

3-2022

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### Repository Citation

Jonathan Marchuk, *Not So Objective Indicia: Why Public Polling and Ballot Referenda Could Create a More Concrete Standard for Eighth Amendment Objective Indicia Analysis*, 30 Wm. & Mary Bill Rts. J. 855 (2022), <https://scholarship.law.wm.edu/wmborj/vol30/iss3/8>

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# NOT SO OBJECTIVE INDICIA: WHY PUBLIC POLLING AND BALLOT REFERENDA COULD CREATE A MORE CONCRETE STANDARD FOR EIGHTH AMENDMENT OBJECTIVE INDICIA ANALYSIS

Jonathan Marchuk\*

## INTRODUCTION

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.”<sup>1</sup> Through the Fourteenth Amendment, these restrictions on punishment are applicable to the states.<sup>2</sup> Over the years, the interpretation of what constitutes cruel and unusual punishment has changed.<sup>3</sup> Cruel and unusual punishments include those punishments that are greatly disproportionate to the committed offense,<sup>4</sup> but what is considered a disproportionate punishment is not a static judgment.<sup>5</sup> Instead, part of the proportionality analysis of the punishment to the crime looks to “the evolving standards of decency that mark the progress of a maturing society.”<sup>6</sup> To evaluate how society views the punishment at a given time, the Court looks to “objective indicia” of the nation’s opinion.<sup>7</sup>

This Note will focus on what the phrase “cruel and unusual punishment” means in the context of modern-day punishments. It will argue that the objective indicia used to evaluate the current evolving standards of decency causes too much confusion

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\* Thank you to Jacqueline de Leeuw for all of her help and support in the editing process.

<sup>1</sup> U.S. CONST. amend. VIII (emphasis added).

<sup>2</sup> *Id.* amend. XIV.

<sup>3</sup> See generally Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419 (1995).

<sup>4</sup> See *Weems v. United States*, 217 U.S. 349, 366–67 (1910); see also *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005).

<sup>5</sup> E.g., *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion); see also *Roper*, 543 U.S. at 563 (stating that the “standards of decency have evolved since *Penry* and now demonstrate that the execution of the [intellectually disabled] is cruel and unusual punishment”). Please note that the opinion of the Court uses the term “mentally retarded” in this case. In later opinions of the Court, the term “intellectual disability” has been used to describe the same condition out of respect, and this Note does the same when referring to the decisions using this term. See, e.g., *Hall v. Florida*, 572 U.S. 701, 704 (2014).

<sup>6</sup> *Roper*, 543 U.S. at 561 (quoting *Trop*, 356 U.S. at 100–01) (internal quotations omitted).

<sup>7</sup> See, e.g., *id.* at 563–64.

and leaves this portion of Eighth Amendment analysis up in the air. If the purpose of the objective indicia test was to capture society's moral standards,<sup>8</sup> then the test is failing to achieve its goal. With recent changes to the Supreme Court, objective indicia have been, and will likely continue to be, interpreted in ways that do not reflect current societal standards.<sup>9</sup> In fact, current standards may encourage penalties, such as the death penalty, for the political reason of ensuring the punishment remains constitutional.<sup>10</sup>

The future of Eighth Amendment jurisprudence should be important to all American citizens who want a judicial system that imposes fair punishments. These protections may be even more relevant to specific groups such as minorities and juveniles. Punishments considered cruel and unusual, such as the death penalty, disproportionately affect racial minority offenders who commit the same crimes as their white counterparts.<sup>11</sup> Juvenile offenders have been held to be less culpable for their crimes due to certain characteristics that accompany their young age.<sup>12</sup> Because of this, life without parole is not allowed for juveniles not convicted of murder, yet juveniles can still be sentenced to de facto life sentences through long term-of-year sentences.<sup>13</sup> Current evaluations of "objective indicia" may not capture society's views on issues such as these and may continue to leave these groups, as well as all other criminal defendants, vulnerable.

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<sup>8</sup> See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring in part)) ("Proportionality review under th[e] evolving standards should be informed by 'objective factors to the maximum possible extent.'").

<sup>9</sup> See generally Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403 (2011); John Charles Boger, *The Future of the Death Penalty: The Seeds of Time*, 51 TEX. TECH L. REV. 75 (2018) (evaluating the views of the death penalty for the Court in 2018).

<sup>10</sup> See Holly Honderich, *In Trump's Final Days, A Rush of Federal Executions*, BBC NEWS (Jan. 16, 2020), <https://www.bbc.com/news/world-us-canada-55236260> [<https://perma.cc/4BU9-P3FW>] (discussing the Trump administration's use of the death penalty in the final year of his term, ending a lapse in the use of the punishment by the federal government since 2003).

<sup>11</sup> *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty*, DEATH PENALTY INFO. CTR. (Sept. 15, 2020), <https://deathpenaltyinfo.org/facts-and-research/dpic-reports/in-depth/enduring-injustice-the-persistence-of-racial-discrimination-in-the-u-s-death-penalty> [<https://perma.cc/A67M-ERSZ>]; see Josh Rovner, *Juvenile Life Without Parole: An Overview*, THE SENT'G PROJECT (May 2021), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/> [<https://perma.cc/LVQ2-Y3NL>].

<sup>12</sup> See *Roper*, 543 U.S. at 569–70 (noting "[t]hree general differences between juveniles under [eighteen] and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders" including: (1) lack of maturity and underdeveloped sense of responsibility; (2) susceptibility to peer pressure; and (3) the fact that juveniles are still developing their character and permanent personality traits).

<sup>13</sup> See generally Megan R. Pollastro, *Where Are You, Congress?: Silence Rings in Congress as Juvenile Offenders Remain in Prison for Life*, 85 BROOK. L. REV. 287 (2019) (discussing juvenile de facto life sentences and their legality under *Miller v. Alabama*, 567 U.S. 460 (2012)).

This Note will argue that “objective indicia” can be and seemingly is evaluated arbitrarily.<sup>14</sup> To stop the “objective” evidence evaluation from flipping based on the makeup of the Court, the Court needs to establish a more unequivocal test. Objective indicia should be evaluated by looking to readily available polling data and should be furthered through direct voting measures when possible. This will allow for a more objective measure when determining the number of states finding a punishment permissible. Furthermore, the Court should no longer look to jury decisions at all when determining societal opinion. In making sure that state laws reflect the will of the people, state ballot measures should be encouraged, and state polling should be routine.

Part I of this Note will discuss the history of the Eighth Amendment and what objective indicia the Court has used in the past.<sup>15</sup> Part II will discuss questions raised by the current analysis of objective indicia.<sup>16</sup> Finally, Part III will argue that to fix the problems with objective indicia, the evolving standards of decency test needs to be changed to allow for a more objective method of evaluation.<sup>17</sup>

## I. THE HISTORY OF EIGHTH AMENDMENT ANALYSIS

### A. Early History of the Eighth Amendment

The language of the Eighth Amendment comes from the English Bill of Rights of 1689.<sup>18</sup> Before making its way into the U.S. Constitution in 1791, the clause had been included in several state constitutions and the Northwest Ordinance of 1787.<sup>19</sup> At its adoption, the clause was thought to bar punishments that were torturous or barbaric.<sup>20</sup> Even then though, there were concerns over future interpretations of the

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<sup>14</sup> See, e.g., John D. Bessler, *Tinkering Around the Edges: The Supreme Court’s Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1922 (2012) (“Eighth Amendment decision-making seem[s] ad hoc at best.”).

<sup>15</sup> See discussion *infra* Part I.

<sup>16</sup> See discussion *infra* Part II.

<sup>17</sup> See discussion *infra* Part III.

<sup>18</sup> Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839, 840 (1969).

<sup>19</sup> *Id.* (noting that the inclusion of the clause “indicate[s] that the cruel and unusual punishments clause was considered constitutional ‘boilerplate’”).

<sup>20</sup> *Id.* at 840–41; see also *Hobbs v. State*, 32 N.E. 1019, 1021 (Ind. 1893) (“[T]he word ‘cruel,’ when considered in relation to the time when it found place in the bill of rights, meant . . . such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel, etc.”). *But see generally* *Commonwealth v. Wyatt*, 27 Va. (6 Rand.) 694 (1828) (upholding an act that allowed for whipping as long as the punishment was up to no more than thirty-nine stripes at a time); *Foote v. State*, 59 Md. 264, 266–68 (1883) (upholding a punishment of seven lashes for a man who beat his wife because the punishment of whipping was recognized by States that adopted cruel and unusual punishment clauses in their constitutions). It seems at odds to claim that an original interpretation of the cruel and unusual punishment clause did not include whipping when one considers the practice of whipping enslaved people. See, e.g., *id.* at 267.

clause.<sup>21</sup> One representative was concerned that the clause was “too indefinite” while another was concerned that “it seem[ed] to have no meaning in it.”<sup>22</sup> The latter representative, one of the small minority opposing inclusion of the clause, was concerned that the clause would ban necessary punishments.<sup>23</sup> He noted that “it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off,” showing that these were the types of punishments the clause might be opposed to.<sup>24</sup> The acceptance of penalties, such as the death penalty, are further noted by the Fifth Amendment’s explicit contemplation of the deprivation of life as a punishment.<sup>25</sup> Yet, even that representative noted that “[i]f a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it,” signaling that even those who disagreed saw the importance of limiting punishments that caused unnecessary suffering.<sup>26</sup>

Early interpretation of the clause did not comport with modern standards.<sup>27</sup> In 1824, the Virginia Supreme Court of Appeals (later renamed the Supreme Court of Virginia)<sup>28</sup> held that a law allowing for free Black people to be enslaved and then subsequently sold outside of the country as punishment was consistent with the cruel and unusual punishment clause of the Virginia Bill of Rights.<sup>29</sup> The court reasoned that slavery was acceptable at the time of the clause’s adoption and was an acceptable penalty.<sup>30</sup>

In 1899, the Supreme Judicial Court of Massachusetts considered whether a twenty-five-year punishment was a cruel and unusual punishment.<sup>31</sup> The court held that it was not, but did consider that the clause may bar other punishments than just those that were “inhuman and barbarous.”<sup>32</sup> It stated the possibility that the clause may also prohibit punishments, including term-of-year punishments, that are “so disproportionate to the offense as to constitute a cruel and unusual punishment.”<sup>33</sup> The twenty-five-year punishment in that case was deemed to not be disproportionate

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<sup>21</sup> See 1 ANNALS OF CONG. 782–83 (1789) (Joseph Gales ed., 1834).

