THE WAY THE COURT GAUGES CONSENSUS (AND HOW TO DO IT BETTER)

Robert J. Smith, Bidish J. Sarma & Sophie Cull†

The Supreme Court gauges whether a national consensus against a punishment exists by reference to a number of objective indicators. Despite its reliance on these external indicators, scholars have characterized the Court's consensus analysis as little more than a crude charade performed by outcome-oriented Justices. The consensus analysis does lack both transparency and a stable infrastructure, but as this Article demonstrates, commentators are too quick to overlook the possibility that a stable and tightly theorized framework could equip the Court to gauge societal consensus and reduce the perception that the analysis is outcome-driven.

When it comes to consensus analysis, the Court should mend it not end it. This Article provides the first systematic analysis of consensus analysis. It maps the various indicators of consensus upon which the Court relies: the number of jurisdictions that legislatively authorize a punishment, the number of sentences imposed, and, in death penalty cases, the number of executions performed. We explore the theoretical justifications and relative importance of each consensus indicator. We then propose a realistic and transparent framework to position the Court to better comprehend whether these indicators establish that there is a national consensus against a particular punishment.

Finally, this Article illustrates the ease and effectiveness of our proposed framework by using the death penalty as a case study. To assess whether a consensus against the death penalty exists, we consider not only the six states that have recently shed their capital punishment statutes, but also make use of a comprehensive database of death sentences and executions that have occurred in America since 2004. We find that most American

† Robert J. Smith is an Assistant Professor of Law, University of North Carolina School of Law. Bidish J. Sarma is a Clinical Teaching Fellow and Lecturer in Residence, University of California, Berkeley, School of Law. We thank Charles Ogletree, G. Ben Cohen, Stephen Bright, Elisabeth Semel, Ty Alper, Dana Remus, Richard Myers, Emily Hughes, Zoe Robinson, David Harris, David Menschel, Natasha Minkser, and Stephanie Pace for extremely valuable feedback on earlier drafts of this Article. We also appreciate the comments that we received from workshop participants at the University of North Carolina School of Law. Finally, we are especially grateful for the excellent research assistance that Katherine Garceau and Lauren Demanovich provided.

jurisdictions have legislatively abolished the death penalty or else have not sentenced anyone to death or not performed any executions since 2004. In other words, the death penalty is—or is rapidly becoming—obsolete.

TABLE OF CONTENTS

INTRODUCTION

To determine whether a punishment is constitutionally cruel and unusual, the United States Supreme Court must consult contemporary societal norms. To probe these norms, the Court weighs a variety of objective factors in an attempt to determine whether a national consensus against the challenged punishment exists. On the surface, this may seem to be a straightforward task. Hundreds of public opinion polls each year inform us of societal preferences on everything from political candidates to potato chips. But looks can be deceiving. The search for a consensus has proven to be a complicated endeavor. Despite nearly four decades of practice, the Court's consensus-gauging approach continues to draw the ire of scholars and judges.

Justice Scalia, though he endorses the constitutional mandate to engage in consensus analysis, has chastised the Court for its "halfhearted" effort to gauge societal mores and for its willingness to find consensus on the "flimsiest of grounds."[1] Justice Thomas has characterized the Court's reliance on infrequent jury verdicts as an indicator of societal repudiation of a punishment as "stunning" and remarked that its "logic strains credulity."[2] These Justices are not the only ones who have expressed frustration. Indeed, it seems as though no one is truly satisfied with the Court's approach to gauging consensus. Professor Raeker-Jordan believes that consensus analysis too tightly restrains the Court.[3] She claims that consultation of objective factors "improperly put[s] [a] thumb on the scale toward majoritarian control of the [counter-majoritarian] Eighth Amendment."[4] Other commentators worry that the Court is not constrained tightly enough. Professor Ferrell critiques consensus analysis as "highly malleable," and worries that it imposes no "meaningful constraint" on the possibility that judges apply "their own personal values" rather than "social mores."[5] Echoing Farrell, Professor Hills suggests that the analysis functions only to ensure there is no consensus *in favor* of the challenged punishment.[6] Otherwise, the Court does whatever it wants to do. Professor Sigler is even less charitable than Professors Farrell and Hills.[7]

---

1 Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting).

2 Graham v. Florida, 560 U.S. 48, 108, 110 (2010) (Thomas, J., dissenting).

3 *See generally* Susan Raeker-Jordan, *Kennedy,* Kennedy*, and the Eighth Amendment: "Still in Search of A Unifying Principle"?*, 73 U. PITT L. REV. 107 (2011).

4 *Id.* at 137.

5 Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. ONLINE 303, 312, 313 (2013), *available at* http://www.yalelawjournal.org/forum/abandoning-objective-indicia.

6 Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 22 (2009).

7 Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403 (2011).

She labels the Court's efforts "specious," and urges it to do away with consensus analysis altogether.[8]

This intense criticism encompasses both foundational and methodological objections. The primary foundational critique questions the wisdom of hinging the determination of whether a punishment is cruel and unusual on popular indicators because the Eighth Amendment was meant to protect against unrestrained majoritarian impulses. The methodological critiques are myriad. First, though the Court routinely considers an amalgamation of factors when gauging consensus, it never has provided a theoretical justification for why the factors it relies upon matter or ranked their relative importance. Second, the Court relies upon some factors in some cases and other factors in other cases without explaining its methodology. The inevitable result is that many observers—even those that are supportive of the outcome—believe that the Court cherry-picks data to enable an ends-driven decision.

The Court's consensus analysis does lack both transparency and a stable infrastructure. Nonetheless, commentators are too quick to overlook the possibility that a stable and tightly theorized framework could simultaneously equip the Court to gauge societal consensus while reducing the perception that consensus analysis is outcome-driven. When it comes to consensus analysis the Court should mend it not end it. This Article offers a theoretical defense of consensus analysis and proposes a comprehensive, transparent, and consistent approach to constructing consensus. To illustrate our proposed approach, we use a hypothetical challenge to the constitutionality of the death penalty as a case study.

We chose the death penalty for two reasons. First, until 2010, the Court only conducted consensus analysis in capital cases. Though the Court now has measured consensus in the juvenile life without parole context,[9] it remains an open question whether the analysis will be deployed in other settings. Second, America is in the middle of a dramatic shift in our relationship to capital punishment. Six states abolished the death penalty since 2004.[10] Death sentences and executions have declined significantly. Public opinion polls indicate the least support for capital punishment in the modern era.[11] These considerations have led scholars to ponder whether the Court will

---

8 *Id.* at 406.

9 Graham v. Florida, 560 U.S. 48, 62 (2010).

10 *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited June 15, 2014) (listing New York, New Jersey, Illinois, New Mexico, Connecticut, and Maryland among the "States Without the Death Penalty" and listing their respective years of abolition).

11 Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP (Oct. 13, 2011), http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx.

reconsider the constitutionality of the death penalty writ large. Hence, we chose to use the death penalty as a case study because whether a consensus against the capital punishment exists is a relevant and timely question.

The remainder of this Article unfolds in three parts. Part I is descriptive. It begins with an investigation into why the Eighth Amendment requires the Court to engage in consensus analysis. It then delves into the Court's recent opinions to draw out the factors that the Justices have been struggling with as they develop and refine the consensus analysis. Finally, it considers and responds to scholarly objections to consensus analysis. Taken together, this descriptive part of the Article reveals what it is the Court has been looking for: evidence that a punishment has become obsolete.

Part II examines in detail whether the factors the Court uses to gauge consensus—the number of jurisdictions that authorize the punishment, the number of times the punishment is imposed, and, in the death penalty context, the number of times an execution is performed—are legitimate indicators of societal consensus.[12] After determining which of these factors are suitable for inclusion in consensus analysis, it briefly prioritizes the indicators in terms of their ability to gauge contemporary preferences.

Part III proposes a more robust approach to measuring consensus and uses the death penalty as a case study on how the suggested approach would operate in practice. To assess whether a consensus exists, we consider not only the six states that have recently shed capital punishment statutes, but also make use of a comprehensive database of death sentences and executions that have occurred in America since 2004. Viewing the consensus inquiry as geared toward barring obsolete punishments, we demonstrate that the death penalty is obsolete in a number of jurisdictions. Indeed, most American jurisdictions have legislatively abolished the death penalty or else have not sentenced anyone to death or not performed any executions since 2004. In other words, the death penalty is—or is rapidly becoming—obsolete.

---

12 The Court has engaged in consensus analysis in only one non-death case, *Graham v. Florida*, 560 U.S. 48, which involved the constitutionality of life without the possibility of parole for juveniles who commit non-homicide offenses. Though the analysis in this Article applies outside of the death penalty context, some of the terminology in the cases that it examines is specific to the death penalty (e.g., executions). Reflecting that consensus analysis is primarily a death penalty doctrine, this Article, too, disproportionately uses examples and terminology specific to capital cases.

I. WHY AND HOW DOES THE COURT GAUGE CONSENSUS?

This Part does three things. First, it explains why the Court must go through the hassle of gauging consensus as opposed to simply using its own collective conscience as a guide to interpreting the Eighth Amendment. After explaining why the Court must gauge consensus, we trace the development of consensus analysis from an academic idea to a staple of the Eighth Amendment jurisprudence. Second, it explores how the Court has conducted consensus analysis by providing the first comprehensive assessment of the indicators upon which the Court relies when gauging societal mores. Third, it details—and responds to—scholarly critiques of consensus analysis. Though these critiques take several forms, the bottom-line scholarly assessment is that consensus analysis is a charade that permits the Court to rely on its own independent judgment to decide Eighth Amendment disputes.

Taken together, this Part identifies the strengths and weaknesses of the Court's approach to gauging consensus. The core strength is that the Court endeavors seriously to detect whether a punishment has become obsolete before it exercises its own judgment to end the punishment practice. Conversely, it has two core weaknesses. First, the Court's analysis has developed without a consistent theoretical framework explaining why the Court relies on the objective indicators that it uses or how those factors are integrated in or across cases. Second, regardless of the substance of consensus analysis, the Court loses credibility by not being explicit about its methodology. The goal of this Part, then, is to provide context for the theoretical discussion in Part II, which justifies and prioritizes the objective indicators of consensus.

A. *Why Must the Court Gauge Consensus?*

Over 100 years ago, the Court grappled with the meaning of the Eighth Amendment in *Weems v. United States*.[13] It acknowledged that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided," and observed that "[t]he provision received very little debate in Congress."[14] To find the applicable principles in the case at hand, Justice McKenna, the author of the majority opinion, explained, "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth."[15] With this understanding, the Court approvingly held that this "clause of the

13 217 U.S. 349 (1910).
14 *Id.* at 368.
15 *Id.* at 373.

Constitution"—the Eighth Amendment—"may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[16]

Therefore, the Eighth Amendment standard does not change, but "its applicability must change as the basic mores of society change."[17] In other words, the Amendment necessitates that the Court somehow determine the current state of public opinion when deciding whether a particular punishment is cruel and unusual. Judicial recognition that the Eighth Amendment's reach to some extent turns on society's view of a punishment became entrenched in the constitutional doctrine when the Court issued its opinion in *Trop v. Dulles*.[18] In that case, the Court noted that *Weems* made clear the Amendment is not "static," and famously wrote that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[19] This key phrase, emphasizing "the evolving standards of decency," left no doubt that the Court had to develop some way by which to gauge how society perceives a particular punishment. The dissent criticized the project because, "it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic."[20] This criticism effectively foreshadowed the critiques to come.

In part because the Court considered so few Eighth Amendment challenges, a lack of clarity about how evolving standards should be assessed persisted. Scholars took up the task, and in their seminal Article on the Eighth Amendment, Justice Arthur Goldberg and Professor Alan Dershowitz proposed that the Court should use objective factors to measure consensus.[21] The Article—focusing on the death penalty—identified three "objective indicia of sentiment actually prevailing among civilized people: historic usage of particular punishments, statutory authorization in other jurisdictions, and general public opinion."[22] Goldberg and Dershowitz's "objective indicia" standard for assessing Eighth Amendment violations was immediately influential. Importantly, the petitioner's briefs in two companion cases—*Furman v. Georgia*[23] and *Aikens v. California*[24] riffed on the Goldberg and

16 *Id.* at 378.

17 Furman v. Georgia, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

18 356 U.S. 86 (1958).

19 *Id.* at 101 (plurality opinion).

20 *Id.* at 120 (Frankfurter, J., dissenting).

21 Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1779 (1970).

22 *Id.*

23 408 U.S. 238 (1972).

24 406 U.S. 813 (1972).

