EVOLVING STANDARDS OF DECENCY IN OUR COURTS AND IN OUR SOCIETY

Donald N. Krosin
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I want to introduce myself to this group because this is my first presentation to the group. My name is Donald Krosin and I have been a member for about one year. I have lived in the Cuyahoga County area all my life being raised in the Glenville section on the East Side and am a graduate of Glenville High School. I attended Ohio University and was graduated from what is now Case Western Reserve University with a Bachelor of Business Administration degree. I started my legal studies at that university and received a Bachelor of Laws degree from Cleveland-Marshall Law School in 1958. I was in the private practice of law with an emphasis on criminal defense, personal injury and workers compensation law until 1973 when I joined the original staff of the Federal Pubic Defender Office of the Northern District of Ohio as a full time government employee of the Judicial Branch. Until my retirement from that position my practice was the representation by appointment of the court of persons charged with criminal violations of federal law. Following my retirement from that position I was engaged in a consulting capacity to various lawyers in the community for several years. My hobbies and interests have been my appearance in probably fifty productions in many local professional and community theatres, writing memoirs of life and professional experiences, attendance at concerts of The Cleveland Orchestra and its Music Study Groups and as a volunteer in the Community Options program of the Jewish Federation of Cleveland. And now membership in this august group of philosophers. I assume that makes me a philosopher by association

As a professional practicing criminal defense law, particularly as a public defender working exclusively in the federal system, I was made aware of the doctrine of "evolving standards of decency in a maturing society" as affecting court decisions especially in cases involving the death penalty, questions of the proportionality of sentences to crimes of conviction and other issues raised in litigation arising out of the Eighth Amendment to The United States Constitution, commonly known as the prohibition of cruel and unusual punishment. That amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This Amendment is a part of those known as our Bill of Rights. Since the doctrine arises most frequently in the context of the Eighth Amendment it would be helpful to go into the background of that amendment in order to follow its development and consider its use in other contexts and its effect on other aspects of American society not limited to criminal law.

The aim of this presentation is to demonstrate that the doctrine is presently recognized and exists in various forms by the courts and in other aspects, perhaps unconsciously, of American life. This is not intended to be a legal brief or a law review article. I will not go into any analyses of the multitude of Eighth Amendment cases or the minutiae of the legal reasoning or the methodology used in arriving at a determination as to

whether the doctrine is applicable to a particular case. I want to show that it exists and is applied by the courts and then to examine its application in areas of our society other than the courts whether designated as an evolving standard or is applied under the guise of another principle or is simply a development over time that rests on that foundation of evolving standards, but without recognizing it as such. Further, I wish to generate a consideration of the future of this doctrine and how it may develop in our society and its effects on national mores and the certainty of cultural clashes to arise from those developments.

After the failure of the rebellion of 1685 in England many suspected rebels were convicted during a period known as the "Bloody Assizes." Punishments meted out as authorized by law included drawing and quartering, burning, beheading and disemboweling. In 1689 in the Declaration of Rights indicted King James II and accused the king and the government of mistreating the people and of subverting the law. It also contained a "cruel and unusual punishments" clause as a result of the abuses during the reign of James II. This clause objected to the "cruel and unusual punishments inflicted…." However, the punishment were not considered "cruel and unusual" if it was only severe or disproportionate to the crime. It was improper only if it was "out of the judges' power," "without precedent," or "illegal." In other words, "cruel and unusual" meant "cruel and illegal." The principal is considered to have had its origin in the Magna Carta. Five former colonies, now states, prohibited "cruel *or* unusual punishments," two more prohibited "cruel punishments." The Eighth Amendment adopted as part of the U.S. Constitution in 1791 followed the prohibition by Virginia of "cruel *and* unusual punishment."

The Amendment as adopted served as limitation upon the federal congress rather than upon federal judges as had been the object of the English version. It may be noted that many states insisted that a bill of rights be attached to the constitution as a condition of ratification . In the federalist papers, those 85 essays written and published under the name "Publius" by Alexander Hamilton, James Madison and John Jay beginning in October, 1787, four weeks after the proposed constitution was submitted to the states for ratification, I have found only one real reference to a bill of rights. It appears in Federalist Paper no. 84, attributed to Alexander Hamilton. In it he considers the objection that the document contained no bill of rights which had been raised by several of the new states. His position was that the entire constitution was, in itself, "in every rational sense, and to every useful purpose, a BILL OF RIGHTS." *(sic)*. He argued that "in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account would afford a colorable pretext to claim more than were granted." In other words, for example, there was no need to prohibit the restraint of the press when no power to restrain the press was given to the government in the constitution. I think it is relevant to quote these remarks to show a contrarian argument made at that time to the adoption of a bill of rights and because of the reverence paid to the federalist papers today by those who continue to advocate an originalist interpretation of the constitution. In any event, as we know, the first ten amendments to the constitution were adopted in 1791, and included a clause prohibiting the infliction of