<sup>22</sup> *Id.* at 782.

<sup>23</sup> *Id.* at 782–83.

<sup>24</sup> *Id.*

<sup>25</sup> U.S. CONST. amend. V (“No person shall . . . be deprived of life . . . without due process of law.”).

<sup>26</sup> 1 ANNALS OF CONG., *supra* note 21, at 783.

<sup>27</sup> See *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824) (holding that “the ninth section of the Bill of Rights, denouncing cruel and unusual punishments” had no bearing on the constitutionality of the punishment of stripes and being condemned and sold as a slave).

<sup>28</sup> *A Short History of the Supreme Court of Virginia*, SUP. CT. OF VA. JUD. LEARNING CTR., <https://scvahistory.org/scv/supreme-court-of-virginia/> [<https://perma.cc/AJ2Z-K3PR>].

<sup>29</sup> *Aldridge*, 4 Va. at 449–50.

<sup>30</sup> See *id.*

<sup>31</sup> *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

to the offense as the punishment was for a repeat offender, and thus the safety of society outweighed his minimal chance at reforming.<sup>34</sup>

Later, in 1910 the U.S. Supreme Court decided the important case of *Weems v. United States*.<sup>35</sup> There, the Court held that the clause did not allow a punishment of fifteen years of hard labor for the falsification of a “public and official document.”<sup>36</sup> While this punishment was not one that would have been previously considered under the clause, the Court noted that the interpretation of cruel and unusual punishment “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”<sup>37</sup>

### B. *The Evolving Standards of Decency Test*

The decision in *Weems* set the stage for the Court to establish the modern test for determining what is cruel and unusual punishment.<sup>38</sup> The Court in *Trop v. Dulles* was tasked with deciding whether a deserting soldier could be punished with the loss of his citizenship.<sup>39</sup> This punishment clearly did not fall into a category of punishments that would have been considered at the adoption of the Eighth Amendment.<sup>40</sup> Drawing on the decision in *Weems*, the Court noted that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society.”<sup>41</sup> As such, the Court was definitively stating that the standard of cruel and unusual punishments was not solely tied to those punishments that were outlawed at the signing of the Amendment’s adoption.<sup>42</sup>

Instead, the Court evaluated the humaneness of the punishment and its inhumane nature.<sup>43</sup> A punishment of denationalization could cause discrimination and result in banishment and a stateless person.<sup>44</sup> In essence, it could cause an individual to “los[e] the right to have rights.”<sup>45</sup> The Court looked to international opinion and noted

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<sup>34</sup> *Id.*

<sup>35</sup> 217 U.S. 349, 357 (1910).

<sup>36</sup> *Id.* at 357–58. This case interpreted the language in the Philippine Bill of Rights, but the Court found that since the language was based on the United States Constitution, the two “must have the same meaning.” *Id.* at 367.

<sup>37</sup> *Id.* at 378.

<sup>38</sup> See *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (plurality opinion).

<sup>39</sup> *Id.* at 87.

<sup>40</sup> See *id.* at 100–02.

<sup>41</sup> *Id.* at 101.

<sup>42</sup> See *id.* at 100.

<sup>43</sup> See *id.* at 102–03. But see Granucci, *supra* note 18, at 842 (noting that humaneness of punishments was considered at the adoption of the Eighth Amendment but that “the clause was rarely invoked” because “the ‘barbarities’ of Stuart England were not used often in America.”).

<sup>44</sup> *Trop*, 356 U.S. 86, 101–03 (1958).

<sup>45</sup> *Id.* at 102.

that only two out of eighty-four nations surveyed allowed for denationalization for desertion.<sup>46</sup> In exercising its judgment, the Court found that the cruel and unusual punishment clause, like the majority of nations, disallowed for this punishment even though stripping someone of their citizenship was not encompassed by the original meaning of the clause.<sup>47</sup>

Fourteen years later, in *Furman v. Georgia*, the Court considered and struck down the imposition of the death penalty in a murder and two rape cases.<sup>48</sup> Each of these cases involved a black defendant who had received the death penalty after the discretion of whether to impose the death penalty or a lighter sentence was left to a jury.<sup>49</sup> In his concurrence, Justice Brennan noted that the Eighth Amendment includes the notion that the “punishment must not be unacceptable to contemporary society.”<sup>50</sup> Justice Brennan believed that while the death penalty was a necessary and acceptable punishment at the nation’s founding, it was no longer morally acceptable.<sup>51</sup> The four dissenting Justices were concerned that the acceptability of the punishment should be left to the normal democratic process.<sup>52</sup> Justice Blackmun was particularly troubled that the concurring opinions of the per curiam opinion were just arbitrarily trying to reach the conclusion they wanted, showing that this is not a new worry to Eighth Amendment analysis.<sup>53</sup>

The evolving standards of decency concept was further expanded on in 1976 when the Court decided *Gregg v. Georgia*.<sup>54</sup> The *Gregg* Court reviewed whether it was a violation of cruel and unusual punishment to execute a criminal under Georgia law.<sup>55</sup> Reviewing the previous Eighth Amendment cases, the Court noted that the

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<sup>46</sup> *Id.* at 103.

<sup>47</sup> *See id.* at 102.

<sup>48</sup> 408 U.S. 238, 239–40 (1972).

<sup>49</sup> *See id.* at 241 (Douglas, J., concurring) (per curiam).

<sup>50</sup> *Id.* at 277 (Brennan, J., concurring) (per curiam). Justice Brennan further noted that “rejection by society . . . is a strong indication that a severe punishment does not comport with human dignity.” *Id.*

<sup>51</sup> *See id.* at 277 (Brennan, J., concurring) (per curiam). Justice Brennan considered where the Court could get “objective indicators” of society’s current values and noted that the Court should not look to legislative authorization of a punishment to establish societal values but should instead look to the actual use of the punishment. *See id.* at 278–79.

<sup>52</sup> *See id.* at 461–62 (Powell, J., dissenting) (per curiam) (noting that this judgment “deprives those jurisdictions of the power to legislate with respect to capital punishment in the future” and that “[t]he normal democratic process, as well as the opportunities for the several States to respond to the will of their people expressed through ballot referenda . . . is now shut off”); *see also id.* at 405 (Burger, C.J., dissenting) (per curiam) (“The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits.”).

<sup>53</sup> *See id.* at 413–14 (Blackmun, J., dissenting) (per curiam).

<sup>54</sup> 428 U.S. 153 (1976).

<sup>55</sup> *Id.* at 158.



“Eighth Amendment ha[d] not been regarded as a static concept.”<sup>56</sup> Instead, the interpretation of the clause had been expanded over time to include proportionality and punishments such as hard labor and denationalization.<sup>57</sup> Here the Court noted that it would evaluate what the contemporary standards were by looking to “objective indicia that reflect[ed] the public attitude toward a given sanction.”<sup>58</sup> Objective indicia, in this sense, was supposed to reflect the will of the people.<sup>59</sup>

The Court was careful to note that it did not mean that society’s opinions on a punishment were dispositive in ruling whether a punishment was cruel and unusual.<sup>60</sup> Instead, the punishment should still comport with the Eighth Amendment’s purpose of upholding “the dignity of man.”<sup>61</sup> Within this, the Amendment still ensures that punishments are not causing unnecessary suffering and that they should be proportional to the crime committed.<sup>62</sup> Here, the Court was still upholding the objective principles of the Eighth Amendment’s purpose.<sup>63</sup> Society’s opinion would not be the end all in this decision, as there was still an evaluation of the objective nature of a punishment.<sup>64</sup>

As noted by the *Gregg* Court, conflict in the Eighth Amendment cases comes from the judges’ finding that laws passed by the legislature violate the Constitution.<sup>65</sup> The main benefit is allowing for an independent party to judge the validity of the punishment.<sup>66</sup> Still, the Court noted that deference is needed, and that the presumption is that a punishment is valid, because this punishment was adopted by the legislature.<sup>67</sup> Legislatures are democratically elected, so they are better representations of society’s morals than a non-elected judge might be.<sup>68</sup> Objective indicia are thus the Court’s way of making sure the opinion of the people is not lost in the analysis.<sup>69</sup>

In deciding on the constitutionality of a punishment under the Eighth Amendment, the Court noted that it had to be careful.<sup>70</sup> The Court was conscious of the fact that a determination on a punishment violating the Constitution would be hard to

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<sup>56</sup> *Id.* at 173.

<sup>57</sup> *Id.* at 171–72.

<sup>58</sup> *Id.* at 173.

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958)) (internal quotations omitted).

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 174.

<sup>66</sup> *See id.*

<sup>67</sup> *Id.* at 175.

<sup>68</sup> *See id.*

<sup>69</sup> *See id.* Justice White noted that the Court should be hesitant to categorically ban punishments under the Eighth Amendment because this would limit “[t]he ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda.” *Id.* at 176.