Dershowitz argument, emphasizing that because "it was not the purpose of the Eighth Amendment that succeeding generations of judges should mirror in it their own, individual philosophies of the criminal section"[25] the Court should use "objective indicators" to gauge society's prevailing standards of decency.[26] These "objective indicators," petitioners argued, "do[] not imbibe subjective judicial judgment" and "do[] not ask this court to put itself in the position of super legislature and decide matters of penological policy."[27]

The Court decided *Furman* on June 29, 1972.[28] In a per curiam decision the Court held that "the imposition and carrying out of the death penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[29] *Furman* generated nine separate opinions. Traces of the consensus-detecting arguments that Goldberg and Dershowitz developed—and the petitioners deployed—are found throughout the labyrinthine opinions. Justices Brennan and Powell adopted the idea that there are objective indicia that the Court can analyze to gauge whether a national consensus exists. Justice Brennan wrote that whether "a severe punishment" is "unacceptable to contemporary society" is a question to be resolved by reference to "objective indicators from which a court can conclude" that society has rejected the challenged punishment practice.[30] Justice Powell, dissenting, echoed Justice Brennan's point that objective indicia of consensus should drive the Court's analysis.[31] The two Justices disagreed, however, on which objective indicator should be prioritized. While Justice Powell believed "[i]n a democracy the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives,"[32] Justice Brennan maintained that "[t]he acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use."[33] Though Justice Powell believed legislative enactment to be of primary importance, he did not disagree with Justice Brennan that usage played an important role as indicator of national consensus. He acknowledged that sentencing juries are an "even more direct source of information reflecting the public's attitude toward capital punishment" than are legislative pronouncements.[34]

---

25 Brief for Petitioner, *Aikens*, 406 U.S. 813 (No. 68-5027), 1971 WL 134168, at *18.
26 *Id.* at *27.
27 Transcript of Oral Argument, *Aikens*, 406 U.S. 813 (No. 68-5027).
28 *Furman*, 408 U.S. at 240. *Aikens* was dismissed as improvidently granted.
29 *Id.* at 239–40.
30 *Id.* at 277–78 (Brennan, J., concurring).
31 *Id.* at 437 (Powell, J., dissenting).
32 *Id.*
33 *Id.* at 279 (Brennan, J., concurring).
34 *Id.* at 439–40 (Powell, J., dissenting).

In the years following *Furman*, the Supreme Court began to develop and refine its consensus analysis. However, with Justice Thomas as a notable exception, at no point in the post-*Furman* jurisprudence has any justice seriously questioned that the Eighth Amendment obligated the Court to perform such an analysis. Even Justice Scalia—who has penned some stinging dissents to opinions banning particular punishments—has not consistently questioned the consensus piece itself. Instead, Justices dispute the manner in which the Court conducts its consensus analysis,[35] and brings to bear its independent judgment.[36] In short, the Court measures consensus because it interprets the Constitution as requiring it to do so.

However, as Justice Edward White predicted when *Weems* was decided over a century ago,[37] deciding Eighth Amendment cases inescapably entangles the Court in assessments many believe the legislature is more competent to make: discerning society's evolving standards of decency.[38] Although concerns of institutional competence continue to worry some commentators,[39] the fundamental contemporary critique is that the Court's consensus-seeking analysis has enabled the Justices to impose their own views in deciding whether evolving standards of decency condemn a particular punishment.[40] To determine the merits of this critique the question of how the Court goes about measuring consensus must be explored.

---

35 *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting) ("Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views. To avoid this danger we have, when making such an assessment [of consensus] in prior cases, looked for objective signs of how today's society views a particular punishment."); *see also* Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1090–91 (2006) (noting that "the Supreme Court Justices intensely disagree over how state legislation should be used to establish an evolving national consensus, but all maintain an uncritical acceptance of the flawed practice itself"). As Professor Jacobi points out, Justice Scalia in *Simmons* wrote that the Eighth Amendment jurisprudence is "in my view mistaken." Roper v. Simmons, 543 U.S 551, 608 (2005) (Scalia, J., dissenting). Jacobi notes that he "seems primarily to be critical of the national consensus doctrine on originalist grounds." Jacobi, *supra*, at 1097.

36 *See Thompson*, 487 U.S. at 873 (Scalia, J., dissenting) ("On its face, the phrase 'cruel *and unusual* punishments' limits the evolving standards appropriate for our consideration to those entertained by the society rather than those dictated by our personal consciences.").

37 *See supra* note13.

38 *See also* Furman v. Georgia, 408 U.S. 238, 383–84 (1972) (Burger, C.J., dissenting) (noting that "in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people" but also "not suggest[ing] that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment").

39 *See supra* note 18.

40 *See, e.g.*, Farrell, *supra* note 5, at 313.

B. *How Does the Court Gauge Consensus?*

This section explores how evidence of a particular punishment's availability and usage influences the Eighth Amendment determination of whether that punishment contravenes contemporary standards of decency. The Court's Eighth Amendment framework centers on the use of objective factors that assist the Court in detecting modern norms. As the Court has explained, "these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."[41] The Court's task would be impossible if the Justices did not look out into the world for data that meaningfully informed their determination.[42]

Since *Furman*, the Court has developed and applied an increasingly sophisticated form of the objective indicia analysis on more than a dozen occasions. It considers a number of factors throughout those cases: the number of states that authorize the punishment; legislative direction of change; the number of sentences imposed; in the death penalty context, the number of executions carried out; and the degree of geographic isolation.[43] The remainder of this section is dedicated to identifying these objective indicators and examining how the Court has used each of them.

1. Number of States that Legislatively Authorize the Punishment

This subsection considers not only the number of jurisdictions that legislatively authorize a punishment, but also the strength of the direction of change. In other words, is the legislative trend moving towards or away from the punishment?

---

41 Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

42 Richard M. Re, *Can Congress Overturn* Kennedy v. Louisiana*?*, 33 HARV. J.L. & PUB. POL'Y 1031, 1042 (2010) ("Because the concept of national consensus is empirically grounded, these cases suggest that the Eighth Amendment's meaning is contingent on actual facts.").

43 The Court occasionally references other factors that strictly speaking could be characterized as factors influencing the consensus analysis. For instance, it has noted the opinions of "social and professional" organizations, referenced public opinion polls, and consulted the views of the international community. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002). Though consultation of these sources, and especially of international viewpoints, has engendered sustained scholarly response, no one seriously contends that these factors drive the consensus analysis. Space constraints, as well as our belief that these factors are more atmospheric than substantive—and, in any case, that they should be considered in the independent judgment analysis—move us to put these "grab bag" factors to one side. *Id.* at 352.

i. Number of States that Authorize the Punishment

The Court has long counted the number of states that authorize a challenged punishment as relevant to its analysis because "the legislative judgment weighs heavily in ascertaining such standards [of decency]."[44] In finding some states' administration of the death penalty constitutional again in 1976, the Court held that "[t]he most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*."[45] In holding the death penalty unconstitutional for the crime of the rape of an adult, the Court emphasized "that Georgia is the sole jurisdiction . . . at the present time that authorize[d]" the sentence, and held that this fact "obviously weighs very heavily on the side of rejecting capital punishment" for the crime.[46]

No specific number of states appears to be a recognized tipping point either in showing a consensus in favor of or opposed to a particular punishment. Instead, the Court's analysis remains fluid, and depends on other factors in addition to the sheer number of states that authorize the penalty.[47] With that said, in determining whether a consensus exists, the Court frequently notes the number of states that hold (or do not hold) a particular legislative position. For example, in *Atkins*, the Court noted that twenty states (excluding abolitionist jurisdictions) had prohibited the death penalty for mentally retarded individuals.[48] In *Simmons*, the Court counted thirty states that prohibited the execution of juvenile offenders, which included twelve abolitionist states plus eighteen states that excluded juveniles from their capital punishment schemes.[49] In *Kennedy v. Louisiana*, the Court noted "44 States have not made child rape a capital offense."[50] And, in *Graham v. Florida*, the Court ultimately found a national consensus even though it tallied only thirteen jurisdictions that banned life without parole for

---

44 Gregg v. Georgia, 428 U.S. 153, 175 (1976) (plurality opinion); *see also* Roper v. Simmons, 543 U.S. 551, 564 (2005) (stating that "[t]he beginning point [of the Eighth Amendment analysis] is a review of objective indicia of consensus, as expressed *in particular* by the enactments of legislatures that have addressed the question" (emphasis added)); Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (indicating that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"), *abrogated by Atkins*, 536 U.S. at 312.

45 *Gregg*, 428 U.S. at 179 (noting that at least thirty-five states reinstated the penalty in *Furman*'s wake).

46 Coker v. Georgia, 433 U.S. 584, 595–96 (1977) (plurality opinion); *see also* Ford v. Wainwright, 477 U.S. 399, 408–10 (1986) (noting that "no State in the Union permits the execution of the insane" in finding that the Eighth Amendment "prohibits a State from carrying out a sentence of death upon a prisoner who is insane").

47 *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 426 (2008) ("[O]ur review of national consensus is not confined to tallying the number of States . . . .").

48 536 U.S. at 314–15.

49 543 U.S. at 564 (in this opinion, Justice Kennedy also reframes *Atkins* as a case in which thirty states prohibited the death penalty for mentally retarded offenders).

50 554 U.S. at 423.

juveniles.[51] These cases demonstrate that although the number of states banning a punishment does not necessarily determine the outcome, it can "weigh very heavily" in favor of an Eighth Amendment prohibition.

Though the core consideration of consensus analysis appears to be whether the legislature of the state authorizes the punishment, it is clear that the Court has a broad understanding of whether a jurisdiction should be counted in the category that permits a punishment or the category that prohibits a punishment.[52] Both *Atkins* and *Graham* forcefully demonstrate the legislative enactments are not dispositive. The Court has indicated that states that technically authorize a punishment may still be functionally equivalent to states that have prohibited the penalty if circumstances in those states nullify the need for legislative action to prohibit the punishment. In *Atkins*, for example, the Court noted that "[s]ome States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States."[53] In other words, a state's failure to execute (or perhaps sentence to death) individuals for long periods of time could arguably be construed as evidence that a state is as good as abolitionist for national consensus purposes.[54] The Court took a similar approach in *Graham* where it

---

51 560 U.S. 48, 62 (2010). Notably, the Court only tallied thirteen jurisdictions and commented that "[s]ix jurisdictions do not allow life without parole sentences for any juvenile offenders" and "[s]even jurisdictions permit life without parole for juvenile offenders, but only for homicide crimes." *Id.*

52 The trouble with this sort of binary counting method is that it fails to capture important differences between states that retain the death penalty. Taking a sociological perspective,

> Professor David Garland identifies a four-fold typology of American States and the death penalty—(1) abolishing States; (2) States such as Colorado, Connecticut and Wyoming that have death penalty statutes but only rarely invoke them; (3) States such as California, Pennsylvania, and Tennessee that frequently impose death sentences but rarely execute them; and (4) States such as Ohio, Oklahoma, and Texas that impose and execute death sentences fairly frequently.

James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO ST. J. CRIM. L. 255, 260 (2011) (citing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 200 (2010)).

53 *Atkins*, 536 U.S. at 316.

54 In the very next sentence of the *Atkins* opinion, the Court mentions the low rate of executions of mentally retarded offenders in states that have executions. *Id.* ("And it appears that even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders possessing a known IQ less than 70 since we decided *Penry*."). The Court's opinion thus does not clarify whether the extraordinarily low number of executions in some places like New Hampshire is a relevant usage consideration, a reason to consider the state functionally-abolitionist in head-counting, or both. This concept is reflected in *Graham*, which stated

> the statutory eligibility of a [penalty] does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. Similarly, the many States that allow [the penalty] *but do not impose the punishment* should not be treated as if they have expressed the view that the sentence is appropriate.

specifically examined the number of states that authorized the challenged punishment, but did not ever impose it in practice.[55]

The Court also has suggested that states that fail to amend punishment-authorizing legislation rendered unenforceable by a binding judicial ruling should not be counted as retentionist. For instance, in *Kennedy v. Louisiana*, Texas, as amici, argued that Florida's statutory law permitted the death penalty for child rape.[56] Yet, the Court did not count it as one of six relevant retentionist states because a Florida Supreme Court opinion found the death penalty for child sexual assault unconstitutional.[57] It held that "there may be disagreement over the statistics," and did not firmly resolve the question, but cast serious doubt that Florida should count as retentionist (in this context) and did not refine its count despite the State's claims.[58] It appears that binding opinions requiring either legislative or administrative responses to constitutionalize a punishment may remove the state from the pro-punishment side of the ledger.[59]

Graham, 560 U.S. at 67 (emphasis added). This analysis is helpful, but slightly distinguishable because it relied on a two-step process that rendered juveniles eligible for the punishment: (a) juvenile transfer provisions; and (b) laws enabling a LWOP sentence to those tried in adult court. By contrast, death penalty statutes make the punishment directly available for certain crimes (though the complexity and reach of statutory eligibility factors certainly create the possibility that the laws in practice extend to some conduct the legislatures never intended to be punishable by death).