cruel and unusual punishments. In the debates in the First Congress over the incorporation of the Bill of Rights only two statements were made as to the amendment. William Smith of South Carolina objected to the phrase "cruel and unusual punishments" as being too indefinite and Samuel Livermore who argued that the ambiguity would lead to a bar to punishments which had been socially acceptable such as public whipping since it might be necessary sometimes to administer "cruel" punishments. Statements made at ratifying conventions in Massachusetts and Virginia (by Patrick Henry) suggest that at a minimum the founding fathers were concerned with banning punishments resembling torture.

The language of the Constitution gives little direction as to the correct interpretation of "cruel and unusual," and the Supreme Court has long had to deal with that lack of guidance. The Court admitted the difficulty to "define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted." (*Wilkerson v. Utah*, 99 U.S. 130, (1878)). It was not until *Robinson v. California*, 370 U.S. 660 (1962) that the Court made the Eighth Amendment applicable to the states by reason of the Fourteenth Amendment. (Until that time the amendment was held applicable only to the federal government. In fact, it was not until the mid-twentieth century that the various provisions of the bill of rights were made applicable to the states by reason of the Fourteenth Amendment.) In *Trop v. Dulles, 356 U.S. (1958)*, the Court had to decide what the Clause itself meant. Chief Justice Warren in his opinion made no attempt to determine the original meaning of the Clause. He cited *Wilkerson* decided in 1878 and discounted the word "unusual" in the Clause as either secondary or irrelevant. It followed that the Court had to set forth a standard for determining whether a punishment is impermissibly cruel. Such a definition was a problem with which the Court had grappled for years. If public whipping, pillorying, or mutilation were acceptable when the Amendment was adopted could it be that they could be imposed in 1958 when *Trop* was before the Court? The Court then looked to *Weems v. United States*, 217 U.S. 349, 1910, decided almost fifty years before, which had suggested that the meaning of the clause may be "progressive." It "may acquire meaning as public opinion becomes enlightened by a humane justice." In an opinion written by Chief Justice Earl Warren the Court in *Trop* held that the Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958). The question becomes how does the Court determine that a standard of decency has evolved to the point of sustaining a finding that that there has been a violation of the Amendment. Often the Court will consider the actions of state legislatures as an indication that the has been such a change in public attitude. For example, in *Lawrence v. Texas*, 539 U.S. 558, (2003), the Court struck down the Texas statute that criminalized private, consensual and adult same-sex conduct overruling the previous decision of the court in *Bowers v. Hardwick*, 478 U.S. 186, (1986) which had allowed states to criminalize same-sex sexual conduct. The Court found in *Lawrence* by using objective indicators a consensus against sodomy laws in the United States and in foreign countries. While *Lawrence* is usually considered to be case involving a Due Process of Law violation, the reasoning seems to have relied on the tests considered in Eighth Amendment cases, namely whether there had been an instance of an evolving standard of decency requiring the Courts action. This doctrine has been the basis for the Court's decisions holding as unconstitutional in Eighth Amendment cases the

execution of persons under age eighteen (later lowered to age sixteen); the execution of mentally disabled persons; the execution of insane persons; the death penalty for felony murder; the death penalty for rape of an adult; disproportionate sentence, that is more severe than called for by the offense of conviction; as well as considering methods of execution and complaints about prison conditions. This past June the Court held that mandatory life sentences without parole were unconstitutional as to minors. *Miller v. Alabama,* 132Sup Ct. 2455 (2012).

While the concept of this doctrine has become a part of our jurisprudence the Court is sometimes questioned as to its use in particular cases in that the Court is sometimes accused of applying a loose or imprecise method of finding that a new standard has evolved, ignoring opposing views on an issue, and substituting its own ideas of morality and sense of a shift in popular sentiment regarding a particular aspect or issue in American life; a sort of conforming the facts of a case and accepting soft evidence of a changed standard in order to reach a desired resolution, accepting what fits and downplaying what does not. Not every case is decided by a unanimous decision. There are sometimes very narrow majorities and strong dissents.