<sup>70</sup> *See id.* at 176.



reverse.<sup>71</sup> While normally the people could “express their preference through the normal democratic processes, as well as through ballot referenda,” a decision on this matter would make sure that this punishment could not be reinstated unless the ruling was overturned or there was a constitutional amendment.<sup>72</sup>

Ultimately, the Court evaluated the objective indicia of state legislatures and jury decisions.<sup>73</sup> The democratically elected legislatures of thirty-five states, as well as Congress, enacted new death penalty enabling statutes between the *Furman* and *Gregg* decisions.<sup>74</sup> State legislatures reflect the will of the people because the democratic process allows constituents to directly vote for representatives to reflect their views during the legislative process.<sup>75</sup> The will of the people can also be reflected in ballot referenda.<sup>76</sup> For example, in *People v. Anderson*, the California Supreme Court ruled that the death penalty was unconstitutional, but this ruling was negated by ballot referendum by the people of the state who adopted an amendment to their constitution to allow this penalty.<sup>77</sup> The Court also stated that juries are a “significant and reliable objective index of contemporary values because” of the direct involvement of the people in the process.<sup>78</sup> The jury system directly allows for the values of the American people to come into play during sentencing.<sup>79</sup>

Even at the test’s adoption, there was some ambiguity on how the test was to be interpreted.<sup>80</sup> While the Court seemed sure of the death penalty’s acceptance by the state legislatures, it noted that evaluating jury decisions was more complex.<sup>81</sup> The Court noted that “[i]t may be true that evolving standards have influenced juries in recent decades to be more discriminating in imposing the sentence of death. But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*.”<sup>82</sup> Instead of showing that juries, and as such the people, were disapproving of the death penalty, the infrequency of the penalty could show that people thought the penalty should be given out less frequently and be reserved for the most extreme cases.<sup>83</sup>

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<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *Id.* at 178–82.

<sup>74</sup> *Id.* at 179–80.

<sup>75</sup> *Id.* at 175.

<sup>76</sup> *Id.* at 181.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *See id.*

<sup>80</sup> *See id.* at 179, 181–82.

<sup>81</sup> *See id.* at 179–82.

<sup>82</sup> *Id.* at 181–82.

<sup>83</sup> *See id.* at 182. The Court noted that 254 people had been sentenced to death since the *Furman* decision to support the notion that juries were still supportive of the punishment. *Id.* However, the Court did not go into an analysis of how frequently the punishment was given out by juries when the accused was eligible for that sentence. *See id.*

*C. A Sampling of Modern Cases Dealing with Objective Indicia: A Complete Mess of Reasoning*

The ambiguity created by the need to evaluate objective indicia has caused problems ever since *Gregg*. In *Penry v. Lynaugh*, the Court held that the Eighth Amendment allowed the execution of the intellectually disabled in an opinion that was guided by a lack of a societal consensus against the punishment.<sup>84</sup> Despite this ruling, the Court explicitly stated that “a national consensus against execution of the [intellectually disabled] may someday emerge . . . .”<sup>85</sup> Thirteen years later, in *Atkins v. Virginia*, the Court found that this national consensus had emerged—due to sixteen states banning the death penalty for the intellectually disabled following the *Penry* decision—and used this to help “inform” their own independent opinion that the death penalty was an inappropriate penalty for the intellectually disabled.<sup>86</sup> The Court’s independent reasoning in *Atkins* largely relied on the fact that penological justifications for the death penalty did not hold when applied to the intellectually disabled, and that there was a risk that the penalty may be used on individuals who deserved a lesser penalty.<sup>87</sup> While the Court was swayed in *Atkins*, the Court also considered the penological justifications of the death penalty for the intellectually disabled in *Penry*, and was less persuaded when societal consensus did not seem to express disapproval of the punishment like it did here.<sup>88</sup> How informative the objective indicia was in these cases is uncertain, but it does seem to point to the fact that this part of the test is not irrelevant.

Looking at whether penological reasons for a punishment apply to the sentenced group would also be used to evaluate Eighth Amendment cases for juvenile punishments.<sup>89</sup> In *Thompson v. Oklahoma*, Justice Stevens’ plurality opinion stated that the standards of decency in the country were such that the death penalty should not be imposed on juveniles under sixteen.<sup>90</sup> The decision looked to the “contemporary standards of decency,” and explained how these standards matched the plurality’s own judgment that this punishment should be categorically banned.<sup>91</sup> To establish

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<sup>84</sup> 492 U.S. 302, 340 (1989). The Court in *Penry* also considered the reduced culpability of intellectually disabled offenders and the lack of retributive reasons for punishment in these cases but ultimately decided that allowing intellectual disability as a mitigating factor was sufficient for these worries. *Id.* at 336–38.

<sup>85</sup> *Id.* at 340.

<sup>86</sup> 536 U.S. 304, 314–16, 320 (2002). *See also* *Hall v. Florida*, 572 U.S. 701, 704 (2014).

<sup>87</sup> *Atkins*, 536 U.S. at 320–21.

<sup>88</sup> *See Penry*, 492 U.S. at 338.

<sup>89</sup> *See Roper v. Simmons*, 543 U.S. 551, 565–66, 571 (2005); *see also* *Graham v. Florida*, 560 U.S. 48, 71–73 (2010) (discussing the lack of penological reasons for implementing life without parole on juvenile nonhomicide offenders).

<sup>90</sup> 487 U.S. 815, 838 (1988) (plurality opinion).

<sup>91</sup> *Id.* at 822–23; *see id.* at 824 (establishing sixteen as the cutoff for the penalty because there was a “complete or near unanimity among all [fifty] States and the District of Columbia

the current contemporary standards of decency, the plurality first looked to state legislative enactments and jury decisions, but then also examined the opinions of professional groups and international legislatures, which it included as other categories of objective indicia.<sup>92</sup>

To evaluate the legislatures' opinions on the death penalty for juveniles under sixteen, Justice Stevens noted that this punishment was outlawed completely in fourteen states, outlawed for some ages in eighteen states, and was legal regardless of age in nineteen states.<sup>93</sup> The plurality dismissed the nineteen states that allowed the juvenile death penalty regardless of age.<sup>94</sup> They claimed that these state legislatures never considered age in their enactments because if they had, it would have been "self-evident" that the standards of decency would not allow the death penalty for sufficiently young children.<sup>95</sup> As such, the Court looked to the eighteen states that had set an age limit on the death penalty and noted that every one of these states required the offender to be at least sixteen years old at the time of their offense.<sup>96</sup> Because of this, the plurality found a state legislative consensus on the matter.<sup>97</sup> By doing this, the Court opened the door to interpreting which state laws should and should not be counted when determining a possible societal consensus.<sup>98</sup> While the

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in treating a person under [sixteen] for several important purposes," including voting, driving without parental consent, marrying without parental consent, etc.). *But see id.* at 865 (Scalia, J., dissenting) (arguing that elected representatives have a better understanding of their constituents' views than the Court and that the Comprehensive Crime Control Act of 1984 had just lowered the age (from sixteen to fifteen) that juveniles could be transferred to adult court in Federal District Court just four years prior to the decision).

<sup>92</sup> *See Thompson*, 487 U.S. at 830. While looking to professional groups would largely be dropped from future opinions, the Court did look to professional opinion in a more recent case. *Hall v. Florida*, 572 U.S. 701, 710 (2014). In this case, the Court was trying to determine which individuals fall under the "intellectual disability" exception to the death penalty. *Id.* The Court noted that "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the medial condition [of intellectual disability] at issue." *Id.* Whether the Court was using a professional group as an independent indicator of objective indicia in this case or was just noting that professional groups influence society's opinions is unclear. *Compare id.* at 712–13 (discussing how "professionals who design, administer, and interpret IQ tests" use and interpret IQ results), *with id.* at 710 (noting that "this Court, state courts, and state legislatures consult and are informed by the work of medical experts in determining intellectual disability"), and *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (vacating an opinion of the Texas Court of Criminal Appeals where the "medical community's current standards" for determining intellectual disability was not followed).

<sup>93</sup> *Thompson*, 487 U.S. at 826–29 (counting the District of Columbia as a state).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*; *id.* at 828 (using the example of ten-year-old children and stating that legislatures that allow the death penalty for juveniles would agree that a ten-year-old is too young to sentence to death). *But see id.* at 828 n.27 (noting two instances of ten-year-old children being sentenced to death, including a Black child in 1855 and a Native American child in 1885).

<sup>96</sup> *Id.* at 829.

<sup>97</sup> *See id.* at 826–29.

<sup>98</sup> *See id.*

exclusion of laws was never contemplated in the *Gregg* decision,<sup>99</sup> the Court found this important to the analysis.<sup>100</sup>

In determining whether the punishment was acceptable, the plurality then looked to how juries dealt with sentencing juveniles under sixteen to death and concluded that this was unusual.<sup>101</sup> Between 1982 and 1986, only five juveniles under sixteen years old were sentenced to death.<sup>102</sup> This was 0.3% of juveniles under sixteen who committed homicide as compared to a 1.7% death penalty rate for homicide perpetrators over sixteen.<sup>103</sup> The plurality believed that the proportionally low rate of juvenile death sentences showed that the punishment was “unusual” in the sense of being a rare occurrence.<sup>104</sup> In this way, the Court found public support for a punishment based on the willingness a jury or other sentencer to give the punishment out, at least as compared to other punishments.<sup>105</sup> Again, this proportionality analysis was never analyzed in a decision such as *Gregg*.<sup>106</sup>

Lastly, the plurality looked outside of the country in establishing a “societal consensus” and noted that nations with Anglo-American heritage and “leading members of the Western Community” had outlawed the practice.<sup>107</sup> Looking to international opinion would be dropped in future opinions, rightfully so, as international opinion may not coincide with national opinion which is the point of the objective indicia analysis.<sup>108</sup>

Again, objective indicia are only used to guide the Court’s analysis of a punishment, and after its finding, the Court completes its own independent analysis of the permissibility of the punishment under the Eighth Amendment.<sup>109</sup> As noted by the *Thompson* Court, the opinions of contemporary society may “weigh heavily in the balance,” but that “it is for [the Justices] ultimately to judge.”<sup>110</sup> While objective

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<sup>99</sup> See *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976).

<sup>100</sup> See *Thompson*, 487 U.S. at 826–29.

<sup>101</sup> *Id.* at 815, 831–33.

<sup>102</sup> *Id.* at 832.

<sup>103</sup> *Id.* at 833 n.39.

<sup>104</sup> *Id.* at 833 (citing *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (per curiam) (arguing that the death penalty for committing rape was “extraordinarily rare” and was thus “cruel and unusual in the same way that being struck by lightning is cruel and unusual”)).