55 *Graham*, 560 U.S. at 64 ("Thus, only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders—and most of those do so quite rarely—while 26 States, the District of Columbia, and the Federal Government do not impose them despite apparent statutory authorization.").

56 Transcript of Oral Argument at 27, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343) (oral argument of Ted Cruz).

57 *See Kennedy*, 554 U.S. at 423 (counting Louisiana, Georgia, Montana, Oklahoma, South Carolina, and Texas).

58 *Id.* at 424–25 ("Respondent would include Florida among those States that permit the death penalty for child rape. The state statute does authorize, by its terms, the death penalty for 'sexual battery upon . . . a person less than 12 years of age.' . . . In 1981, however, the Supreme Court of Florida held the death penalty for child sexual assault to be unconstitutional. It acknowledged that *Coker* addressed only the constitutionality of the death penalty for rape of an adult woman, but held that '[t]he reasoning of the justices in *Coker* . . . compels [the conclusion] that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment[.]' Respondent points out that the state statute has not since been amended. Pursuant to Fla. Stat. § 775.082(2) (2007), however, Florida state courts have understood *Buford* to bind their sentencing discretion in child rape cases." (citations omitted)).

59 Significantly, this approach would consider New York non-retentionist in light of the state high court's ruling that the death penalty as administered is unconstitutional under the New York Constitution, *see* People v. LaValle, 817 N.E.2d 341 (N.Y. 2004), and the state's failure to make a legislative or constitutional fix. *See, e.g.*, Patrick D. Healy, *Death Penalty Seems Unlikely to Be Revived*, N.Y. TIMES, Feb. 11, 2005, at B1 ("'A moratorium on the death penalty, or doing nothing to restore it, seems the best way to go, because there's very little evidence the death penalty has helped New York these 10 years,' said Assemblyman Ron Canestrari of Albany County . . . .").

ii. Direction of Legislative Change

In addition to the number of states that authorize a punishment, as part of its complement of objective indicia, the Court assesses the direction in which jurisdictions are moving. This notion of "direction" first arose in *Atkins*, where the Court held, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[60] In *Atkins*, the Court noted that a "large number of States"—sixteen—took the death penalty off the table for mentally retarded offenders after the Court rejected the Eighth Amendment claim in *Penry v. Lynaugh*,[61] and there was a "complete absence of States passing legislation reinstating" the penalty for the same class of individuals.[62] The Court also relied on "direction" in *Simmons*, holding that "the same consistency of direction of change" had "been demonstrated" where no state reinstated the juvenile death penalty after *Stanford*[63] and five states prohibited it in fifteen years.[64] The Court's analysis thus searches for uniformity in the direction, along with some (undefined) number of jurisdictions to undergird that shift.

Importantly, the Court's analysis of direction evidences the same fluidity as its determination of the number of states that do or do not authorize a punishment. In *Kennedy*, the majority opinion found that "no showing of consistent change [in favor of the punishment] has been made in this case" even though "in the last 13 years. . . . six new death penalty statutes [were passed to make child rape a potentially capital crime], three enacted in the last two years."[65] Although these numbers appear as compelling as the "direction of change" numbers put forth in *Simmons*, the Court invoked the baseline number of jurisdictions that opposed the trend to support its finding that the State did not demonstrate consistent change. It noted that "the total number of States to have made child rape a capital offense after *Furman* is six," and distinguished it from *Simmons*, in which twelve states already prohibited the execution of individuals under eighteen at the time *Stanford* was decided, and that number grew considerably in the years that followed.[66] Valence is the key difference between the state trends in *Atkins* and *Simmons* and the trend in *Kennedy*. In the former cases, the

60 Atkins v. Virginia, 536 U.S. 304, 315 (2002).

61 492 U.S. 302, 340 (1989) ("[W]e cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation alone."), *abrogated by Atkins*, 536 U.S. at 312.

62 *Atkins*, 536 U.S. at 316.

63 Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (plurality opinion) ("We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age.").

64 Roper v. Simmons, 543 U.S. 551, 566 (2005).

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

66 *Id.* at 433.

petitioners' trend arguments benefited from "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime."[67] In *Kennedy*, however, the state trend argument lacked the same power because the trend illustrated conformity with "the well-known fact."

2. Number of Sentences Imposed

The Supreme Court also analyzes a challenged penalty's usage when it decides the national consensus question. In capital cases, actual sentencing practices require a look at jury verdicts because of the jury's role in determining which offenders deserve the death penalty in many states.[68] The notion that actual sentencing determinations matter emerged when *Furman* fractured the Court in 1972. Justice Brennan wrote that "[t]he acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use."[69] Infrequent infliction of a particular punishment may thus reflect society's rejection of that punishment even absent legislative repeal.

When the Court decided *Gregg* in 1976, the plurality viewed the infrequency of death sentences as a signal that only "extreme cases" warrant the death penalty.[70] In *Coker*, however, the Court discarded the position that infrequency equates to selectivity. There the State argued that the low number of death sentences for homicide offenses was indicative that juries selectively gave death to those defendants that truly deserved it. However, the Supreme Court concluded that the low number of death sentences supported its finding that the punishment is unconstitutional, stating "it is true that in the vast majority of cases, at

---

67 *Atkins*, 536 U.S. at 315; *see also Simmons*, 543 U.S. at 566 (finding the fact that "no State that previously prohibited capital punishment for juveniles has reinstated it. . . . coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation").

68 *See, e.g.*, *Atkins*, 536 U.S. at 323 (Rehnquist, C.J., dissenting) (acknowledging the importance of "data concerning the actions of sentencing juries . . . because of the jury's intimate involvement in the case and its function of 'maintain[ing] a link between contemporary community values and the penal system'" (quoting Gregg v. Georgia, 428 U.S. 153, 181 (1976) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)))); Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (plurality opinion) (noting that "jury determinations" are an important indicator of "societal values").

69 Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

70 *Gregg*, 428 U.S. at 182 (plurality opinion) ("[T]he reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases."); *see also* Graham v. Florida, 560 U.S. 48, 111 (2010) (Thomas, J., dissenting) ("That a punishment is rarely imposed demonstrates nothing more than a general consensus that it should be just that—rarely imposed. It is not proof that the punishment is one the Nation abhors.").

least 9 out of 10, juries have not imposed the death sentence."[71] This holding reflects the idea that, at some point, the low number of death sentences reflects not the considered judgment of sentencing juries, but instead the societal rejection of a legislatively-authorized punishment.[72]

In cases of extreme infrequency, the Court has relied on the low absolute number of those sentenced to a challenged punishment to support a finding that the punishment has fallen out of favor. In *Enmund v. Florida*, the Court found "only three persons in that category [where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder] are presently sentenced to die."[73] And, in *Kennedy*, the Court emphasized that only two individuals on death row at the time in the United States had been capitally sentenced for a non-homicide offense.[74] In *Coker*, the Court confronted both a larger number of relevant sentences and much smaller number of eligible defendants: Georgia juries had handed down six death sentences in sixty-three capital rape cases between 1973 and 1977.[75] Although seemingly relying more on the number of states that prohibited capital punishment for rape, the Court still found instructive that more than nine out of ten juries had not imposed the death sentence.[76]

Sentencing practices also played an important—perhaps decisive—role in the Court's decision in *Graham* to bar life without the possibility of parole sentences for juveniles who commit non-homicide offenses.[77]

---

71 Coker v. Georgia, 433 U.S. 584, 597 (1977).

72 Significantly, jurors typically only sit in one capital case in a lifetime, so they do not develop the experience theoretically needed to gauge arbitrariness. Empirical research shows that capital jurors tend to systematically prejudge and misapply the law in a manner that favors death verdicts over life sentences. *See, e.g.*, Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011 (2001); William J. Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings*, 70 IND. L.J. 1043, 1085–1102 (1995). This evidence supports the Court's rejection of the State's claim in *Coker*.

73 458 U.S. 782, 796 (1982). In this case, the Court used the total number of people on death row to demonstrate infrequency of the punishment for individuals situated similarly to the defendant, but acknowledged that "[t]he dissent criticizes these statistics on the ground that they do not reveal the percentage of homicides that were charged as felony murders or the percentage of cases where the State sought the death penalty for an accomplice guilty of felony murder." *Id.* Nevertheless, the Court noted, "it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder." *Id.*

74 *See* Kennedy v. Louisiana, 554 U.S. 407, 434 (2008).

75 *Coker*, 433 U.S. at 596–97.

76 *See id.* at 597.

77 *But see* Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 461 (2012) (arguing that the independent judgment prong of the categorical ban approach "is really what matters" in *Graham* because of "the exceeding weakness in Justice Kennedy's finding of a national consensus against the use of this sentence").

More than three-dozen jurisdictions legislatively authorized life without parole (LWOP) for juveniles who commit non-homicide offenses.[78] Florida argued that this widespread display of legislative support *for* the punishment foreclosed a finding that a consensus against the punishment exists. The Court labeled Florida's argument "incomplete and unavailing" and reiterated that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus."[79] Where only 129 juvenile offenders were under a sentence of LWOP, the Court indicated there was "a consensus against its use."[80] The Court acknowledged that this number was greater than the number of people executed in *Enmund* and *Atkins*, but considered briefly that the eligible number as measured by a raw estimate of serious non-homicide crimes committed by juveniles every year was very large (presumably much larger than the number sentenced in the other cases), so the practice appears "as rare" as those struck down in earlier cases.[81]

3. Number of Executions Performed

In the death penalty context, usage can also be measured by counting the number of executions actually imposed. After all, the death penalty is unique in that it is an irrevocable and final punishment. The gap between the number of death sentences handed down after trial and the number of those sentences that result in execution provides additional data about society's view of capital punishment. The unwillingness or inability of death penalty jurisdictions to see through the ultimate sentence itself undermines the claim that the punishment has meaningful societal support.[82]

The Court has determined that executions, like sentencing outcomes, can provide compelling evidence of a national consensus against the death penalty for certain crimes or classes of offenders. In *Enmund v. Florida*, the Court found "only 6 cases out of 362 where a nontriggerman felony murderer was executed. All six executions took

---

78 Graham v. Florida, 560 U.S. 48, 62 (2010) ("Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances.").

79 *Id.*

80 *Id.*

81 *Id.* at 49.

82 Although one might argue that support for a "symbolic" or "expressive" death penalty that does not result in executions is legitimate, "that expressive value must inevitably be undercut by the delay and attrition that make execution such an unlikely prospect." Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1923 (2006); *see also id.* at 1922 (acknowledging "[t]he only thing that could be said in favor of current symbolic states over pre-*Furman* states is that symbolic states get whatever symbolic value inheres in pronouncing sentences of death").

place in 1955."[83] The Court also prominently reported in *Kennedy v. Louisiana* that "no individual ha[d] been executed for the rape of an adult or child [in the United States] since 1964 . . . ."[84] In that case, the Court also referred back to the number of executions in other contexts:

> Both in *Atkins* and in *Roper*, we noted that the practice of executing mentally retarded and juvenile offenders was infrequent. Only five States had executed an offender known to have an IQ below 70 between 1989 and 2002; and only three States had executed a juvenile offender between 1995 and 2005.[85]

4. Geographic Isolation in Sentencing and Executions

Although the Court has not explicitly considered geographic isolation as an independent variable in the national consensus analysis (as apart from the number of states that authorize a punishment), the Eighth Amendment cases indicate that it plays a role. Geographic isolation describes when a relatively small number of jurisdictions that authorize a punishment become responsible for the vast majority of the contested sentences imposed.[86] In *Kennedy*, for example, the Court observed that "Louisiana is the *only* State since 1964 that has sentenced an individual to death for the crime of child rape."[87]

Just as both the number of death sentences and the number of executions inform the national consensus analysis, geographic isolation across both those markers also appears important. In *Simmons*, the Court noted: "[s]ince *Stanford*, six States have executed prisoners for crimes committed as juveniles. In the past 10 years, *only* 3 have done so: Oklahoma, Texas, and Virginia."[88] Similarly, in the non-capital context in *Graham*, the Court pointed out that a "significant majority"—seventy-seven—of the 129 challenged sentences arose from Florida.[89]

---

83 458 US 782, 794–95 (1982).

84 554 U.S. 407, 433 (2008).

85 *Id.* at 425 (citations omitted).

86 In the death penalty context, scholars have increasingly emphasized the geographic nature of the punishment's reach, usage, and meaning. *See, e.g.*, Garland, *supra* note 52, at 309 (noting "a radically local version of democracy" as "the primary cause of capital punishment's persistence"); Liebman & Clarke, *supra* note 52, at 258 (explaining that "almost all there is to know about its death penalty is local, not national"); Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 228 (2012) ("A county-level analysis of the distribution of death sentences and executions from 2004 to 2009, however, provides a more nuanced view. Just 10% of counties nationally returned even a single death sentence during this time period."); Steiker & Steiker, *supra* note 82, at 1870 (noting that "the United States is not monolithic in its death penalty practices").

