approach, on the other hand, considers the current state of the world.
how people should be treated in prison without examining how those punishments affect incarcerated people. This evidence should be included in courts’ determinations of the constitutionality of prison conditions.

Furthermore, the current formulation of the “evolving standards” test is already suited to consider evidence outside of what the Court has traditionally included. The conclusion that would follow from the objective indicators of national consensus may be supplanted if the Court has reason to disagree with that conclusion.164 As the Court explained in Atkins: “[w]e also acknowledged in Coker that the objective evidence, though of great importance, did not ‘wholly determine’ the controversy, ‘for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.’”165 In the case of deprivations of outdoor exercise, the strong evidence that exercise and sunlight exposure—and, thus, outdoor exercise—can prevent serious diseases and health complications and increase lifespans could be a reason to disagree with state legislatures that have not codified access to outside recreation. Phrased another way, such evidence could motivate the Court to exercise its ability to bring “[its] own judgment” into the equation.166

It is true that the Court’s influence might be increased if it weighed in on punishments that state legislatures have ignored, expanding beyond its role of asking whether there is a reason to disagree with legislative enactments regarding specific punishments. But the Court has indicated that assessing legislative opinions is one way that its judgment might be “brought to bear.”167 The salient point is that the Court’s independent judgment has a place in the analysis. The Court utilizing that independent judgment can have beneficial effects. By expanding the “evolving standards” analysis, the Court will protect incarcerated people from all cruel and unusual punishments, not just those that state legislatures have recognized as such.

It is also true that, on its face, this expansion appears to grant the Court the power to declare even incarceration itself unconstitutional

165 Id. at 312 (quoting Coker, 433 U.S. at 597).
166 Id. (quoting Coker, 433 U.S. at 597).
167 “[I]n cases involving a consensus, our own judgment is ‘brought to bear,’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” Id. at 313 (emphasis added) (citation omitted) (quoting Coker, 433 U.S. at 597).
because of the negative effects it can have on incarcerated people. But this Comment is not advocating that the Court make judgments that are untethered from objective evidence that a punishment has strong negative effects. There is considerable evidence that depriving incarcerated people of access to outdoor exercise has many demonstrable and grave impacts. That is what the Court would be using to support its judgment that such deprivation is unconstitutional, not a general conclusion that a punishment stands to make an incarcerated person’s life worse. No one would suggest that the Eighth Amendment prevents making offenders’ lives more difficult; that, to a certain extent, would defeat the purpose of punishment as a concept. This Comment, instead, argues that punishments that have been shown to pervasively and devastatingly affect mental and physical health and life expectancy may be prohibited under the Eighth Amendment.

That is not to suggest that, under the new formulation of the “evolving standards” test, depriving incarcerated people of outdoor exercise for any length of time, under any conditions, would be unconstitutional. Even when taking medical and psychological research into account, short deprivations for penologically justified reasons would likely comport with evolving standards of decency if they were not long enough to trigger significant physical or mental damage. But the life-sustaining effects of consistent outdoor exercise would support a finding of unconstitutionality for deprivations that were longer than brief. More research may be needed to determine an appropriate cutoff point for constitutionality purposes as courts continue to wrestle with the question themselves. Regardless, a tweaked “evolving standards” test can encompass medical and psychological research to support the unconstitutionality of punishments and prison conditions that are associated with shorter lives and more health complications, both mental and physical.

Often when people reoffend, society looks at it as evidence that they cannot be reformed, instead of considering that prison may not have provided an opportunity for rehabilitation at all. If the United States wants incarcerated people to come out of prison, reenter society, and act like considerate human beings, it would behoove American prison administrators, legislators, and other leaders to facilitate the creation of an environment that makes incarcerated people feel like

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168 See discussion supra Part III.
169 See Lee et al., supra note 70.
people while they are in prison. An updated “evolving standards of decency” test is a significant step in that direction.

VI. CONCLUSION

Regardless of the merits of the “evolving standards” test, it remains the focal point of the Supreme Court’s Cruel and Unusual Punishments Clause jurisprudence. But if it is going to adequately protect the humanity of incarcerated people in prison, the test itself must evolve to consider the knowledge society amasses regarding the effects of specific punishments and prison conditions. Otherwise, as humanity determines that various punishments have devastating effects, incarcerated people will only be protected if legislatures see fit to codify these developments; punishment practices should reflect the actual standards of decency as they evolve with greater research and access to information, not whether voting populations and legislatures are willing to recognize the evolution.

By applying theories regarding the Eighth Amendment’s applicability to punishments for criminal convictions to a prison condition—the denial of outdoor exercise for incarcerated individuals—this Comment has made two contributions: First, these theories, specifically the “evolving standards” theory, can be used to bridge the circuit split based on a lack of consensus over how to assess the objective prong of Eighth Amendment analysis in outdoor-exercise deprivation cases. Second, the “evolving standards” test can be broadened to account for medical and psychological evidence of the effect of punishments to provide greater protection to incarcerated people.

Specifically, if presented with the issue, the Court could use the positive health effects to compel prisons to provide incarcerated individuals with outdoor exercise. Those housed in prisons should not be deprived of access to a practice that would allow them to, not only improve their health but lengthen their lives, simply because the public and their representatives have not yet seen the value in codifying that access. By expanding the scope of the “evolving standards” test, the Court can protect incarcerated people while improving the clarity of its historically inconsistent Cruel and Unusual Punishments Clause jurisprudence.