<sup>105</sup> See *id.* at 832–33.

<sup>106</sup> See *Gregg v. Georgia*, 428 U.S. 153, 182 (1976).

<sup>107</sup> *Thompson*, 487 U.S. at 830. See generally *Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (plurality opinion) (noting that the phrase “cruel and unusual” punishment is one of Anglo-American heritage taken from the English Declaration of Rights of 1688 and that the idea dates back further to the Magna Carta).

<sup>108</sup> See, e.g., *Miller v. Alabama*, 567 U.S. 460 (2012) (excluding international opinion as an indicator of objective indicia).

<sup>109</sup> See *Thompson*, 487 U.S. at 834.

<sup>110</sup> *Id.* at 833. But see *id.* at 865 (1988) (Scalia, J., dissenting) (arguing that the Court should only look to a national consensus and that “[i]t will rarely if ever be the case that the Members

indicia are not determinative, the Court again agreed with the national consensus it found and ruled that the punishment was impermissible.<sup>111</sup> The plurality cited *Eddings v. Oklahoma*, which held that youthfulness is a relevant mitigating factor when applying the death penalty.<sup>112</sup> The plurality noted that this class of juveniles was less deserving of the punishment and that the penological reasons of deterrence and retribution applied with lesser force to them.<sup>113</sup>

One year after *Thompson*, the Court heard and upheld the death penalty for juveniles sixteen and older.<sup>114</sup> In a decision that was later overturned by *Roper v. Simmons*, the Court in *Stanford v. Kentucky* held that there was “neither a historical or modern societal consensus” against the death penalty for those committing murder at the age of sixteen or seventeen.<sup>115</sup> The Court noted that the “Eighth Amendment judgments should not be merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”<sup>116</sup> In this case, the Court was concerned with the idea that the preferences of the majority of the Court could affect the outcomes of these decisions.<sup>117</sup> This decision did not have an independent analysis by the Justices and instead relied on the objective indicia in determining what the societal consensus is about a punishment, and the importance of looking to the societal consensus when considering whether a punishment is categorically barred under the Eighth Amendment.<sup>118</sup>

The Court first evaluated the objective indicia of laws “passed by society’s elected representatives.”<sup>119</sup> The Court looked to the thirty-seven states that allowed the death penalty and noted that there was not a consensus because fifteen of the thirty-seven declined to impose the penalty on sixteen-year-olds and twelve declined

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of [the] Court will have a better sense of the evolution in views of the American people than do their elected representatives”).

<sup>111</sup> *See id.* at 838.

<sup>112</sup> *Id.* at 834 (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) (explaining that “youth is more than a chronological fact” and that minors are “less mature and responsible than adults”).

<sup>113</sup> *Id.* at 836–38.

<sup>114</sup> *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

<sup>115</sup> *Id.* at 380.

<sup>116</sup> *Id.* at 369 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *see also id.* at 379 (“[W]e have never invalidated a punishment on [a proportionality basis] alone. All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty.”).

<sup>117</sup> *Id.* at 379

<sup>118</sup> *See id.* at 369. *But see id.* at 379 (discussing proportionality analyses in other cases and noting that the Court had never invalidated a punishment solely based on proportionality). The Court explicitly considered the use of evaluating public opinion through polling in this case but “decline[d] the invitation to rest constitutional law upon such uncertain foundations.” *Id.* at 377. This Note seeks to show that legislative enactments and jury decisions are not as certain as the Court seems to think they are.

<sup>119</sup> *Id.* at 370.

to impose it on seventeen-year-olds.<sup>120</sup> The Court did recognize that juries were less likely to convict a juvenile to the sentence of death, but noted that it was very likely due to the fact that juries believed that a juvenile should rarely get the death penalty, not that they believed that no juvenile should ever receive it.<sup>121</sup>

In 2005, the Court reevaluated the constitutionality of the death penalty for juveniles between sixteen and eighteen, and found that offenders under the age of eighteen are not eligible for the death penalty.<sup>122</sup> This case, *Roper v. Simmons*, reestablished the importance of the Justices' own opinions in interpreting the Eighth Amendment.<sup>123</sup> In establishing a societal consensus, the *Roper* Court noted that while twenty states allowed for the juvenile death penalty for this age group, only six of the states had ever imposed the sentence and only three<sup>124</sup> had done so within the past decade.<sup>125</sup> This was similar to *Atkins v. Virginia*, which had outlawed the death penalty for those with an IQ under seventy where twenty states allowed the penalty, but only five states had actually executed such persons.<sup>126</sup> Furthermore, the Court cited *Atkins* which stated, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”<sup>127</sup> The Court went on to find a consistent direction of change in society's views on the juvenile death penalty.<sup>128</sup> The *Atkins* Court found a consistent direction of change, because after *Penry* was decided, sixteen state legislatures decided to ban the death penalty for the mentally handicapped (due to both the publicity of the case and the execution of Jerome Bowden, a mentally handicapped man).<sup>129</sup> Because there was a shift toward banning the juvenile death penalty, as five states banned the practice in the fifteen years between the *Stanford* decision and *Roper*, and no state unbanned the practice,

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<sup>120</sup> *Id.* at 370.

<sup>121</sup> *Id.* at 374; *see also* *Gregg v. Georgia*, 428 U.S. 153, 182 (1978) (discussing the idea that jury verdicts may or may not show disapproval of a punishment per se).

<sup>122</sup> *Roper v. Simmons*, 543 U.S. 551, 555–56 (2005).

<sup>123</sup> *See id.* at 563–64 (stating that the Court will return to the interpretation rule quoted in *Atkins* which was citing the rule stated in *Coker v. Georgia*); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion) (“[T]he 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.”).

<sup>124</sup> Note that Kentucky would have been the fourth state to impose this penalty in the ten years prior to the *Roper* decision, but the Governor of Kentucky commuted *Stanford*'s sentence to life without parole. *Roper*, 543 U.S. at 565. While the Governor is an elected official, it is unclear how pardons and commuted sentences should be evaluated in the objective indicia analysis.

<sup>125</sup> *Id.* at 564–65. *But see id.* at 596 (O'Connor, J., dissenting) (arguing that there was no national consensus against the juvenile death penalty as there were “over [seventy] juvenile offenders on death row in [twelve] different States ([thirteen] including respondent”).

<sup>126</sup> *Id.* at 564.

<sup>127</sup> *Id.* at 565–66 (quoting *Atkins*, 536 U.S. at 315).

<sup>128</sup> *Id.* at 565–66.

<sup>129</sup> *Id.* at 565.



the Court said that there was also a national consensus against this punishment.<sup>130</sup> Just like refusing to count the laws of states where the legislatures may be unsure of the law's consequences, the consistent direction of change test was another step toward opening up Eighth Amendment objective indicia to more uncertain interpretation.

## II. QUESTIONS RAISED BY THE CURRENT ANALYSIS OF OBJECTIVE INDICIA

Current evaluation of objective indicia is ad hoc and would be better served by looking directly to the citizens of the states.<sup>131</sup> The test's complicated and seemingly arbitrary analysis has left the status of punishments such as the death penalty up in the air when it comes to changes in state laws.<sup>132</sup> This is particularly relevant with the changes to the Supreme Court makeup and with Joe Biden's election as president.<sup>133</sup> With the change in the presidency comes the hope of ending federal executions.<sup>134</sup> President Biden explicitly campaigned on abolishing the federal death penalty and even pledged to "incentivize states to follow."<sup>135</sup> It is unclear if a change in federal law would be the tipping point in showing a consensus for ending the death penalty, but it could provide further evidence of the consistency of the direction of change in the country under *Atkins*.<sup>136</sup> Even if federal law is not changed, a moratorium on federal executions could be relevant under an analysis on how frequently a punishment is given out.<sup>137</sup> In July of 2021, the Justice Department did in fact implement a moratorium on federal executions so that it could "conduct[] a review of its policies and procedures."<sup>138</sup> If the moratorium holds for the entirety of

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<sup>130</sup> *Id.* at 566. The Court notes that this trend away from the juvenile death penalty was particularly compelling due to the legislatures of the time generally cracking down on crime. *Id.* at 566 (citing H. Snyder & Sickmund, National Center for Juvenile Justice, *Juvenile Offenders and Victims: 1999 National Report* 89, 133 (Sept. 1999); Scott & Grisso, *The Evolution of Adolescence: A Development Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & C. 137, 148 (1997)).

<sup>131</sup> See *supra* Part I; see, e.g., Bessler, *supra* note 14, at 1922 ("[T]he Eighth [A]mendment decision-making seem[s] ad hoc at best.").

<sup>132</sup> See Bessler, *supra* note 14, at 1922.

<sup>133</sup> Michael Tarm, *Big Challenge: Biden Is Pressed to End Federal Death Penalty*, AP NEWS (Feb. 7, 2021), <https://apnews.com/article/joe-biden-us-news-pandemics-health-corona-virus-pandemic-ad6b1681aaf4128aa5e3ca0e94672e45>.

<sup>134</sup> See *id.*; Madeline Carlisle, *What Happens to the Federal Death Penalty in a Biden Administration?*, TIME (Jan. 25, 2021, 11:39 AM), <https://time.com/5932811/death-penalty-abolition-joe-biden/>.

<sup>135</sup> See Carlisle, *supra* note 134.

<sup>136</sup> *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

<sup>137</sup> See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (noting a minority of states declining to impose capital punishment on minors under seventeen years of age).

<sup>138</sup> Michael Balsamo, Colleen Long & Michael Tarm, *Federal Executions Halted; Garland Orders Protocols Reviewed*, AP NEWS (July 1, 2021), <https://apnews.com/article/joe-biden-executions-government-and-politics-9daf230ef2257b901cb0dfceeb60be44>.



President Biden's term, or a federal ban is enacted, will there need to be a reanalysis of the punishment as a whole?