87 *Kennedy*, 554 U.S. at 434 (emphasis added).

88 Roper v. Simmons, 543 U.S. 551, 564–65 (2005) (emphasis added).

89 Graham v. Florida, 560 U.S. 48, 64 (2010).

The Court also underscored that the remaining sentences had been imposed in "just" eleven other jurisdictions.[90]

Given the increasingly sophisticated manner in which the Court has sought to gather and evaluate consensus evidence in recent years (beginning with *Atkins* and moving through *Simmons*, *Kennedy*, and *Graham*), it appears that the Eighth Amendment jurisprudence can be better understood now than at the turn of the millennium. Experience and time provide observers a meaningful opportunity to perceive the interpretive arc.

A long view of Eighth Amendment developments suggests that one word may accurately summarize what the Court is really looking for when it conducts its national consensus analysis: obsolescence. Although the word "obsolete" is almost entirely absent from the seminal modern era Eighth Amendment cases, the Court recognized in *Weems v. United States* that the Eighth Amendment "in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the *obsolete*."[91] Several considerations inform the Court's view of whether a challenged punishment has become obsolete, including the legislative and usage indicators. No single consideration dictates the particular outcome. While the understanding of the Court's consensus approach as obsolescence-detecting is examined in detail in Parts II and III, the following section undertakes a necessary precursor: examining commentator critiques of the Court's consensus approach.

C. *Critiques of the Court's Consensus Analysis*

In surveying the Court's attempt to measure consensus a few things become apparent: First, the Court seems to give priority to legislative authorization in many of the cases in which it has searched for consensus, but it has been willing to give priority to on-the-ground usage statistics in others.[92] Second, the Court offers little explanation

---

90 *Id.*

91 217 U.S. 349, 378 (1910) (emphasis added).

92 As this article was being finalized for publication, the Supreme Court handed down its opinion in *Hall v. Florida*, 134 S. Ct. 1986 (2014). That decision both underscored the Court's commitment to the consensus analysis and demonstrated that the analysis is becoming more nuanced. In analyzing the national consensus data on the issue of how jurisdictions determine whether a defendant is intellectually disabled under *Atkins*, the Court placed Oregon on the same "side of the ledger" as "the 18 States that have abolished the death penalty" because the governor there has "suspended the death penalty" and the state has "executed only two individuals in the past 40 years." *Id.* at 1997. The Court also took stock of the fact that Kansas "has not had an execution in almost five decades" and concluded that "its laws and jurisprudence on this issue are unlikely to receive attention on this specific question." *Id.* The Court's analysis in *Hall* is worthy of further exploration and commentary. An initial review suggests that the Court can and will consider many of the measures and details identified in this Article.

(much less theoretical justification) for why the indicia it uses to gauge consensus actually are helpful for gauging consensus. Finally, the Court gives little guidance about why and when a particular indicator might be more valuable than another indicator.

This lack of doctrinal clarity has created the appearance that objective indicia do not really matter; instead, what many commentators believe matters are the personal beliefs of the Justices who vote with the majority.[93] Not surprisingly, scholars and judges alike have voraciously criticized the Court's methodology. One recent commentator labeled the use of objective indicators "specious."[94] Another commentator reasoned that because the indicators are "highly malleable" the analysis fails to offer "meaningful constraint" and does not ensure that "judges apply social mores and not their own personal values."[95] Taken together, these critiques are encapsulated by, as Professor Farrell puts it, the sense that "objective indicia analysis is not really objective in the relevant sense."[96]

Several of the Justices have offered their own commentary on the Court's consensus methodology. For example, Justice Scalia disagreed with the Court's interpretation of its consensus evidence in *Atkins v. Virginia*, writing that the analysis "does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate" and characterizing the Court's opinion as resting "upon nothing but the personal views of its Members."[97] Similarly, in *Graham v. Florida*, seemingly caught off guard by the Court's giving priority to the infrequency of sentences imposed over the number of states that legislatively authorized the punishment, Justice Thomas asserted, "[n]o plausible claim of a consensus against this sentencing practice can be made in light of this

93 Atkins v. Virginia, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) ("The arrogance of this assumption of power takes one's breath away. And it explains, of course, why the Court can be so cavalier about the evidence of consensus. It is just a game, after all."); Corinna Barrett Lain, *Lessons Learned from the Evolution of "Evolving Standards,"* 4 CHARLESTON L. REV. 661, 675 (2010) ("On both ends of the ideological spectrum, the [j]ustices' policy preferences are strong and rigid, and neither the law nor anything else is likely to make a dent.").

94 Sigler, *supra* note 7, at 406.

95 Farrell, *supra* note 5, at 312–13.

96 *Id.* at 312; *see also* Tonja Jacobi, *supra* note 35, at 1089–90 ("The lack of a clear standard . . . has resulted in questionable findings, which in turn are relied on, creating an increasingly lax standard of cruel and unusual punishment jurisprudence."); Christopher E. Smith, *The Malleability of Constitutional Doctrine and Its Ironic Impact on Prisoners' Rights*, 11 B.U. PUB. INT. L.J. 73, 79 (2001) ("[T]he Eighth Amendment serves as the prime illustration of Feeley and Rubin's description of opportunities for overt judicial policymaking with little justifiable pretense that judges' decisions are guided by the constitutional text . . . ."); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005) ("The Court's jurisprudence is plagued by deep inconsistencies concerning the Amendment's text, the Court's own role, and a constitutional requirement of proportionate punishment.").

97 *Atkins*, 536 U.S. at 337–38 (Scalia, J., dissenting).

overwhelming legislative evidence."[98] Justice Thomas found the Court's reliance on the infrequency of use of the penalty "stunning" and insisted that the Court's "logic strains credulity."[99]

Much of this criticism is generated by the fact that when the Court decides Eighth Amendment claims it both searches for consensus and exercises its independent judgment. The Court has never exercised its independent judgment in a way that conflicts with the results of its search for a national consensus. Professor Hills has offered a somewhat charitable analysis of this fact, suggesting that the Court uses its consensus analysis to constrain its independent judgment—if no consensus exists, then the Court cannot exercise its independent judgment to strike down a challenged punishment practice.[100] Professor Farrell has leveled a less charitable evaluation: "Either that fact is an extraordinary coincidence, or it is evidence that the Court manipulates objective indicia analysis to support its desired outcome."[101]

These critiques largely ignore the baseline of subjective evaluation that marks the prevailing norm for constitutional interpretation. Professor Farrell and Sigler both urge the Court to abandon consensus analysis. Farrell urges the Court to employ a "tiered scrutiny" approach that reflects the Supreme Court's three-tiered approach to Equal Protection analysis.[102] Professor Sigler urges the Court to abandon consensus and to employ its own independent judgment.[103] Normatively, if the problem with gleaning consensus from objective factors is that the process is "too malleable," then it is difficult to understand how either a tiered-scrutiny approach or resort to

98 Graham v. Florida, 560 U.S. 48, 107 (2010) (Thomas, J., dissenting).

99 *Id.* at 108, 111.

100 *See* Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 22 (2009) ("It is more helpful and coherent to think of state laws as forming a *limit* on the Court's independent interpretation.").

101 Farrell, *supra* note 5, at 313. There is a more plausible explanation for the relationship between the two prongs—and it is an explanation that demonstrates the central importance of consensus analysis in elucidating the Eighth Amendment's meaning in a society with evolving norms. The consensus inquiry provides the Court with substantive knowledge: Has the community repudiated the challenged sentencing practice? The primary function of the set of questions placed under the umbrella of the Court's independent judgment is to contextualize the evidence of consensus. It does this in two ways: First, it provides confirmation that a consensus against a punishment ("unusual") derives in significant part from its cruelty. Counting states tells us very little about whether executions are cruel. Perhaps the punishment is simply too costly? The independent judgment questions allow the Court to put the legislative consensus in context: Does the punishment add anything meaningful to deterrence or retribution above available sentencing alternatives? Are there systemic flaws that risk that the punishment is doled out in an unfair fashion? The answers to those questions give the Court insight into why the punishment is unusual.

102 *Id.* at 316–17.

103 Sigler, *supra* note 7, at 421 ("The resulting doctrine lacks coherence and legitimacy, producing outcomes that are unjust-or at least unwarranted by the Court's stated rationale. Whether we lament or celebrate particular Eighth Amendment decisions, we should be deeply troubled by the process that produces them.").

independent judgment alone is a more rigorous alternative. The objective indicators of consensus might not be perfect proxies for societal norms, but it is difficult to see how either alternative approach gets us farther away from the concern that a majority of Justices impose their will instead of prevailing societal standards of decency.[104] Even in the most skeptical light, the objective indicia analysis prevents the Court from substituting its judgment when there is a consensus *for* the sentencing practice.

We believe the consensus analysis drives the Court's Eighth Amendment jurisprudence. To be sure, the Court has not carefully explained the relative importance of legislative enactments (which dominated the analysis in *Atkins* and *Simmons*) compared to usage indicators (which dominated the analysis in *Graham*). Nor has the Court explained how it integrates data from multiple indicators to reach a consensus determination in any particular case. Nonetheless, we see the Court's use of multiple indicators of consensus as a more robust approach to measuring the acceptability of a punishment to contemporary society. After all, what would it mean to say that Americans support a punishment if citizens charged with meting it out refuse to do so in the vast majority of cases in which it is available? Viewed through this lens, the "malleable" (or, as we see it, more responsive) nature of the objective indicia analysis is a virtue. In the next Part, we flesh out the value of each individual indicator of consensus to illustrate the value of a multi-source approach to gauging contemporary standards and then prioritize their importance based on their representativeness of societal mores.

II. JUSTIFYING AND PRIORITIZING THE OBJECTIVE INDICIA OF CONSENSUS

This Part provides context and depth to our understanding of consensus analysis by providing the first comprehensive assessment of the objective indicators of contemporary societal mores: the number of states that legislatively authorize the penalty, the number of jury verdicts, and the number of executions. We assess the comparative strengths and weaknesses of these indicators and provide some thoughts on how to rank their relative importance. When detailing the objective indicators that the Court has used to gauge consensus, we noted the emergence of geographic isolation as a possible indicator. As we explain

---

104 On this point, consider Professor Amsterdam's oral argument in *Aikens*: "[T]he State seek[s] to support capital punishment . . . [on the grounds] that in some cases retribution requires killing people . . . and [that the] legislature could find the capital punishment had some[] deterrent efficacy. You immediately see that the same arguments could . . . be made if the legislature [enacted] boiling in oil as a punishment for crime." Transcript of Oral Argument, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027).

at the conclusion of this Part, however, geographic isolation is important to consider as a counting principle, but not as a separate objective indicator. After providing this theoretical foundation, we will propose a modified consensus analysis.

A. *Legislative Authorization*

This section explores the strength of legislative enactments as one objective indicium to glean contemporary standards of decency. The legislative judgments of Congress and the several states have traditionally been the most heavily relied upon indicia of contemporary consensus.[105] This primacy appears reasonable at first blush due to the perception of a tight link between the will of the people and legislative enactments. The basic idea is that because residents elect their legislators, those legislators serve as the voice of state residents. In other words, Texans whom opposed the practice of capital punishment would voice that opposition at the ballot box.[106] If a majority of Texans disagreed with capital punishment, then legislators would either repeal the death penalty or else be voted out of office. Professor Cassell and District Attorney Joshua Marquis have credited this straightforward political process as the reason why America retains the death penalty while the "rest of the Western world has abolished capital punishment."[107] In sum, "America responds to the will of the people more than other countries do . . . America is more of a democracy."[108]

For a number of reasons, we think that the link between public will and legislative enactments is not as tight as Cassell and Marquis suggest; and, in any event, the politics of crime policy suggest a chasm between what the law authorizes in theory and what citizens do in reality. First, there is reason to believe that even if public will and legislative enactments are closely linked, legislatives enactments tell us very little about the grounds upon which the public and the legislature support or oppose a particular punishment practice. As Professor Hills put the point: "[t]hat a state legislator rejects a punishment [] might have

---

105 *See* Roper v. Simmons, 543 U.S. 551, 564 (explaining that "[t]he beginning point is a review of objective indicia of consensus, as expressed *in particular* by the enactments of legislatures that have addressed the question" and commenting that "[t]hese data give us essential instruction" (emphasis added)).

106 To make this discussion concrete, and to facilitate the death penalty case study that we present in Part III.B, this discussion assumes that the challenged punishment practice is capital punishment. Nonetheless, the analysis does not change significantly when translated into the life without parole context.