Everything I have said so far applies to the consideration of and application of this doctrine in Eighth Amendment cases by the courts. What I want to discuss with you now is the broader meaning of the concept of evolving standards of decency not only in other matters decided by the courts, but in other aspects of and in our society. There have been a number of cases decided technically on other constitutional grounds that I believe illustrate the evolving standards of our life. Some of these are referred to in a later part of this essay.

It may appear that the attitudes of the community are precursors to action by the courts by forming the basis for the determination by the courts that there has been an evolution in the community's attitudes toward a particular issue. There is the development of societal attitudes and standards in matters involving other aspects of life not necessarily involving the courts at first in every instance such as the right to an abortion, homosexual sex and same-sex marriage, civil rights, the right of privacy and women's rights. The heart of the whole concept of evolving standards begins with the Court, in effect, taking the pulse of the community in determining to what extent its attitudes have evolved. There has long been the question of whether capital punishment is so inherently cruel to the extent that it is unconstitutional *per se* as violative of the Eighth Amendment. But the Court has always demurred from such a broad holding because it is not convinced that society is ready to abandon that punishment even though the Court has, as I have said before, limited its use by deciding that society's standards have changed to some degree regarding executing minors, and the mentally ill. With the present make-up of the Court it appears unlikely that capital punishment will be banned nationwide any time soon although several states have abolished it or declared moratoriums on executions. We no longer have Justices like Marshall and Douglas who believed that all such punishment was unconstitutional.

In a real sense the very act of ratifying the Eighth Amendment was a beginning of

the evolution of standards of decency in this country since it recognized that punishments were meted out that are unacceptable in a moral and humane society. This trend has accelerated in the last fifty years which is somewhat surprising since the first consideration of the Amendment came some eighty years after its ratification in *Wilkerson* and it was not until 1910 that *Weems v. United States,* 217 U.S. 349 (1910) held for the first time that excessive punishments were barred by the Eighth Amendment.

But in the last fifty years or so there have been a body of decisions that have recognized matters we may take for granted today that were neglected before. For example, in *Plessy v. Ferguson,* 163 U.S. 537 (1896), the Court held that the "separate but equal" provision mandated by state government as to racial segregation is constitutional. That was the law of the land until the decision in *Brown v. Board of Education,* 347 U.S. 483 (1954) that held that "separate but equal" in terms of school segregation was inherently unequal and therefore unconstitutional. I am sure that every person in this room will recall the furor that followed that decision and the problems in enforcing the law that followed. The case was technically decided by applying the equal protection of the laws guaranteed by the Fourteenth Amendment. But I believe this is an example of what I consider to be the equivalent of an Eighth Amendment case in that I believe it speaks to the doctrine of evolving standards although those words do not appear in the decision. I believe this same analysis applies to other cases such as *Griswold v. Connecticut,* 381 U.S. 479 (1965), a case that I think is one of the most significant of this era, the Court recognized that although the Bill of Rights does not explicitly contain the word "privacy", the right of privacy is the "penumbra" and "emanation" of other constitutional protections. To me this right of privacy is the foundation of our rights. What does the requirement that a warrant issue before an arrest or search of an area in which there is a reasonable expectation of privacy mean but the protection of our privacy right? The case involved a Connecticut statute that prohibited the use of contraceptives. The petitioner was the Executive Director of the Planned Parenthood League of Connecticut. She and a physician who was also a professor at the Yale School of Medicine opened a birth control clinic in New Haven in order to test the law which had been passed in 1879. She was arrested and convicted. Her conviction was upheld on appeal to the Connecticut Supreme Court. The U.S. Supreme Court recognized the right of privacy and found that the Connecticut statute was in violation of that right. The ruling in *Griswold* was limited to married couples. However, in *Eisenstadt v. Baird,* 405 U.S, 438 (1972), the Court extended the Griswold holding to unmarried people when it struck down a Massachusetts law which prohibited the distribution of contraceptives to unmarried people. That case was based on the Equal Protection of Law Clause. In *Loving v. Virginia*, 388 U. S. (1967), the Court struck down miscegenation statutes prohibiting the mixed racial marriages as a deprivation of a fundamental right without due process of law.