Regardless of what happens at the federal level, Virginia's decision to ban capital punishment could have a nationwide effect on the punishment by itself.<sup>139</sup> This move made Virginia the twenty-third state to abolish the death penalty.<sup>140</sup> Although this did not cause there to be a majority of states against the death penalty, this could still affect the analysis in other ways. With this change, Virginia became the eleventh state in the past sixteen years to outlaw the punishment.<sup>141</sup> The Court previously found that sixteen states choosing to prohibit the death penalty for the intellectually disabled in the thirteen years between *Penry* and *Atkins* showed a consistent direction of change.<sup>142</sup> It has also found that the smaller change of five states banning the juvenile death penalty in the fifteen years between *Stanford* and *Roper* showed a "significant" consistent direction of change.<sup>143</sup> Using the Court's past reasoning, it is unclear why eleven states banning the punishment would not show a consistent direction of change as well,<sup>144</sup> especially if the federal government is added to the count of "states" outlawing the punishment.<sup>145</sup>

One possible complication to the matter is that in 2015, the Nebraska Legislature abolished capital punishment, but this law was repealed by ballot referenda directly by Nebraskan voters.<sup>146</sup> In *Atkins* and *Roper*, the Court noted the importance of the fact that no state that had already banned the relevant punishment went on to reinstate it.<sup>147</sup> This provided evidence of the consistency of the evolving standards.<sup>148</sup>

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<sup>139</sup> Whitney Evans, *Virginia Governor Signs Law Abolishing the Death Penalty, A 1st in the South*, NPR (Mar. 24, 2021), <https://www.npr.org/2021/03/24/971866086/virginia-governor-signs-law-abolishing-the-death-penalty-a-1st-in-the-south> [<https://perma.cc/R3TS-NNXB>].

<sup>140</sup> Veronica Stracqualursi, *Virginia Set to Become 23rd State to Abolish Death Penalty After State House Passes Bill*, CNN (Feb. 5, 2021, 6:35 PM), <https://www.cnn.com/2021/02/05/politics/virginia-to-abolish-death-penalty/index.html> [<https://perma.cc/6GM8-U6X3>].

<sup>141</sup> Frank Green, *Abolition of the Death Penalty Will End an Institution Once 'Part of the Fabric of Virginia'*, THE ROANOKE TIMES (Feb. 28, 2021), [https://roanoke.com/news/abolition-of-the-death-penalty-will-end-an-institution-once-part-of-the-fabric-of/article\\_25655751-8508-5f9f-9039-34d006808bb7.html](https://roanoke.com/news/abolition-of-the-death-penalty-will-end-an-institution-once-part-of-the-fabric-of/article_25655751-8508-5f9f-9039-34d006808bb7.html) [<https://perma.cc/G6AF-UNBK>].

<sup>142</sup> See *Atkins v. Virginia*, 536 U.S. 304, 314–15 (2002).

<sup>143</sup> *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005).

<sup>144</sup> See *id.* at 565.

<sup>145</sup> See *Graham v. Florida*, 560 U.S. 48, 62 (2010) (noting that federal law allowed for life without parole for some juvenile offenders when analyzing the national consensus on the punishment).

<sup>146</sup> *States and Capital Punishment*, NAT'L CONF. STATE LEGIS. (Mar. 24, 2020), <https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx>.

<sup>147</sup> *Roper*, 543 U.S. at 566 ("In particular, we found it significant that, in the wake of *Penry*, no State that had already prohibited the execution of the [intellectually disabled] had passed legislation to reinstate the penalty . . . . Since [*Stanford v. Kentucky*, 492 U.S. 361 (1989)], no State that previously prohibited capital punishment for juveniles has reinstated it.").

<sup>148</sup> See *id.* at 565–66.

As such, a new ruling may be necessary to decide whether this is a strong enough consistent direction of change.<sup>149</sup> If the change in one state's laws is relevant, one has to wonder if there is a possibility for a state to game the system. Could it be possible for a state in the future to ban and subsequently unban the death penalty just to keep it from being ruled as a cruel and unusual punishment?<sup>150</sup> However unlikely, this does seem to be possible under current objective indicia analysis.

Another complication to consider is the possible rise in executions following the Trump administration's lead. States such as Arizona and South Carolina seem poised to do just this.<sup>151</sup> "Arizona ha[s] refurbished and tested a gas chamber and purchased chemicals used to make hydrogen cyanide," a poisonous gas, while South Carolina has "authorized the use of a firing squad or electrocution in the event that lethal injection is unavailable."<sup>152</sup> Is the contemplation and seeming approval of these punishments enough to show that the societal consensus of these states is that these types of punishments are not cruel and unusual?

All these questions bring about the even greater question of whether past Eighth Amendment cases are even binding under *stare decisis*.<sup>153</sup> In previous Eighth Amendment cases, the Court has evaluated the current societal opinions by looking to the objective indicia of the current year.<sup>154</sup> For example, the Court in *Roper v. Simmons* noted that the objective indicia "provide[d] sufficient evidence that *today* our society views juveniles . . . as 'categorically less culpable than the average criminal.'"<sup>155</sup> Analysis of the number of states that ban a punishment, how frequently the punishment is imposed, and the consistency and direction of change are all subject to change from year to year.<sup>156</sup> If these and other objective indicia are subject to change, why should an Eighth Amendment ruling that was guided by the previous state of the country hold today?

This uncertainty shows how complicated current Eighth Amendment analysis is when it comes to objective indicia. One should ask if something this important, with the potential to put people's lives at stake, should be this unclear and subject

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<sup>149</sup> *See id.*

<sup>150</sup> *See id.* at 563, 566.

<sup>151</sup> Hailey Fuchs, *A Pause in Federal Executions, but Uncertainty About What's Next*, N.Y. TIMES (July 16, 2021), <https://www.nytimes.com/2021/07/16/us/politics/biden-death-penalty.html> [<https://perma.cc/REP8-JXWK>].

<sup>152</sup> *Id.*

<sup>153</sup> *See generally* Meghan J. Ryan, *Does Stare Decisis Apply in the Eighth Amendment Death Penalty Context?*, 85 N.C. L. REV. 847 (2007) (arguing that language of the Eighth Amendment Supreme Court cases endorses applying the tests put forth by the Court rather than just applying the outcomes).

<sup>154</sup> *See id.* at 853–59.

<sup>155</sup> *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (emphasis added)).

<sup>156</sup> *Id.* at 564–67 (evaluating these factors at the time of *Roper* to show a national consensus against the juvenile death penalty).

to ad hoc reasoning. It is also important to note that while much of this Note's discussion has used the example of capital punishment, these questions apply more broadly. This analysis is necessary for every potential punishment that could be ruled to be cruel and unusual.<sup>157</sup>

### III. OBJECTIVE INDICIA DOES NOT TRACK SOCIETAL CONSENSUS

The point of using objective indicia in the first place was to capture the will of the people so that the judiciary could find a presumption in upholding society's moral values (unless these clearly violated the decency standards of the Eighth Amendment).<sup>158</sup> The legislative process is supposed to capture the will of the constituents who voted for them and could decide to vote them out if they disagreed with their legislative enactments.<sup>159</sup> Jury decisions are supposed to capture the will of people as they are directly engaged in the judicial process, reflecting their view on what punishments they chose or did not choose.<sup>160</sup> These "objective" factors are not objective in the way that they are being applied and interpreted by the Court.<sup>161</sup>

#### A. Legislative Enactments

Legislative enactments, by themselves, show little about what punishments society believes are impermissible. The Court has been willing to disregard states towards finding a legislative majority for a variety of reasons.<sup>162</sup> In *Graham*, the Court disregarded an overwhelming majority of state legislatures allowing life without parole for nonhomicide offending juveniles because some of these states were not sentencing juveniles to the punishment.<sup>163</sup> To have a state legislature's laws count toward a consensus, it seems that the Court has fashioned a "use it or lose it rule" as a state that does not use a punishment, or reserves it for very exceptional cases, may be seen not to endorse it at all.<sup>164</sup> This is in spite of the fact that legislatures them

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<sup>157</sup> For example, the Court ruled in *Miller v. Alabama* that juvenile life without parole was a cruel and unusual punishment under the Eighth Amendment. 567 U.S. 460, 489 (2012). There is currently a question of whether life without parole sentences for juveniles are functionally equivalent to term-of-years sentences without parole that extend beyond the juvenile's lifespan. See generally Pollastro, *supra* note 13 (discussing de facto life sentences and their legality under *Miller*). An issue like this may one day require an objective indicia analysis as well.

<sup>158</sup> See *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

<sup>159</sup> See *id.*

<sup>160</sup> *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (noting that jury decisions "maintain a link between contemporary community values and the penal system").

<sup>161</sup> See *id.*

<sup>162</sup> See *Graham v. Florida*, 560 U.S. 48, 62 (2010).

<sup>163</sup> See *id.* at 62–63; see also *Roper v. Simmons*, 543 U.S. 551, 609 (2005) (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.").

<sup>164</sup> See *Graham*, 560 U.S. at 111 (Thomas, J., dissenting) (quoting *Gregg v. Georgia* 428

selves are not doing the criminal sentencing. However, it is unclear if this trend will continue with the makeup of the new Court.