107 *See generally* Paul G. Cassell & Joshua K. Marquis, *What's Wrong with Democracy? A Critique of "The Supreme Court and the Politics of Death,"* 94 VA. L. REV. IN BRIEF 65, 65 (2008) (internal quotation marks omitted).

108 *Id.* at 66.

nothing to do with the legislator's assessment that the punishment is cruel."[109] "Instead," Hills continued, "[t]he legislator might [] simply believe that the punishment is administratively costly, leads to excessive litigation, or is an ineffective deterrent."[110] Indeed, rhetoric surrounding the successful recent abolition drives in New Jersey, New Mexico, Illinois, and Connecticut—like the nearly successful push in California—focused mostly on the unnecessary costs to taxpayers and the need to use more effective crime prevention tools.[111] Inability to separate *why* from *whether* a state repeals its death penalty statute suggests that legislative de-authorization of the death penalty might overstate societal consensus against capital punishment.

It is also possible for legislative enactments to understate consensus against the death penalty. The rhetoric of the death penalty is one of fear.[112] There is a symbiotic relationship between the public and its elected officials when it comes to sustaining fear-driven politics. Each of us is susceptible to experiencing levels of fear that are out of whack with actual risk.[113] Rampant media coverage of crime—especially violent crime—might help to explain why crime and the fear it instills is so prevalent even in locations where little-to-no serious crime occurs.[114] Another partial explanation is that politicians often engage in efforts to use crime to create fear to drive a wedge between themselves and other candidates.[115] In this sense, then, it is hard to know how much of fear-driven support for harsh punishment is communicated from the public to the legislature and how much is manufactured by "tough on crime" political campaigns.

In addition, even where imagining crime in the abstract leads to support for punitive policies, support in the abstract is not the same as supporting the punishment when it is being applied to real people in real cases with messy factual realities. Legislative debates do not give

---

109 Hills, *supra* note 100, at 20.

110 *Id.*

111 Ian Urbina, *Citing Cost, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 25, 2009, at A1.

112 *See generally* BARRY GLASSNER, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS: CRIME, DRUGS, MINORITIES, TEEN MOMS, KILLER KIDS, MUTANT MICROBES, PLANE CRASHES, ROAD RAGE, & SO MUCH MORE (2010).

113 *Id.*

114 *See, e.g.*, *Crime on the Rise?*, U. TEX. AUSTIN (Nov. 10, 2008), http://www.utexas.edu/features/2008/11/10/crime ("People are bombarded with information about crime from the media, which makes them believe the world is a much more dangerous place than it really is . . . .").

115 *See, e.g.*, Nicholas Riccardi, *Crime Makes Halting Comeback as a Political Issue*, ASSOCIATED PRESS (July 6, 2013), http://bigstory.ap.org/article/crime-makes-halting-comeback-political-issue (describing a Republican sponsored commercial in Colorado attacking the sitting Governor—a Democrat—for indefinitely suspending the death sentence imposed upon a man who killed four victims. The ad queried: "How can we protect our families when Gov. Hickenlooper allows a cold-blooded killer to escape justice?").

legislators the opportunity to see defendants as people.[116] Unlike a jury which must see the accused in the flesh and listen to the details of his character and background, the information that filters into legislative debates over capital punishment is largely abstract considerations.[117] Deciding to impose a death sentence after listening to the character and background of the defendant is something altogether different.[118] The latter is a "reasoned moral response" based on more complete information about the crime and the person who committed it.[119] Whether or not legislative judgments reflect the abstract policy preferences of the public, legislative enactments do not tell us about how the public feels about the punishment when it is applied to real, individual people. The legislative process is not generally geared towards the reality that those who commit crimes are people, too.

So far, we have assumed that regardless of whether legislative authorization indicates consensus for or against a punishment, legislative enactments and public will are tightly connected. As it turns out, though, there are good reasons to doubt that legislative and popular will are so tightly linked. Professor Hills has emphasized that even if the public supports legislative exemptions for capital punishment—e.g., no death penalty for severely mentally ill offenders—the "politics of death"—can interfere because when "very powerful interest groups" such as "prosecutors and police groups" oppose reform, and these groups are "effective at election time in helping voters see who is, and who is not, 'tough' on crime." Moreover, as Professor Corinna Barrett Lain notes, sometimes "the ostensibly majoritarian stance of the legislative and executive branches—is not majoritarian after all."[120] Legislative enactments often suffer from a variety of critical defects ranging from low voter turnout among eligible citizens to the fact that

116 There are two possible exceptions. First, exonerated inmates testify before state legislatures on some crime legislation. Second, the family members of victims often testify at hearings at the state legislature.

117 Harris v. Alabama, 513 U.S. 504, 518–19 (1995) (Stevens, J., dissenting) (explaining that jurors "focus their attention on a particular case involving the fate of one fellow citizen, rather than on a generalized remedy for a global category of faceless violent criminals who, in the abstract, may appear unworthy of life").

118 Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1357 n.117 (2002) (noting that "national public opinion diverged" "in the capital prosecution of Susan Smith for drowning her two young children in the family car" and that "those polled felt that Smith deserved to die, and only 28% agreed with the outcome." As Logan wrote, "the divergence might be explained by the understandable empathic response of jurors faced with a choice about the fate of a fellow resident in a small community, versus regarding the accused as an abstract subject of discussion, based on incomplete reportage, outside the jury box.").

119 California v. Brown, 479 U.S. 538, 545 (1987) (noting that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime").

120 Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 116 (2012).

there always are too many other pressing issues for legislatures to consider.[121] For instance, the people most impacted by homicides—both as victims and as offenders—are racial minorities that tend to be underrepresented at the polls.[122] Moreover, in states like Wyoming or New Hampshire, where death penalty activity is almost non-existent, it is difficult to get the legislature to focus on capital punishment abolition as a legislative priority. These issues—low voter turnout, low priority issues—have led Professor Lain to conclude that "[t]he idea that legislative outcomes should serve as a paragon of democracy or a proxy for the will of 'majorities' seems almost bizarre."[123]

These critiques of using legislative enactments to measure community values are amplified when attempting to determine community consensus on a specific issue. Rarely does any single issue drive a state-level election. Hence, it is generally impossible to trace votes for a candidate to a stance on the death penalty—or even on crime issues broadly. Another obstacle with equating legislative enactments with community preferences is that states are comprised of political subdivisions. Recall that juries are culled from the county of offense and charged with the responsibility of expressing the moral conscience of their local community. Even if residents in a majority of counties send pro-death penalty legislators to the state capitol, it still could be the case that residents of high usage counties do not support capital punishment but nonetheless live in a state where residents of low use counties authorize capital punishment. For instance, Californians voted in 2012 to retain the death penalty by a margin of 52.6%–47.4%.[124] Yet, residents of Los Angeles County, which is the county with the highest absolute number of death sentences in California, voted to jettison the death penalty by a margin of 53.7%–46.3%.[125]

Moreover, the more irregularly a punishment is applied the less pressure is placed in the legislature to revisit its utility.[126] Recall that laws

---

121 *Id.* at 148 ("According to Arrow's Theorem and other social-choice concepts, majority preferences are hopelessly obscured by the sequence in which voting occurs and thus are inevitably dependent on the agenda-setting abilities of particular constituencies.").

122 Jan E. Leighley & Arnold Vedlitz, *Race, Ethnicity, and Political Participation: Competing Models and Contrasting Explanations*, 61 J. POL. 1092 (1999).

123 Lain, *supra* note 120, at 145 (citing GEORGE I. LOVELL, LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY 22 (2003)).

124 *California Election Results*, L.A. TIMES (Nov. 6, 2012), http://graphics.latimes.com/2012-election-results-california.

125 *Id.* (revealing county by county results on Proposition 34).

126 *See* Atkins v. Virginia, 536 U.S. 304, 316 (2011) ("Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States."); Richard E. Myers, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1332 (2008) ("Majorities strong enough to overcome the checks and balances that slow legislation and enact a law at one point in time may pass away, but the same obstructive genius intended to defend

criminalizing homosexual conduct remained on statute books in some states for decades before the Court invalidated the statutes in *Lawrence v. Texas*.[127] Some states still possess statutes that criminalize oral sex. It would be absurd to believe that we can read from the presence of oral sex on state statute books that the contemporary moral consensus is that consensual oral sex deserves to be punished through the criminal justice system. The point that irregularity and legislative modification are not highly positively correlated is especially true when the penalty at issue is one applied against individuals without much clout. The death penalty is such a penalty. Those who receive it are mostly poor and politically invisible apart from the homicide that they have committed. Citizens might not support harsh punishment if the penalty would be applied with regularity and without class or racial preferences.[128] As Professor Amsterdam put the point: "[t]he problem in a Democracy is that legislation . . . can be arbitrarily, selectively spottily applied to a few outcast[s] . . . whose political positions are so weak . . . that public revulsion which would follow the uniform application of the penalties . . . does not follow [when a] few outcast creatures are condemned to that punishment."[129]

Taken together, these considerations lead to the conclusion that despite the Court's disproportionate focus on legislative enactments they might not be the most important indicator of consensus. Indeed, legislative enactments are less important for gauging consensus than the usage indicators described in the following sections.

B. *Prosecutorial Discretion and Jury Verdicts*

This section demonstrates that punishment usage is a more important indicator of societal mores than whether the punishment is legislatively authorized. Two dominant actors control imposition of the death penalty: prosecutors and juries. Prosecutors are critical actors in

liberty stymies attempts by a new majority to restore liberty.").

127 539 U.S. 558 (2003).

128 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 173 (1980) (noting that the "political processes" would not result in "beheading as the penalty for tax fraud" because legislators are reluctant to enact harsh punishment when "people like us" could be exposed to the punishment; however, when the average voter runs no realistic risk of being subjected to the punishment, a non-legislative fix is needed).

129 Transcript of Oral Argument, Aikens v. California, 406 U.S. 813 (1972) (No. 68-5027); *see also* McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) (Defendants often speak with "too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life. The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of 'sober second thought.'" (quoting Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936))).

the criminal justice system because they decide both whether to charge a case capitally, and whether to accept a plea to a sentence less than death in those cases where capital charges are filed. Once a capital case proceeds to trial, however, the jury usurps the prosecutor as the dominant actor given that it is the jury that is asked to decide whether the particular defendant should be sentenced to death. Both actors need to work in unison before a death verdict can be returned. This section explores the importance of the discretionary decisions of both actors, although for purposes of this Article, considers prosecutorial discretion and jury verdicts in tandem. The question for both actors is how infrequently they exercise their discretion to impose the death penalty.

1. Prosecutorial Charging and Bargaining Decisions

The charging and bargaining decisions of prosecutors are uniquely situated among indicia of consensus. Like legislators, citizens elect their district attorney.[130] However, unlike legislators, district attorneys answer only to the citizens from the county in which they are prosecuting crimes.[131] The "local" nature of prosecutorial elections is important. As one commentatorrecently documented, the idea of electing prosecutors—a commonly accepted practice today—emerged in response to a desire for "popular control over government, eliminating gubernatorial patronage, and making government officials more responsive to local communities."[132] Furthermore, as Professor Rainville has noted, the decline in jury trials—a phenomenon that applies to death penalty cases—has increased the discretionary power of the prosecutor without a corresponding increase in meaningful jury oversight. Thus, district attorneys face elections so that they have proper external incentives to "be responsive to community demands."[133]

This is important because capital punishment is intensely local—neighboring jurisdictions often yield widely different capital sentencing practices despite their geographic proximity.[134] If political subdivisions, especially the ones that contain a disproportionately high population, speak with a voice that is contrary to the state generally, respect for the process by which they allocate death sentences—jury verdicts at the

130 Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1568 (2012).

131 *Id.*

132 *Id.*

133 Gerard Rainville, *The District Attorney in America: An Evolution*, 40 PROSECUTOR 32, 36 (2006).

134 See G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Federal Death Penalty*, 85 WASH. L. REV. 425, 446 (2010) (listing capital sentencing disparities in Orleans and neighboring Louisiana parishes); *id.* at 450 (same for St. Louis City, Missouri and St. Louis County, Missouri).

county level—requires consideration of the message they are sending. One objection is that jury verdicts—even in the aggregate—cannot speak for the entire county because the sample is too small to be representative of community views. Prosecutorial practices thus provide an intermediate view—it might be wise to look beyond the individual jury, but not farther than the group of people whom could have been eligible to serve based on their residency within the county.