Other instances which illustrate the evolving standards of our society include such things as child labor laws, (originally struck down by the Supreme Court), passage of the Nineteenth Amendment in 1920 extending the right to vote to women, civil rights legislation and any number of societal changes not codified by any legislature or ordered by any court, some of which have been accepted by a majority and others that have not. Such a concept as "political correctness" has caused controversy, but has been an attempt

to recognize and discourage behavior that may be offensive to minority groups. Greater acceptance of relationships without marriage and out of wedlock births, lessening of the stigma of divorce, women in the work place, the armed forces and law enforcement as a societal issue rather than a legal one. The list goes on. I believe we have now will be facing many instances of cultural conflicts due to some of these developing changes in the attitudes of some that are unacceptable to and rejected by others in our society. We have had conflicts over many things in the past such as place and function of government in our society; slavery and abolition; racial segregation; crime and punishment; ownership of guns and still face present conflicts over social issues such as racism, abortion and extending rights and protections to gay persons; taxation; immigration; and, still, the place and function of government and courts in our society. This past June the Supreme Court held unconstitutional mandatory sentences of life without parole for minors. Dissenting opinions indicated the dissatisfaction of some Justices with the evolving standards doctrine. *Miller v. Alabama*, 132 Sup. Ct. 2455. And in a pending case in Florida the trial judge turned down a motion for dismissal based on *Miller* in a case wherein a juvenile faces life without parole if convicted, but not as a mandatory sentence. Nine states and the District of Columbia sanction same-sex marriages. But thirty-one states have laws or constitutional amendments forbidding such unions. Contraception was a fiery subject for some in the past elections as was abortion as well as some calls for courses in "Creation Science" and the loosening of church-state relations. This is the season where some feel they are victims in a "War on Christianity" because of what they see as the disparagement of the Christmas holiday. Some gun owners are threatened by any suggestion that the ownership or possession of firearms be regulated. While all this can represent a healthy debate that is the heart of a true democracy, the effect can be to create divisions that can hamper the growth of a modern, progressive society and distract from the full debate over and resolution of issues more vital to our country.

Only last week the Supreme Court accepted for consideration two cases dealing with same-sex marriage. One, *Hollingsworth v. Perry,* is an appeal from the striking down as not consistent with the federal constitution the amendment to the California Constitution known as Proposition 8 which banned same-sex marriages in that state. The Court had, of course, the first option of not accepting the case for review. But having taken it in the Court has several courses open to it: first it could find a problem with the question of jurisdiction to hear the case because of possible challenges to the nominal parties; it may reverse the Court of Appeals thus leaving the ban in place in California; it could affirm the striking of the measure allowing those marriages in California, but not extending it beyond California; or it could consider the broader question of whether people of the same sex have a constitutional right to marry. The other case, *United States v. Windsor,* out of New York, challenges section 3 of the Defense of Marriage Act of 1996, which defines marriage as between a man and a woman for the purposes of more than 1,000 federal programs and laws. Without going into too much detail the case involves the refusal to treat the surviving spouse in a same-sex marriage as entitled to the same marital status exemption in an estate tax case as in an opposite-sex marriage. The New York federal appeals court as did a federal appeals court in Boston struck done the law. Again, the Supreme Court could have rejected the case for review since one ground for accepting cases is to resolve conflicting decisions in different federal appeals courts, a situation that

apparently does not exist in this case. These two cases are now on the Court's docket along with cases involving affirmative action in higher education and on the future if the Voting Rights Act of 1965.

I submit that the decisions of the Court in these cases will be very significant in influencing the direction our society will take in determining just what is the future of "evolving standards of decency in a maturing society", and indeed, whether that doctrine will survive and be a viable, accepted and applied principle in the courts as well as a recognized principle in our society. The issues we confront today are much the same as those confronted by our founding fathers over 200 years ago. Indeed, they are issues that go back to much earlier civilizations. I believe the doctrine of the evolving standards of decency can be a major factor in the continued development of our society, particularly in our judicial system. I believe that without the consideration and application of that doctrine by human judges we might as well create software containing the laws and legal precedents and load a computer with the facts of a case and have a decision in seconds. But would that truly be justice? Can a computer consider the intangibles, the humanities and arrive at a really just conclusion. The law is not a scientific, mathematical or engineering problem. While our system is far from perfect and I have experienced far too many instances of its failures, it is better than any alternative I know of. I have felt after a long career spent in court rooms at every level with judges of every sort that the best attribute a judge can have is not great legal scholarship or pure intellect, but rather just a basic and simple sense of justice as in right and wrong. As Chief Justice Earl Warren is said to have often asked from the bench, "Yes, but is it fair?" An understanding of doctrines such as evolving standards and fairness and knowing when and how to apply them is far more important than the cold scholastic achievements of the man in the robe sitting on high with the power to make decisions and pronouncements that affect the lives of so many people.

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