Furthermore, the Court has previously held that legislatures may not even be aware of the consequences of their own laws.<sup>165</sup> As previously stated, in *Thompson*, the Court declined to count nineteen states toward the total of states that allowed the juvenile death penalty as these states did not state a minimum age in their death penalty statute.<sup>166</sup> Instead the Court only looked at the eighteen states that established a minimum age because the majority believed that any legislature that had contemplated the age issue would have set a minimum age.<sup>167</sup> In essence, the Court found that the legislatures of these states did not intend the consequences of their laws, and that these laws were written incorrectly.<sup>168</sup>

In *Graham*, the Court noted that the state laws allowing for a juvenile non-homicide offender to face life without parole did not mean that the “[s]tates intended to subject such offenders to life without parole sentences.”<sup>169</sup> Similarly to *Thompson*, juveniles convicted of crimes other than homicide could be transferred to adult court and then sentenced as adults, leaving them susceptible to punishments of life without parole.<sup>170</sup> The Court agreed with the reasoning in *Thompson* that this possibility “tells [the Court] nothing about the judgment these States have made regarding the appropriate punishment.”<sup>171</sup> In his dissent, Justice Thomas stated that states had been increasing their punishments for juvenile offenders for the past two decades before this decision, showing that this may have been an intentional consequence of the legislation.<sup>172</sup>

Rather than trying to establish and guess the intent of the legislators, the Court could have gotten a better representation of societal values by looking to polling on the issues. For example, Gallup polling shows that support for the juvenile death

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U.S. 153, 182 (1976) (joint opinion of Stewart, Powell, and Stevens, J.) (“[T]he relative infrequency of jury verdicts imposing the death sentence . . . may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.”) (internal quotations omitted); see *Furman v. Georgia*, 408 U.S. 238, 388–89 (1972) (Burger, J., dissenting) (per curiam) (noting that juries may be “increasingly meticulous” in handing out the death penalty but that this does not mean that “only a random assortment of pariahs are sentenced to death”).

<sup>165</sup> See *Graham*, 560 U.S. at 67.

<sup>166</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 826–29 (1988).

<sup>167</sup> See *id.* at 816. It does seem correct to assume that society would agree that there is a sufficiently young age where the death penalty is morally reprehensible.

<sup>168</sup> *Id.* at 826–29.

<sup>169</sup> *Graham*, 560 U.S. at 67.

<sup>170</sup> *Id.* at 66.

<sup>171</sup> See *id.* at 66 (quoting *Thompson*, 487 U.S. at 826 n.24); see also *Thompson*, 487 U.S. at 850 (O’Connor, J., concurring) (stating that when there is an interaction of laws of this sort, “it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate to impose capital punishment on 15-year-olds”).

<sup>172</sup> *Graham*, 560 U.S. at 109 (Thomas, J., dissenting).

penalty has consistently been fairly low.<sup>173</sup> Prior to the *Thompson* decision in 1988, a Gallup poll in 1956 showed that only 21% favored this punishment for adults and juveniles under twenty-one.<sup>174</sup> A 1936 Gallup poll with the same question showed 26% support and a more recent 2002 poll showed that only 26% supported this for juveniles.<sup>175</sup> While there is much less data on juvenile life without parole stances,<sup>176</sup> polling could have shown a clear consensus that would have served as better objective indicia in these cases.<sup>177</sup> The Court would not have to evaluate the intent or lack of intent of lawmakers' legislation if they avoid the intent question by asking the public directly.<sup>178</sup>

Even if we were to take legislative enactments at face value, they may not reflect people's values on punishments at all. One has to wonder whether the acceptability of different modes of punishment is a strong enough voting issue to be reflected in a person's voting choices. In fact, looking specifically at capital punishment, state polls show that the moral acceptability of the death penalty is on the decline.<sup>179</sup> Despite this, a majority of Americans still find this punishment morally acceptable at 54%.<sup>180</sup>

When death penalty questions have been put up to vote on ballot referenda, the majority of these outcomes have been pro-death penalty.<sup>181</sup> Numerically, in the last thirty-four ballot referenda, thirty-one of these outcomes were pro-death penalty.<sup>182</sup> In some of these cases, the voters have disagreed with the legislatures of their states, even in states that have bans on the punishment.<sup>183</sup> For example, a 2000 poll in Minnesota found that 57% of respondents supported the death penalty<sup>184</sup> even though

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<sup>173</sup> Jeffery Jones, *The Death Penalty*, GALLUP (Aug. 30, 2002), <https://news.gallup.com/poll/9913/death-penalty.aspx> [<https://perma.cc/AD39-63UL>].

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See generally Sheryl Pimlott Kubiak & Terrence Allen, *Public Opinion Regarding Juvenile Life Without Parole in Consecutive Statewide Surveys*, 57 CRIME & DELINQ. 495, 498 (2011).

<sup>177</sup> See generally *id.*

<sup>178</sup> See *Graham v. Florida*, 560 U.S. 48, 62, 65–66 (2010).

<sup>179</sup> See *National Polls and Studies*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/national-polls-and-studies> [<https://perma.cc/6ZYK-3URT>] (last visited Mar. 28, 2022).

<sup>180</sup> *Id.* Even though most Americans find this punishment morally acceptable, a greater majority of the American public believes that life imprisonment without parole is a preferable sentence than capital punishment. *Id.* Even with Americans finding this penalty to be preferable to capital punishment, the question is whether this punishment is acceptable at all under the Eighth Amendment. See *Gregg v. Georgia*, 428 U.S. 153, 182–83 (1976).

<sup>181</sup> Austin Sarat, *People Keep Voting in Support of the Death Penalty. So How Can We End It?*, THE CONVERSATION (June 23, 2017, 10:27 AM), <https://theconversation.com/people-keep-voting-in-support-of-the-death-penalty-so-how-can-we-end-it-79632> [<https://perma.cc/63SU-YVNG>].

<sup>182</sup> *Id.*

<sup>183</sup> See *id.*

<sup>184</sup> *State Polls and Studies*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts>

this penalty has been outlawed in the state since 1911.<sup>185</sup> Similarly, in Massachusetts, a 2003 poll showed that 53% of respondents supported the death penalty even though the state abolished this penalty in 1984.<sup>186</sup> It is not the purpose of this Note to discuss the death penalty generally; all this does is to point out that legislative enactments in this area may not reflect the will of the people and may not provide a good sense of society's morals.<sup>187</sup> That is supposed to be the overall purpose of objective indicia.<sup>188</sup>

The discrepancy between citizens of a state and government was also seen in 1972 when the California Supreme Court ruled that the death penalty was unconstitutional.<sup>189</sup> This ruling was later negated by ballot referendum by the people of the state, who adopted an amendment to their constitution to allow this penalty.<sup>190</sup> Because many judges are not directly elected, this furthers the point that ballot measures can be used to get a more accurate picture of what constituents think about the cruelty of a punishment.<sup>191</sup>

There is a further question of whether we should be looking at the legislative enactments and attitudes of society today, or whether we should look to the future.<sup>192</sup> *Roper*, using similar reasoning as cases such as *Gregg* and *Atkins*, showed that the Court was partially concerned with the direction of state laws.<sup>193</sup> *Gregg* noted that the four years after *Furman* saw thirty-five states enact death penalty statutes.<sup>194</sup> Both *Roper* and *Atkins* focused on the "consistency of the direction of change" of state laws.<sup>195</sup> While the *Gregg* decision did have greater support, the consistency of

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-and-research/public-opinion-polls/national-polls-and-studies [https://perma.cc/445Z-TYE2] (last visited Mar. 28, 2022). *But see id.* (noting that support for the death penalty in the state of Minnesota saw a massive decline between the two years of study of 1996 and 2000). It is very possible that in the last twenty years support for the death penalty is now aligned with the state law. However, the point of this example was to point out that the voting population may disagree with current law.

<sup>185</sup> *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> [https://perma.cc/6US9-U9M9] (last visited Mar. 28, 2022).

<sup>186</sup> *See id.*

<sup>187</sup> *See, e.g., State Polls and Studies, supra* note 184.

<sup>188</sup> *See, e.g., Graham v. Florida*, 560 U.S. 48, 61 (2011).

<sup>189</sup> *People v. Anderson*, 493 P.2d 880, 891 (Cal. 1972).

<sup>190</sup> *See California*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/california> [https://perma.cc/M8DS-USJW] (last visited Mar. 28, 2022).

<sup>191</sup> *See id.*

<sup>192</sup> *See Roper v. Simmons*, 543 U.S. 551, 565–66 (2005) (quoting *Atkins v. Virginia*, 536 U.S. 304, 315 (2002)) (noting that the "consistency of the direction of change" in legislative enactments can determine a societal consensus).

<sup>193</sup> *See id.*

<sup>194</sup> *Gregg v. Georgia*, 428 U.S. 153, 155 (1976).

<sup>195</sup> *Roper*, 543 U.S. at 565–66 (quoting *Atkins*, 536 U.S. at 315). Justice Scalia, who was joined by Justice Thomas, expressed the concern that looking to the direction of state laws in *Roper* leads to the position "not . . . that [the] Court's decision 15 years ago was *wrong*, but that the Constitution *ha[d] changed*." *Id.* at 608. However, the consistency of the direction of change



the direction of change in *Roper* was much weaker at the time of the decision.<sup>196</sup> Finding a national consensus where five states banned the practice in fifteen years, and no state unbanned the practice, raises the question of whether the Court was looking to the consensus at the time of the decision, or was projecting what the consensus would be in the future if this trend continued.<sup>197</sup> Looking to the direction of where society will be in the future goes against the point of objective indicia looking to societal standards today.<sup>198</sup> Another possible explanation is that the Court believes that legislation lags behind current societal views.<sup>199</sup> If the latter is the case, a more accurate “objective” evaluation of current societal views would be to check the public consensus, as this would negate any lag between public opinion and voting for officials to make legislative changes on these opinions.<sup>200</sup>

Projecting future societal values may be consistent with “the evolving standards of decency that mark the *progress of a maturing society*” language.<sup>201</sup> The idea that society is making progress towards supporting only humane forms of punishment makes sense when you reflect on the history of punishment in this country.<sup>202</sup> When looking at individual statistics however, it becomes less obvious that this is the case.<sup>203</sup> Support for the death penalty as a punishment for murder has been as low as 42% in 1966, as high as 80% in 1994, and was polled at 55% in 2020.<sup>204</sup> Instead of believing that society becomes more humane over time, it may be better to understand that the moral consensus of a society changes over time and allow this change to be measured periodically using already available polling data and direct voting through ballot measures.<sup>205</sup> Objective indicia is not meant to be the ultimate decider of the humaneness of the punishment.<sup>206</sup> Instead, this is and should continue to be reserved for the independent judgment of the Justices.<sup>207</sup> As such, it is neither appropriate nor

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would still be consistent with a view that the Constitution always looked to societal norms to decide which punishments were cruel and unusual. If this were the case, the standard would not have changed, it just would always have been relative.