District attorneys also represent a more logical source of consensus-relevant information than legislators because they are single subject public servants. Whereas a vote for a legislative candidate cannot reliably be traced to that candidate's position on criminal justice issues, district attorneys are elected *because* of their stance on criminal justice issues. The death penalty is but one criminal justice issue, so the obscured-preferences critique that applies to legislatures applies with lesser force here. Nonetheless, a district attorney electoral race more likely turns on crime issues (even if capital punishment is just one of several crime issues), while the race for state representative might turn on job creation, the economy, healthcare, crime, support for other social issues, and so forth. Moreover, district attorneys, unlike legislators, do not decide whether to pursue capital charges based on abstract ideas about capital crimes and the people who commit them. Instead, prosecutors must consider the facts of each individual crime, and, when the system is functioning adequately, the characteristics of the offenders against whom they will pursue the death penalty.

One detriment to considering prosecutorial discretion as a proxy for community standards is that similar to legislators, prosecutors could possess political incentives to act. Here, this means prosecutors could seek the death penalty even in cases where the district attorney personally believes the punishment is not appropriate.[135] Professor Smith has noted this dynamic, explaining that prosecutors often possess the same incentive to rely on the "tough on crime" as does the typical state legislator.[136] Though this dynamic no doubt exists, we believe that prosecutors are a good place to look when trying to gauge consensus: District attorneys are elected and while they might possess incentives to appear tough on crime, they also have far more opportunity to consider the facts of a particular case before deciding whether to impose death.

---

135 *See, e.g.*, Cassell & Marquis, *supra* note 107, at 69 (describing the "former Los Angeles District Attorney and California Attorney General John Van de Kamp" as someone who "was, and remains, an outspoken foe of capital punishment," though he ran an advertisement in a statewide campaign that touted his tough-on-crime stance and his focus on harsh treatment of capital defendants).

136 Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 334–35 (2008).

2. Jury Verdicts

In *Witherspoon v. Illinois*, the Court claimed that juries "maintain a link between contemporary community values and the penal system."[137] The Court explained that the function of being a "link" to and "speak[ing] for the community" is of critical importance because "without [it] the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"[138] Quoting this language from *Witherspoon*, Justice Scalia articulated in his dissent in *Roper v. Simmons* that the jury's role as a window into community values continues to be important in the context of Eighth Amendment jurisprudence; hence, the Court has "consulted the practices of sentencing juries" when determining whether a consensus against a sentencing practice exists.[139]

This conception of the jury has a long lineage. Founding era juries even had the power to refuse to apply the law upon a belief that the law was unconstitutional.[140] Capital jurors remain uniquely situated to express the community's contemporary standards of decency on the death penalty. Scholars continue to herald the American jury as "the quintessential deliberative democratic body"[141] and "the embodiment of the ideal of a decentralized democracy."[142] Professor Iontcheva recently captured the institutional advantage of juries as compared to legislatures: "[T]he jury has the legitimate authority to make difficult value judgments," and also to "render case-specific sentencing decisions that are outside the capabilities of legislatures."[143] The idea that jury verdicts better capture contemporary standards of decency seems counter-intuitive because juries speak in one specific case while legislatures speak for the mine-run of cases. However, as Professor Iontcheva suggests, "problems that call for individualized, case-by-case assessment are often better decided through small-scale deliberation" and not through "the aggregation of individual preferences through voting."[144]

The main advantage that jury verdicts carry over legislative enactments is that jurors must see the actual person they may sentence to death. The decision is not based solely on sound bites or fear of crime

137 391 U.S. 510, 519 n.15 (1968).

138 *Id.*

139 Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

140 *See* AKHIL REED AMAR, THE BILL OF RIGHTS 100 (1998) (distinguishing between "jury nullification" and "jury review," the latter being "the narrower question of whether a jury can refuse to follow a law if and only if it deems that law unconstitutional").

141 Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 346 (2003).

142 *Id.* at 323.

143 *Id.* at 351.

144 *Id.* at 339.

unattached to real victims and real offenders, but rather must take into account both the enormity of the homicide and also the humanity of the accused. Capital jurors—unlike legislators—are required to consider evidence about the character and background of the accused.[145] Often, jurors are privy to information that contextualizes the crime by revealing empathy-inducing information about the person whom committed the offense: Many offenders possess mental deficiencies, brain damage, or severe mental illness; the lives of many capital defendants were shaped by extreme poverty, unspeakable physical abuse or neglect, or both.[146] This type of information is not likely to make its way into legislative discussions of death sentencing, and, if it does, then it certainly is not attached to a particular person facing death as it is in the jury-sentencing context.

The constitutionality of the death penalty—specifically whether it is excessive and therefore cruel—turns on its retributive value compared to life without the possibility of parole.[147] Retributive fit is an inherently moral question. So measurement of the value added to capital punishment depends on the ability of juries to "express[] the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity."[148] Legislatures and elected prosecutors worry about administrative hurdles, financial costs, and how supporting the death penalty (or not) sounds in a thirty-second television spot. Jurors decide one case. They absorb information about the crime, the victim, and the offender—and then determine whether "society's moral outrage" demands that this particular murderer be sentenced to death.[149] Contrary to conventional understanding, individual jurors tend to be less punitive than citizens questioned about crime policy in the abstract or legislators deciding to enact a criminal justice legislation.[150] Professor Lanni has explained that individuals "presented with detailed descriptions of cases" as opposed to being queried about sentencing practices in the abstract "often suggest more lenient penalties than those meted out by judges and, in many

145 Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that "in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (footnote omitted)).

146 *See, e.g.*, Robert J. Smith, Sophie Cull & Zoë Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221 (2014) (documenting that the vast majority of recently executed offenders suffered from severe physical and sexual abuse, had intellectual deficits or severe mental illness, or were under twenty-one).

147 Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) (singling out "retribution and deterrence of capital crimes by prospective offenders" as the penological objectives that justify capital punishment).

148 Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting) (citing *Gregg*, 428 U.S. at 184).

149 *Gregg*, 428 U.S. at 183.

150 *Id.* at 238.

cases, than the mandatory minimum sanctions currently in force in their jurisdictions."[151] Justice Stevens perfectly captured the mechanics of this process in his dissent in *Harris v. Alabama*:

> Although the public's apparent zeal for legislation authorizing capital punishment might cast doubt on citizens' capacity to apply such legislation fairly, I am convinced that our jury system provides reliable insulation against the passions of the polity. Voting for a political candidate who vows to be "tough on crime" differs vastly from voting at the conclusion of an actual trial to condemn a specific individual to death. Jurors' responsibilities terminate when their case ends; they answer only to their own consciences; they rarely have any concern about possible reprisals after their work is done.[152]

Another comparative advantage that jury verdicts possess over legislative judgments is that jurors chosen to decide capital cases are selected from the county where the crime occurred. Cross-county crime is comparatively rare; indeed, most violent crime is not only intra-county but often is concentrated in a handful of neighborhoods within a given county.[153] Thus, when it comes to imposing community morality, the jury is comprised of the people most likely to be impacted by the decision to impose a death sentence or not: those citizens who reside in the locality where the crime occurred. This is how it is supposed to be. As the Court underscored in *Taylor v. Louisiana*, "the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it."[154] Justice Breyer, too, has commented on the importance of the community knowledge. Jurors are "more likely to express the conscience of the community on the ultimate question of life or death" and "better able to determine in the particular case the need for retribution" because jurors are "more attuned to the community's moral sensibility" and thus "reflect more accurately the composition and experiences of the community as a whole."[155] Citing Professor Liebman's findings that "3% of the Nation's counties account for 50% of the Nation's death sentences," Justice Breyer concluded in *Ring* that "[m]any communities may have accepted some or all of the[] claims [about the ineffectiveness and inequities of the death penalty], for they do not impose capital sentences."[156]

---

151 Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1781 (1999).

152 *Harris*, 513 U.S. at 518–19 (Stevens, J., dissenting).

153 *See, e.g.*, JOHN E. ECK ET AL., U.S. DEP'T OF JUSTICE, MAPPING CRIME: UNDERSTANDING HOT SPOTS (2005) (describing a number of neighborhoods within major cities where police concentrate manpower because they produce disproportionate amounts of violent crime).

154 419 U.S. 522, 529 n.7 (1975) (quoting H.R. REP. NO. 1076, at 8 (1968)).

155 Ring v. Arizona, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring) (internal quotation marks omitted).

156 *Id.* (citing JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH

C. *Executions*

Executions are the final output of the capital punishment system. A legislature can enact a statute, a prosecutor can charge a case capitally, and the people can hand down death sentences, but how much does any of it mean without executions?[157] This question—does the death penalty really exist if no one is executed—led the Court to explicitly find that "statistics about . . . executions may inform the consideration whether capital punishment . . . is regarded as unacceptable in our society."[158]

One advantage of highlighting executions as a consensus indicator is that in most states outlier counties—those with death sentences disproportionate to their population—do not possess the power to carry out an execution. In most places, state executives—not counties—control the execution machinery.[159] In this sense, execution data can be more indicative of statewide contemporary standards than death-sentencing data. This is the case because a few outlier counties in a state can account for the vast majority of a state's death sentences, and thus the actions of those few counties misrepresent the statewide consensus.

A second advantage to measuring usage based on executions is that juries are not privy to information at the time of the verdict that is relevant to a consideration of whether the death penalty is cruel; that is, information is incomplete at the time of sentencing. For instance, the jury does not know how long the person it sentences to death will reside on death row before being executed. This information is important for two reasons. First, the deterrent value of the death penalty is diminished when the state performs few (or no) executions.[160] Second, there is

---

ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 405–06 (Feb. 11, 2002), *available at* http://www2.law.columbia.edu/brokensystem2/report.pdf).

157 Steiker & Steiker, *supra* note 82, at 1922–23 (explaining that while "states get whatever symbolic value inheres in pronouncing sentences of death. . . . that expressive value must inevitably be undercut by the delay and attrition that make execution such an unlikely prospect").

158 Kennedy v. Louisiana, 554 U.S. 407, 433 (2008).

159 Steiker & Steiker, *supra* note 82, at 1914 (noting that Texas largely is an exception to this rule because it possesses the "statewide political mobilization and coordination [that] is necessary to prevent the primarily local impetus for executions from dissipating as the responsibility for administering the death penalty reaches more removed institutional actor").

160 Johnson v. Bredesen, 130 S. Ct. 541, 543 (2009) (Stevens, J. with Breyer, J., dissenting from the denial of certiorari) ("[D]elaying an execution does not further public purposes of retribution and deterrence but only diminishes whatever possible benefit society might receive from petitioner's death." (citation omitted) (internal quotation marks omitted)); *see also* Sara Colón, Comment, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 CALIF. L. REV. 1377, 1405 (2009) (not executing death row inmates "sets the level of punishment needed for retribution and then fails to live up to it"). *But see* Smith, *supra* note 86, at 236 n.33 ("It is possible, of course, to argue that the retributive effect is still sufficient because society has been able to express its highest condemnation of the prisoner simply by issuing the sentence and signaling the belief that the person is no longer fit to live among us.").

strong evidence that awaiting execution can cause excruciating mental pain.[161] This pain is part of the sentence of death, and yet the jury is unable to factor it into consideration. Additionally, the original jury determination is not always fully informed—for example, a trial attorney's failure to investigate and present available and compelling mitigating evidence to the jury may show that the original decision to sentence the defendant to death would not have been made had the jury been provided all of the evidence.[162] Thus, incomplete information at the time of sentencing is another reason to factor into execution data when detecting a national consensus.

Similarly, a number of things can happen between sentencing and execution to suggest that the constitutional legitimacy of the death sentence, or the public will to carry it out, are missing. For instance, Professor Liebman and colleagues found that roughly two-thirds (68%) of death sentences were reversed on appeal between 1977–1995, with 41% of those cases being reversed on state direct appeal.[163] If retried, most formerly condemned offenders do not receive a second or subsequent death sentence.[164]

Other times the county sentences the person to death and the appellate process is exhausted, but the state does not perform the execution. This type of case proceeds down one of two paths: either the death sentence is commuted (a comparatively rare event, with only 273 commutations across the United States since 1976),[165] or the state simply allows the death row numbers to swell without performing any executions.[166] One example of the former is Illinois, where Governor

---

161 *Johnson*, 130 S. Ct. at 543 (noting that a delay of twenty-nine years "itself subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement"); *id.* ("[T]he prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death." (citing Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring))); Atul Gawande, *Hellhole: Annals of Human Rights*, THE NEW YORKER, Mar. 30, 2009, at 36 (explaining that solitary confinement, the conditions under which most death row inmates live, "crushes your spirit and weakens your resistance more effectively than any other form of mistreatment" and noting that Prisoners of War whom returned from Vietnam "reported that they found social isolation to be as torturous and agonizing as any physical abuse they suffered").

162 *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003) (reversing a death sentence due to ineffective assistance of counsel at the penalty phase of the capital trial); Williams v. Taylor, 529 U.S. 362 (2000) (same).

163 *See* Liebman et al., *supra* note 156, at 11.