<sup>196</sup> Compare *Gregg*, 428 U.S. at 155, with *Roper*, 543 U.S. at 565.

<sup>197</sup> See *Roper*, 543 U.S. at 565. Note that in *Roper*, the direction of change was just one part of the objective indicia analysis as the Court also noted that a majority of states had outlawed the juvenile death penalty. See *id.* at 567.

<sup>198</sup> See *Gregg*, 428 U.S. at 173.

<sup>199</sup> See *id.*

<sup>200</sup> See *id.* at 186–87.

<sup>201</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (emphasis added).

<sup>202</sup> See discussion *supra* Part I.

<sup>203</sup> See generally *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> [<https://perma.cc/FCH5-QTVA>] (last visited Mar. 28, 2022).

<sup>204</sup> *Id.* But see *id.* (showing that over the last twenty years, the percentage of the population that has found the death penalty morally acceptable has fluctuated).

<sup>205</sup> See generally *id.*

<sup>206</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (noting that the point of looking at objective indicia is to evaluate “contemporary values”).

<sup>207</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O’Connor, J., dissenting)



necessary to look at the direction of change of legislative enactments, as the Court should be trying to evaluate the consensus of today; one of the easiest and best ways to do this is to directly ask the people.<sup>208</sup> The Court can and should be getting an objective view through polling data and legislative enactments that have stood the test of ballot measures. No further complicated legislative analysis would be needed once the Court finds a consensus of the fifty states.<sup>209</sup>

### *B. Jury Verdicts*

Jury decisions, and the jury process, are also poor reflections on society's views on cruel and unusual punishments. As such, they should not be used as objective indicia for the Court to freely interpret.

#### 1. Problems in Constructing the Jury Pool

Even in the onset of jury selection, there are problems with thinking that jury decisions are representative of society.<sup>210</sup> Juries are supposed to be a random sampling of citizens, but many things can stop this from being true.<sup>211</sup> For one, the lists of the pool of citizens that a random group of potential jurors is selected from may be under-representative of some groups or ideals.<sup>212</sup> For instance, registered voting lists, which are often used, may under-represent racial minorities.<sup>213</sup> This is especially problematic when these same minority groups are more likely to face potentially cruel and unusual punishments such as the death penalty.<sup>214</sup> Some states try to account for under-represented groups by supplementing their voter registration lists with other lists such as driver registration records.<sup>215</sup> While supplementation may help, these other lists may also be incomplete and may still allow for a group, specifically one with strong Eighth Amendment views, to be missed.<sup>216</sup>

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(explaining that while there may be a significant change in societal values, it is up to the Supreme Court to go against its precedent); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

<sup>208</sup> See, e.g., *Roper*, 543 U.S. at 594 (O'Connor, J., dissenting); *State Oil Co.*, 522 U.S. at 20.

<sup>209</sup> See *Atkins v. Virginia*, 536 U.S. 304, 316–17 n.21 (2002) (relying on polling data and legislative evidence to show a consensus against executing intellectually disabled individuals).

<sup>210</sup> See Hiroshi Fukurai, *The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process*, 23 INT'L J. COMP. & APPLIED CRIM. JUST. gp1, gp4 (1999).

<sup>211</sup> See *id.* at gp2.

<sup>212</sup> See *id.*

<sup>213</sup> See *id.*

<sup>214</sup> See DEATH PENALTY INFO. CTR., *supra* note 11.

<sup>215</sup> See Fukurai, *supra* note 210, at gp5; see also, e.g., *How a Jury is Selected*, ARK. JUDICIARY, <https://www.arcourts.gov/jury/guide/jury-selection> [<https://perma.cc/L27D-JEV3>] (last visited Mar. 28, 2022).

<sup>216</sup> See Fukurai, *supra* note 210, at gp5 (noting that driver registration records still under-represent some groups, including women and the elderly).

Even if jury lists were exhaustive, other things, such as socio-economic status (and by extension race), might prevent a jury pool from being a truly random sample of citizens.<sup>217</sup> Citizens with lower incomes may have less stable living situations causing their juror summonses to go undelivered.<sup>218</sup> Those of a lower socio-economic status may also be unable to afford giving up days of work and may try to avoid jury duty.<sup>219</sup> Some individuals are fortunate enough to be able to show that jury duty will result in financial hardship, but this still means their voice will not be reflected in jury pools even when selected.<sup>220</sup> All of these contribute to the very real problem of jurisdictions being unable to fill jury pools with populations representative of their demographic areas.<sup>221</sup> As such, even if we could ensure the soundness of the rest of the jury selection process, there may still be problems with the Court looking to jury determinations.

## 2. Problems with Voir Dire

While the purpose of this Note is not to critique the voir dire process, one may question the consequences of weeding out jurors when jury decisions are being used to obtain reliable evidence of societal views on a subject. Regardless of Eighth Amendment cruel and unusual punishment questions, the voir dire process likely produces juries that are less representative of societal views than the continual use of random sampling would.<sup>222</sup> There is a whole industry of jury consulting to help attorneys strike jurors that may find an undesirable result.<sup>223</sup> When high stakes cases,

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<sup>217</sup> Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. (Sept. 1, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-in-individual-consequences/>.

<sup>218</sup> *Id.*

<sup>219</sup> Alexander E. Preller, *Jury Duty Is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J. L. & SOC. PROBS. 1, 1–2 (2012) (noting that inadequate compensation for some “who are self-employed, hold multiple part-time jobs, or are dependent on tips as part of their compensation” is “critical” and may cause these people to avoid jury duty).

<sup>220</sup> See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 223–24 (1946) (allowing the exclusion of jurors when “financial embarrassment is such as to impose a real burden and hardship”). The Court in *Thiel* was worried about the potential of excluding a large portion of the community from jury pools as this would undermine the democratic nature of the system. *Id.* at 223–24. While only allowing selective exclusions from jury duty may have a smaller effect on undermining the democratic nature of juries, one may wonder if there is still an undermining effect, nonetheless. See *id.*

<sup>221</sup> See Joshi & Kline, *supra* note 217.

<sup>222</sup> Jon Van Dyke, *Voir Dire: How Should it Be Conducted to Ensure That Our Juries are Representative and Impartial?*, 3 HASTINGS CONST. L. Q. 65, 73 (1976).

<sup>223</sup> See generally Walter F. Becker, Jr., *How to Use a Jury Consultant: A Guide for Trial*

such as a death penalty case or life without parole for a juvenile, are being litigated, these types of tactics are more likely to be used.<sup>224</sup> This gives even less reason for one to believe that these jury decisions should be used to represent society's views on cruel and unusual punishments.

Things get even worse for using jury verdicts as objective indicia when one considers the practice of "death qualifying" juries.<sup>225</sup> Death qualifying allows courts to choose not to include those jurors that are categorically opposed to the death penalty, whether this is only for juveniles or across the board.<sup>226</sup> It is self-evident that if you take out those potential jurors that are opposed to the death penalty, jury verdicts will be non-representative of those people.<sup>227</sup> In 2020, a Gallup poll found that 40% of Americans viewed the death penalty as morally wrong.<sup>228</sup> While the percentage of people who find a punishment morally unacceptable and those who would never agree to impose the punishment may not be the same, it is again clear that there is a non-zero portion of people being affected.<sup>229</sup> Again, the purpose of this Note is not to evaluate processes such as death qualification, but rather, it is important to note that a death qualified jury will never be representative of the views of Americans who believe the death penalty should never be imposed.

Furthermore, this issue was clarified to allow for the exclusion of jurors who were unsure if their opinions about the death penalty would interfere with either their assessment of the case "or what they deem to be a reasonable doubt."<sup>230</sup> The Court ruled that those who can be excluded from the jury pool in these cases "do not constitute a 'distinctive group'" and so they can be excluded without violating the fair cross section requirement of juries.<sup>231</sup> This just goes to expand the group of people not being represented by the Court's current process of evaluating objective indicia and will affect the aggregate amount of death penalties being given out.<sup>232</sup>

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*Attorneys*, 50 LA. BAR J. 426 (2003) (providing advice and insight into how trial attorneys can utilize jury consultants and what to look for in a consultant).

<sup>224</sup> *See id.* at 428.

<sup>225</sup> *See generally* Katherine E. Berger, *Death Qualifications of Juries as a Violation of the Social Contract*, 12 WASH. UNIV. JURIS. REV. 115 (2019).

<sup>226</sup> *Witherspoon v. State of Illinois*, 391 U.S. 510, 517–18 (1968).

<sup>227</sup> *Id.* at 519–20. *But see* *Lockhart v. McCree*, 476 U.S. 162, 171 (1986) (doubting the efficacy of studies modeling the opinions and behavior of potential jurors when they are not sworn under oath).

<sup>228</sup> *See Gallup Poll: Record-Low Percentage of Americans Now Find Death Penalty Morally Acceptable*, DEATH PENALTY INFO. CTR. (June 24, 2020), <https://deathpenaltyinfo.org/news/gallup-poll-record-low-percentage-of-americans-now-find-death-penalty-morally-acceptable>.

<sup>229</sup> *Cf.* Berger, *supra* note 225, at 140–41.

<sup>230</sup> *Adams v. Texas*, 448 U.S. 38, 50 (1980). *See generally* *Wainwright v. Witt*, 496 U.S. 412–13 (1985).

<sup>231</sup> *Lockhart*, 476 U.S. at 177.

<sup>232</sup> *See* Berger, *supra* note 225, at 140–41.