164 Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7231 (2014) (noting that "over time, most death-sentenced inmates are removed from death row and resentenced to life in prison").

165 *Clemency*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/clemency (last visited June 15, 2014).

166 Liebman & Clarke, *supra* note 52, at 264 (noting that "since the Supreme Court permitted executions to proceed in 1976" American jurisdictions collectively have "executed only about 15% of those it has sentenced to die").

Ryan commuted 167 sentences—the entire death row—in 2003.[167] Another example is Ohio, a state in which the last two governors have commuted nine death sentences over the past five years.[168] The best examples of the latter are California and Pennsylvania, which together have executed sixteen offenders since 1976 despite having sentenced a combined total of 1352 people to death over the same time period.[169]

The lesson is that death sentences are not perfectly accurate proxies for execution. The ultimate goal of capital punishment is the execution, not the sentence. Thus, it makes good sense to factor-in the frequency of executions when gauging consensus. On the other hand, it is important not to overstate the usefulness of executions as a proxy for contemporary standards of decency. The most obvious disadvantage is that the average time between sentence and execution is more than fourteen years.[170] In this sense, executions reflect, at best, a consensus that existed nearly fifteen years ago. This suggests that courts should look a decade in the past and determine whether death sentences have decreased over that period. If so, then executions almost certainly *understate* consensus against the death penalty. The number of executions performed today reflects a period of increased death sentencing activity in the 1990s. Today's executions are, therefore, spillovers from a past era and contemporary jurors are not able to directly interject themselves—and their moral authority—between the already condemned inmate and his execution.

***

Though legislative authorization of a punishment practice is an important indicator of societal norms, it is both less reliable than one would assume given the Court's reliance on it and less indicative of consensus than the various measures of how the punishment is used in practice. The number of death sentences imposed—which subsumes multiple points of discretion by prosecutors and jurors—is the most important indicator of how a society feels about a punishment in the present moment. Executions are less a reflection of the present and more a reflection on how society felt about a punishment in previous decades. Nonetheless, executions remain an important consideration when measuring consensus. Executions are the final output of the capital punishment system; they measure societal resolve and also take

167 *Id.* at 315.

168 *Clemency*, *supra note* 165 (listing former death row inmates granted clemency since 1976, including nine Ohio commutations in 2008).

169 TRACY L. SNELL, CAPITAL PUNISHMENT, 2010—STATISTICAL TABLES 14, 18 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp10st.pdf (last visited June 15, 2014).

170 *Id.* at 1.

into account the myriad ways in which a death sentence can be reversed or commuted post-verdict. The bottom-line is that usage indicators are more important than legislative enactments; however, because each indicator has its strengths and weaknesses, societal consensus is best measured with reference to multiple objective indicia.

This section does not consider geographic isolation as a separate indicator of consensus. A better way to think of isolation is as a lens through which to view infrequent sentences and executions rather than as an independent indicator of consensus. Geographic isolation refers to an assessment of how usage of the death penalty is clustered in a few states in the country—or a few counties in a state. Isolation is more of an interpretation tool than an independent indicator of consensus. In this sense, gauging isolation in usage is akin to counting the number of states that legislatively authorize a punishment. In both cases, the Court strives for a way to interpret the data produced by the various objective indicators.[171]

Consider *Graham v. Florida*. The *Graham* Court noted that a "significant majority"—seventy-seven—of the 123 challenged sentences arose from Florida.[172] In other words, twelve sentences is a low number, but how low is it? It is easier to determine how low is too low—i.e., whether a punishment has become obsolete—with some sense of how those sentences are distributed. The *Graham* Court also underscored that the remaining sentences had been imposed in "just" ten other jurisdictions.[173] Once it learned that more than *half* of all such sentences in the country stem from one state—and the rest from one fifth of the United States—it became easier for the Court to determine that the challenged sentencing practice is imposed almost exclusively by outlier jurisdictions. For the vast majority of the jurisdictions in the country—state and local—the sentencing practice had become obsolete.

In the next Part, we propose a modified framework for gauging consensus that flows from our conclusion that usage indicators are more important than legislative judgments. We then use the geographic

---

171 Why not simply count usage and decide whether overall usage is infrequent enough to warrant a conclusion that the death penalty has become obsolete? We live in a multi-tiered democracy. State legislators define the availability of capital punishment in each state. Prosecutors are elected at the local level. They prosecute murders that occur in their district and only their district. Moreover, we also live in a country with a Constitution that assigns a particularly powerful role to juries—i.e., they function as the conscience of the community. Jurors are culled from the county where the crime occurred. They speak for the people who reside in that particular district; not for the people of the state generally. Thus, the county is truly an important political sub-unit for gauging contemporary consensus for or against a punishment practice. In order to respect these multiple layers and multiple voices, the Court must look behind raw usage numbers when deciding whether a punishment practice has become obsolete.

172 Graham v. Florida, 560 U.S. 48, 64 (2010).

173 *Id.*

isolation concept both to help us understand how clustered usage is among states and also to help us categorize states as "retentionist" or "functionally abolitionist" based on intrastate usage. Our suggested modifications borrow from the Court's willingness in *Graham* to consider how juries (or judges in some contexts) use the punishment rather than determining only whether the punishment exists on the books. On the other hand, we heed the lessons gleaned from our overview in Part I of the consensus analysis cases: It is not enough to simply consider various objective indicators of consensus, the Court must also explain how it integrates these multiple factors into a determination that consensus exists (or does not).

III. A PROPOSED METHODOLOGY FOR GAUGING CONSENSUS AND THE DEATH PENALTY AS A CASE STUDY

The previous Part laid the foundation for a better understanding of why the indicia of consensus that the Court relies on are valid proxies for contemporary standards of decency. It also helped to explain the comparative importance of the various indicators; an exercise that suggested the Court currently overemphasizes legislative authorization and undervalues on-the-ground usage indicators. This Part proposes a modified approach to tabulating consensus. After detailing our proposed methodology, we explore in-depth how the modified consensus analysis could be brought to bear upon a blanket challenge to the constitutionality of the death penalty as a punishment for murder.

A. *A Proposed Methodology for Better Gauging Consensus*

This section proposes two modifications to the way that the Court gauges consensus. The first modification is minimalist and requires the Court to be *transparent*: The Court needs to be explicit about how each indicator of consensus stacks up in every case ("transparency modification"). The second modification is more ambitious. The Court should count functionally abolitionist states as abolitionist states ("integrated counting modification"). To do so, when tallying jurisdictions, we suggest that the Court incorporate usage indicators *before* it categorizes states into abolitionist and retentionist columns. These two improvements—both of which are consistent with the spirit and letter of the doctrine—would more accurately gauge and account for community consensus than the existing approach, and would do so while simultaneously enhancing the legitimacy of the process by which consensus is measured.

1. The Transparency Modification

The most potent critiques of consensus analysis involve its malleability and, relatedly, the perception that the Court cherry-picks data by focusing on legislative enactments in some case (e.g., *Kennedy*) and usage indicators in others (e.g., *Graham*).[174] Our first proposed tweaking of the consensus analysis aims to minimize these concerns by improving its transparency. The Court routinely relies on legislative enactments (including legislative trends) and usage (including the sentencing decisions of prosecutors and jurors and the actual performance of executions). The Court rarely, however, discusses all of these factors in any one case. Our first proposed modification is that in every case in which the Court employs consensus analysis it should explicitly describe the available data for each of these indicators regardless of whether the results are consistent with the overall consensus finding.[175] This minimalist tweak would bolster the perceived legitimacy of the consensus analysis. Explicitly considering each variable in every case would significantly reduce "malleability" concerns by locking the Court into an ex ante methodology.

One is left to wonder why the Court has not already enacted this small reform. We consider two possible explanations: First, as we noted earlier, the Court has not endeavored to create a clear methodological structure—it has no set way to plug in the data about each of the various indicators. In the absence of a clear structure, the Court does two things. It tallies states that do not legislatively authorize the challenged punishment. It then considers usage indicators in a loose, descriptive fashion. After it does those two things, the Court blends the various considerations together and decides whether it seems like consensus. This structure provides a clear disincentive to carefully list all of the ingredients and their proportions. Another disincentive—or rather lack of opportunity—is that most cases in which the Court engaged in consensus analysis were "easy" cases in that legislative "head-counting" itself demonstrated consensus against the punishment.

The second possible reason for why the Court does not explicitly consider each factor in every case is that the data is not available in each case. The Court largely is dependent on the litigants to put consensus data in front of it. If the briefs do not contain data about sentences imposed, it is difficult for the Court to incorporate the factor into its analysis. This fact-finding challenge is a big obstacle for accurately

---

174 Farrell, *supra* note 5.

175 If data are unavailable, the Court should explicitly note that unavailability. In some cases reliable sentencing information might not be available. In *Atkins*, for example, there was no way for the parties to determine how many mentally retarded offenders were on the row or had been executed.

gauging consensus. Fortunately, it is a relatively easy problem to solve. If the Court makes clear that it will consider each factor in each case and hold the party challenging the punishment practice responsible for introducing evidence of obsolescence, then the litigants will begin to consistently put the information before the Court.

2. The Integrated Counting Modification

Our first proposed modification was modest: The Court should be more transparent as it conducts consensus analysis. Our second proposal is more ambitious; yet, it too, is easily implemented and consistent with the basic parameters of the existing consensus analysis. As we discussed in Part II, usage indicators—and especially death sentencing data—are the most robust indicators of community consensus. Given this reality, why only count a state as "abolitionist" if it does not legislatively authorize the death penalty? Why not count states that have not executed anyone since *Gregg*? Or perhaps states with no executions in the past decade, which is a better reflection of contemporary standards?

We propose that rather than simply tallying states that do—or do not—legislatively authorize the challenged punishment, the Court should integrate the usage indicators before sorting states into abolitionist or retentionist columns. In other words, the Court should create two categories: "functionally abolitionist" and "retentionist." In the remainder of this section, we sketch three possible ways to conduct an integrated tallying of states. The configurations do not matter as much as the point that legislative authorization and usage indicators can be bundled together to obtain a more comprehensive assessment of whether a state is abolitionist. Moreover, while our proposal increases the emphasis placed on how Americans use the death penalty, it retains the state-centric framing that is important in a federalist system that encourages individual states to serve as "laboratories."

Consider three sketches of an integrated approach to counting jurisdictions. Though these are not precise formulations, each one respects the various indicators of consensus and each of them would enhance the substantive output of consensus analysis and bolster the credibility of the doctrine in the eyes of the American public.

a. "Zero" Jurisdictions

The Court tallies jurisdictions that do not legislatively authorize the challenged punishment. Our first potential configuration stays true to the on-switch, off-switch nature of the Court's current approach to tallying jurisdictions. In addition to states that do not legislatively

authorize a challenged punishment, jurisdictions that have not imposed a death sentence in the past decade should count as functionally abolitionist. Similarly, any jurisdiction that has not imposed the punishment—i.e., performed an execution—in the last decade similarly counts as abolitionist. Thus, any state that has neither legislatively authorized the punishment nor imposed a death sentence in the past decade nor carried out an execution in the past decade counts as a "Zero" jurisdiction and should be considered functionally abolitionist. This configuration would provide a more formal and concrete respect for states than simply viewing usage indicators in the abstract as the Court does now. Nonetheless, it would be a conservative approach to gauging consensus as zero is a high bar for inclusion in the functionally abolitionist column.

b. "Zero + Local Majority Zero" Jurisdictions

The first configuration remains true to the on-off switch nature of the Court's current approach to counting jurisdictions. But zero new sentences or executions sets a very high bar, especially when sentences are imposed at the county level with local prosecutors and local jurors. In other words, the "Zero" configuration might understate consensus both by providing too stringent a cutoff for functional abolitionism and by ignoring intrastate geographic disparities. The latter concern is an objection to allowing a very few residents from a handful of counties to speak for the whole state. The "Zero + Local Majority Zero" configuration helps to solve this intra-state disparity problem. This configuration includes the same counting principles as the "Zero" configuration and also includes one other way for a jurisdiction to be categorized as functionally abolitionist: if a majority of the residents of a state reside in a county that did not impose a death sentence in the past decade. This configuration accomplishes two things that the "Zero" configuration does not: First, it elevates the role of usage indicators—if most citizens in a state do not use the punishment in practice, then it is fair to treat the punishment as obsolete. Second, it eliminates the possibility that outlier jurisdictions containing a minority of the population can dictate the morality of the state generally.

c. "Obsolescence" Jurisdictions

The last configuration we considered—"Zero + Local Majority Zero" jurisdictions—fine-tunes the "Zero" jurisdictions configurations primarily by accounting for the possibility that outlier counties can skew the voice of a state as a whole. Nonetheless, the configurations maintain the conservative zero bar for usage indicators. Our final potential integration—"obsolescence" jurisdictions—is more permissive. "Obsolescence" jurisdictions include those states that either possess no

statute authorizing the challenged punishment or else average one or fewer new sentences *and* one or fewer sentences imposed (i.e., executions) per year. Rather than viewing usage indicators as an on-off switch, this configuration recognizes that the concept of "outliers" applies not only to outlier states and outlier counties, but also outlier judgments regardless of where they are rendered. For most punishment practices, there are many times each year in which the punishment is a permissible punishment. If the punishment is imposed only a handful of times each year, then the standard response of the community is still one that hints at repudiation. We believe that this configuration most faithfully represents what the Court hopes to capture in its consensus analysis: a sense that the punishment has become obsolete.