### 3. Carrying Out of Sentences

The politicization of punishments that could be considered cruel and unusual punishment is also problematic, especially when evaluating the number of times a punishment is carried out to determine if it is unusual.<sup>233</sup> Part of unusualness is the infrequency of the punishment being given out.<sup>234</sup> In some cases, the Court actually looks to the number of times that the sentence is carried out.<sup>235</sup> The problem is, there are a variety of reasons that a punishment may or may not be carried out.<sup>236</sup> For one, clemency may be granted to individuals facing the death penalty.<sup>237</sup> In this way, a governor, president, or administrative board may change a death penalty sentence to a lesser sentence and spare the individual from death.<sup>238</sup> Looking to the actual numbers of executions that are actually carried out will miss those individuals that are granted clemency.<sup>239</sup> At the time of writing this Note, states have granted a total of 294 clemencies to individuals sentenced to death since 1976, with the State of Illinois accounting for 187 of these clemencies.<sup>240</sup> A last minute grant of clemency seems opposed to the idea of objective indicia reflecting the will of the people, as the will of the people was already supposed to be reflected in their jury verdict.<sup>241</sup>

One may argue that governors and presidents are democratically elected, so their grants of clemencies may also be reflective of the will of the people.<sup>242</sup> This fails to account for the fact that there may be further politically motivated reasons for clemency.<sup>243</sup> For example, in 1999 Missouri Governor Mel Carnahan granted clemency to Darrell Mease simply because he was asked to by Pope John Paul II.<sup>244</sup> The governor

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<sup>233</sup> See *Thompson v. Oklahoma*, 487 U.S. 815, 832–33 (1988) (citing *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) (per curiam)).

<sup>234</sup> *Id.*

<sup>235</sup> See *Roper v. Simmons*, 543 U.S. 551, 564–65 (2005).

<sup>236</sup> See Richard C. Dieter, *The Declining Role of the Death Penalty in the U.S.*, 50 CRIM. L. BULL. art. 5, at 3 (2014).

<sup>237</sup> See *Clemency*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency> [<https://perma.cc/HGR2-8ZUM>] (last visited Mar. 28, 2022).

<sup>238</sup> See *id.*

<sup>239</sup> See *id.*

<sup>240</sup> See *id.* Note that these numbers are as of February 2021. For a complete list of clemencies and the reasons they were granted, see *List of Clemencies Since 1976*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/clemency/list-of-clemencies-since-1976> [<https://perma.cc/TVE8-D4FY>] (last visited Mar. 28, 2022).

<sup>241</sup> Again though, the effectiveness of jury verdicts reflecting the will of the people in cruel and unusual punishment cases may be questioned. See discussion *supra* Section III.B.

<sup>242</sup> Cf. Ethan J. Lieb & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 GEO. J. L. & PUB. POL'Y 463, 476 (2019) (discussing the President as a fiduciary meant to act for the benefit of the public and how the Executive's pardon power must therefore serve the public's interest).

<sup>243</sup> Brianna Vollman, Note, *Keeping up with the Commutations: The Judiciary's Authority After an Exercise of Executive Clemency*, 88 U. CIN. L. REV. 1129, 1133 (2020).

<sup>244</sup> Stephanie Simon, *Pope's Appeal for Mercy Saves Murderer's Life*, L.A. TIMES (Jan. 29,

considered the grant “a once-in-a-lifetime opportunity to honor the pope’s request,” something that is completely unrelated to the governor’s own views as a democratically elected official.<sup>245</sup> While this is a case where the governor explicitly stated his reason being unrelated to his constituents, it is unclear how many of the other 293 clemencies were decided for similar political reasons but claimed to be for something else.<sup>246</sup>

The politicization of the process can be seen in the recent federal executions put forth by the Trump administration.<sup>247</sup> There had been a sixteen-year break from federal executions prior to 2019.<sup>248</sup> It was not until 2019 that federal executions were scheduled to start being carried out again.<sup>249</sup> As noted by Ngozi Ndulue, director of the Death Penalty Information Center, there may have been political pressure at play with which executions were scheduled.<sup>250</sup> During the summer of 2020’s Black Lives Matter protests around the country, the scheduled executions were all white men.<sup>251</sup> Following this, four African-American prisoners were scheduled to be put to death.<sup>252</sup> The recent executions, such as that of Lisa Montgomery (the first woman to be federally executed since 1953), were being pushed through by the Trump administration at a time when he had already been voted out of office.<sup>253</sup> President Joe Biden has already promised to push to end federal executions during his term.<sup>254</sup> The current way objective indicia is looked at, President Trump may have ensured that the federal government is viewed as another pro-death penalty jurisdiction when in reality, he may be the modern outlier, who had also already been voted out by the people.<sup>255</sup>

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1999, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1999-jan-29-mn-2872-story.html> [<https://perma.cc/SSE5-3R83>].

<sup>245</sup> *Id.* (stating that the Republican floor leader in the Missouri Senate believed that it would have been more appropriate if the governor had started a dialogue on the issue rather than granting Mr. Mease clemency). *But see id.* (noting that the governor was moved by the Pope’s Mass where he spoke out against the death penalty indicating that this was at least partially reflective of the governor’s own views).

<sup>246</sup> *See generally List of Clemencies Since 1976*, *supra* note 240 (discussing other reasons that clemency has been said to have been used).

<sup>247</sup> *See Honderich*, *supra* note 10.

<sup>248</sup> *See id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *See Cheryl Corley, U.S. Executes Lisa Montgomery, The Only Woman On Federal Death Row*, NPR (Jan. 12, 2021, 11:02 AM), <https://www.npr.org/2021/01/12/955984890/u-s-executes-lisa-montgomery-the-only-female-on-federal-death-row> [<https://perma.cc/H65Y-4KK3>].

<sup>254</sup> *See Honderich*, *supra* note 10. *See generally* Marcia Brown, *How Biden Can End Trump’s Macabre Execution Spree*, THE AM. PROSPECT (Dec. 22, 2020), <https://prospect.org/day-one-agenda/how-biden-can-end-trumps-macabre-execution-spree/> [<https://perma.cc/4PZN-6D4W>].

<sup>255</sup> *See Honderich*, *supra* note 10 (noting that the Trump administration is the first in a century “to carry out federal executions in the midst of a political transition[,] with a lame-duck president”). As a side note, one might question why unusual has to mean rare at all. It

All of this points to the ineffectiveness of using jury verdicts and the actual number of times a sentence has been carried out as indicators of objective indicia. Instead, there needs to be a more direct approach to indicate how society generally feels about these punishments. Just like with legislative enactments, this can be more effectively brought about with national and state polling data, which is already available in many cases, and state ballot measures.<sup>256</sup> Direct polling and ballot measures are not susceptible to political candidates who may push for clemency or may push for the scheduling of executions.<sup>257</sup> Instead, they are more direct representations of the people's views as we do not have to worry about the strength of voting issues when state ballot measures allow for voting on the single issue of the punishment's permissibility.<sup>258</sup> This will also avoid the problems of excluding those from jury pools who would never agree to impose the penalty of death under any circumstances,<sup>259</sup> and will lessen problems of financial hardships and delivering jury summonses for some hard-to-locate jurors.

All people need to be reflected to get a true idea of society's views on which punishments are cruel and unusual. If the Justices want to look to society's morals to help guide their own opinion, they should look directly to the people, rather than looking through a process that can and has been easily manipulated.

#### CONCLUSION

Objective indicia are not dispositive to answering Eighth Amendment questions as to what punishments are cruel and unusual, but they do inform the Court as to the evolving standards of decency in our society. As such, it is important that objective indicia actually reflect the will of the people. Currently, objective indicia are evaluated

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seems consistent to think that a punishment may be rare because only a very select few could ever be deserving of a punishment. It is then unclear why a punishment's infrequent use would show that society believes that no person could be deserving of that punishment.

<sup>256</sup> See discussion *supra* Section III.A.

<sup>257</sup> But see Elaine S. Povich, *Big Money Pours into State Ballot Issue Campaigns*, THE PEW CHARITABLE TR. (Sept. 23, 2016), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/09/23/big-money-pours-into-state-ballot-issue-campaigns> [<https://perma.cc/MYH8-YYXT>] (explaining how state ballot campaigns are increasingly targeted by special interests groups that spend hundreds of millions trying to influence voters in ballot measures). While political campaigns may affect ballot measures and affect their ability to track actual societal views, this is the same problem faced in the elections process. See *id.* The problem thus seems related to a separate issue of money in politics and is not necessarily a problem with these ballot procedures.

<sup>258</sup> Cf. Austin Sarat, *When the Death Penalty Goes Public: Referendum, Initiative, and the Fate of Capital Punishment*, 44 L. & SOC. INQUIRY 391, 412–13 (2019) (discussing how referenda allow citizens to directly express their opinions overruling government actions that are either more lenient or strict than public opinion).

<sup>259</sup> See generally Berger, *supra* note 225.



by looking to legislative enactments and jury decisions. Neither of these do a good job at showing how society currently feels about a punishment. Legislative enactments are sometimes disregarded by the Court if the punishments are not being used. Also, the Court sometimes disregards inexplicit legislative enactments when it is not clear that they are actually endorsing a punishment or not. Furthermore, there are questions of whether a legislative enactment by a state legislature reflects the will of the people on issues such as these, where they may not be strong voting issues.<sup>260</sup> Jury verdicts are also not reflective of society's views, as we do not often get truly representative juries through the voir dire process and are unable to reach all potential jurors.<sup>261</sup> Jury verdicts are especially not representative for applications of the death penalty, where there is death qualification that weeds out those jurors who would never agree to impose this sentence.<sup>262</sup>

As a result, the best way for the Court to get a true understanding of what society thinks about an issue is to look to polling data, which for many topics is already available. This shows directly how the people feel about the issue and lessens many of the problems with looking to legislative enactments and jury verdicts. State ballot measures can also show voter preferences about any questionable punishment and should be encouraged. While this may only provide evidence of opinions in a certain state, it would limit problems of interpreting the intent of legislatures that the Court has previously dealt with. At the end of the day, the Supreme Court will get to use its final judgment on the permissibility of potentially cruel and unusual punishments, but to ensure that the Court is transparent about how the people actually feel about the issue, the way objective indicia are determined under the Eighth Amendment needs to be changed.

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<sup>260</sup> See generally Sarat, *supra* note 258.

<sup>261</sup> See discussion *supra* Section III.B.

<sup>262</sup> *Id.*