B. *The Death Penalty as a Case Study*

Looking at the objective indicators the Court has relied upon in deciding whether a national consensus exists has helped to reveal some information about how the Court measures consensus. Yet, a focused examination of a challenge to a particular punishment will provide a more meaningful case study. Because much of the Eighth Amendment jurisprudence has emanated from litigation challenging the death penalty as it applies to certain offenses or classes of offenders, and information about the punishment is widely available, capital punishment provides an accessible case study of how the Court might conduct its consensus analysis when faced with a particular question. This section explores how the Court's consensus analysis could be brought to bear upon a blanket challenge to the constitutionality of the death penalty as a punishment for murder. The exploration uncovers challenges the Court may confront in evaluating consensus evidence and reveals opportunities to refine and improve upon its analysis.

1. Background to Eighth Amendment Capital Punishment Litigation

Before the Court developed its categorical ban approach and applied it to strike down the death penalty for specific offenses or for specific classes of offenders, the Court weighed in on a blanket Eighth Amendment challenge to the entire practice of capital punishment. In *Furman*, the Court granted certiorari to answer this question: "Does the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"[176] Although the Court temporarily struck

[176] Furman v. Georgia, 408 U.S. 238, 239 (1972).

down the death penalty as it was administered at the time,[177] the *Furman* opinions were understood primarily to proscribe arbitrariness.[178] Five justices—each writing separately—voted to overturn the death sentences of petitioners Furman, Branch, and Jackson on Eighth Amendment grounds under the loose theory that the state statutes failed to adequately reduce the risk of arbitrary or capricious imposition of the death penalty. Only two of the concurring justices, however, articulated the view that capital punishment was totally unconstitutional.[179] In other words, *Furman* suggested that the death penalty itself was not broken, but rather the way that the states chose to administer the punishment was broken.

Furman guaranteed an ongoing conversation between the Court and the states.[180] The state legislatures spoke first: Thirty-five states enacted newly designed capital statutes within four years of *Furman*.[181] Then, in 1976, the Court agreed to reconsider the constitutionality of these restructured capital punishment statutes. The Court held in *Gregg v. Georgia* that the State of Georgia had drafted a statute that sufficiently addressed the *Furman* concerns of arbitrary and capricious death sentencing by "ensur[ing] that the sentencing authority is given adequate information and guidance."[182] Since *Furman*, the Court has considered categorical challenges to the death penalty only as applied to certain non-homicide offenses[183] or to particular classes of offenders,[184]

---

177 *Id.* at 240–41 ("the imposition and carrying out of the death penalty" under then applicable death penalty statutes contravened the Eighth Amendment prohibition on cruel and unusual punishments).

178 *See, e.g.*, Bidish Sarma, Furman*'s Resurrection: Proportionality Review and the Supreme Court's Second Chance to Fulfill* Furman*'s Promise*, 2009 CARDOZO L. REV. DE NOVO 238, 239 ("*Furman* stands for two central principles: (1) death penalty statutes must meaningfully limit the class of offenders eligible for the ultimate punishment; and (2) legislatures must channel the sentencer's discretion to minimize the risk of arbitrary sentences.").

179 *See Furman*, 408 U.S. at 358–59 (Marshall, J., concurring) ("There is but one conclusion that can be drawn from all of this—i.e., the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment."); *id.* at 305 (Brennan, J., concurring) ("The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes.").

180 *See, e.g.*, Carol S. Steiker & Jordam M. Steiker, *Entrenchment and/or Destablilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 227 (2012) ("Looking back from the present, it is clear that the foundational cases of the 1970s heralded a new era in which courts would play a much more substantial role in the American capital system."); *id.* (noting the "legions of [capital] cases heard and decided by the U.S. Supreme Court").

181 Gregg v. Georgia, 428 U.S. 153, 179 (1976) (emphasizing that "many of the post-*Furman* statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent").

182 *Id.*

183 *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (striking down the death penalty for all non-homicide crimes against individual persons); Coker v. Georgia, 433 U.S. 584 (1977) (striking down the death penalty for rape of an adult woman).

184 *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (striking down the death penalty for offenders under the age of eighteen at the time of the crime); Atkins v. Virginia, 536 U.S. 304

but focused the rest of its capital jurisprudence on erecting myriad procedural requirements to govern capital trials.[185] Scholars and commentators widely agree that the death penalty statutes in effect since *Gregg* fail to adequately reduce the risk of arbitrary or capricious death sentencing.[186]

A categorical ban challenge to the death penalty focuses less on *how* the death penalty is imposed and more on *how often* it is imposed.[187] Unlike *Furman* and the regulatory jurisprudence that it spawned, infrequency—not arbitrariness—is the touchstone of the categorical ban framework. The categorical ban framework does not entangle the Court in prolonged procedural regulation; instead, it resolves the governed cases completely.[188] Once the Court gleans that a punishment practice is not consistent with evolving standards of decency, the punishment is not open to further legislative tweaking.[189] Instead, the Court permanently forecloses the ability for states to

(2002) (striking down the death penalty for offenders with mental retardation); Stanford v. Kentucky, 492 U.S. 361 (1989) (declining to strike down the death penalty for offenders under the age of eighteen at the time of the crime); Penry v. Lynaugh, 492 U.S. 302 (1989) (declining to strike down the death penalty for individuals with mental retardation), *abrogated by Atkins*, 536 U.S. at 312; Thompson v. Oklahoma, 487 U.S. 815 (1988) (striking down the death penalty for offenders under the age of sixteen at the time of the crime).

185 *See, e.g.*, Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795 (1998); Jordan M. Steiker, *The American Death Penalty: Constitutional Regulation as the Distinctive Feature of American Exceptionalism*, 67 U. MIAMI L. REV. 329 (2013).

186 Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 359 (1995) (asserting that though "[t]he body of doctrine produced by the Court is enormously complex and its applicability to specific cases difficult to discern," the jurisprudence "remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place"). The Court is not blind to the shortcomings of its procedural regulation approach. Indeed, the Court has noted "tension" in its capital jurisprudence. Recently, the Court characterized the whole of its post-*Gregg* regulatory approach to capital punishment as "not altogether satisfactory" and "still in search of a unifying principle." *Kennedy*, 554 U.S. at 436–37. Justice Scalia put the point more colorfully, noting that the Court's recognition of tension in the capital jurisprudence is "rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II." Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring).

187 *See* Robert Batey, *Categorical Bars to Execution: Civilizing the Death Penalty*, 45 HOUS. L. REV. 1493, 1504 (2009) (explaining that "both *Atkins* and *Roper* [*v. Simmons*] looked to trends in legislative and jury decisionmaking").

188 *See* Steiker & Steiker, *supra* note 180, at 242 (noting that the Court's Eighth Amendment capital punishment proportionality cases impose categorical bans for particular crimes or classes of offender, and speculating that the categorical ban framework could provide a hospitable methodology for establishing a national consensus against the death penalty).

189 *See* Carol S. Steiker & Jordan M. Steiker, *Why Death Penalty Opponents Are Closer to Their Goal than They Realize*, NEW REPUBLIC, Sept. 27, 2011, *available at* http://www.newrepublic.com/article/95378/troy-davis-death-penalty-abolish (explaining that the categorical ban approach "provides a 'backstop' against legislative backsliding in the inevitable moments of anger and fear that attend particularly heinous crimes . . . ."). *But see* Re, *supra* note 42, at 1036 ("The possibility of after-arising evidence of national consensus highlights the inherently contingent nature of consensus-based argumentation . . . .").

experiment with the punishment.[190] This categorical ban case study of the death penalty emerges against the backdrop of decades of procedural regulation that characterize capital litigation today.

2. Number of States that Prohibit the Punishment and the Direction of Legislative Change

There are more states today without the death penalty than at any other point in American history. Five states—Maryland (2013),[191] Connecticut (2012),[192] New Jersey (2007),[193] New Mexico (2009),[194] and Illinois (2011)[195] have legislatively abolished the death penalty since 2007. A sixth state, New York, has declined to legislatively enact a constitutional statute after the Court of Appeals held its statute unconstitutional.[196] In full, eighteen states plus the District of Columbia do not authorize capital punishment.[197]

---

190 The categorical ban approach is not easily susceptible to state circumvention when a particular punishment is taken off the books altogether, but can be undermined when the approach seeks to spare offenders with certain, difficult-to-discern characteristics from the reach of specific punishments. *See* Judith M. Barger, *Avoiding* Atkins v. Virginia*: How States Are Circumventing Both the Letter and the Spirit of the Court's Mandate*, 13 BERKELEY J. CRIM. L. 215 (2008); *see also* Hall v. Florida, 134 S. Ct. 1986, 1999 (2014) ("If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.").

191 *States with and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited June 15, 2014) (listing "Maryland" among the "States Without the Death Penalty" and noting "2013" as the year of abolition).

192 *Id.* (listing "Connecticut" among the "States Without the Death Penalty" and noting "2012" as the year of abolition).

193 *Id.* (listing "New Jersey" among the "States Without the Death Penalty" and noting "2011" as the year of abolition).

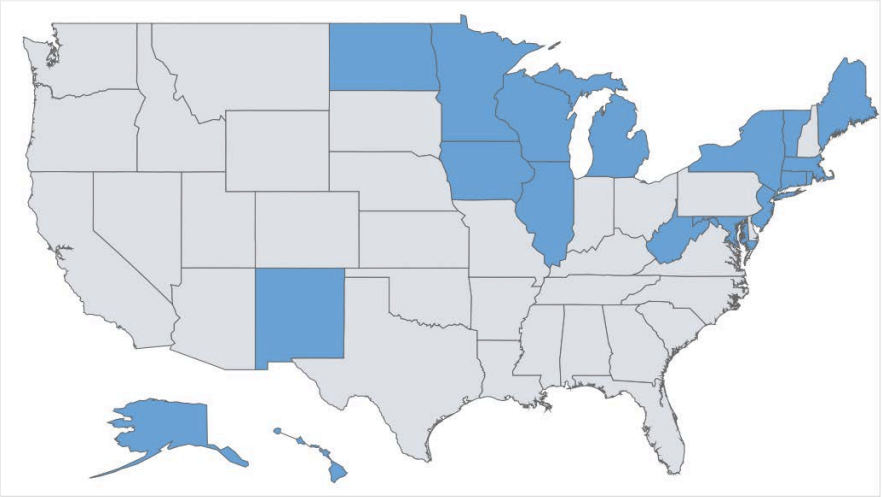
194 *Id.* (listing "New Mexico" among the "States Without the Death Penalty" and noting "2009" as the year of abolition).

195 *Id.* (listing "Illinois" among the "States Without the Death Penalty" and noting "2007" as the year of abolition).

196 *Id.* ("In 2004, the New York Court of Appeals held that a portion of the state's death penalty was unconstitutional. . . . The legislature has voted down [subsequent] attempts to restore the statute.").

197 *Id.* This figure includes New York, which has not had a valid capital punishment scheme in place since 2004 when its highest court invalidated the state statute.

Map 1: Abolitionist States



Five state legislatures have legislatively abolished—and no state newly authorized—the death penalty over the past decade. This fact points towards a fledging legislative trend against capital punishment similar to the one the Court recognized in *Simmons*.[198] And, like the "direction of change" in *Atkins* and *Simmons*, there has been "consistency" here, too; all these states have moved away from the challenged punishment.

Despite the recent trend of legislative repeal, most states retain capital punishment. At this stage, a national consensus against the death penalty cannot be gleaned based on legislative disapproval alone. The trend's implications are more modest still: The trend lines simply point towards legislative de-authorization of the death penalty. And, that trend is but one strand of empirical support for the broader claim that the death penalty has become an obsolete punishment.

3. Actual Sentencing Practices

The trend of legislative repeal of the death penalty provides us with only a tiny glimpse of modern disuse. The full portrait of disuse comes into focus when considering how rarely Americans use the death penalty given the broad opportunity for its use in states where the punishment is authorized.

---

198 Roper v. Simmons, 543 U.S. 551, 565 (2005) (noting "[f]ive States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years").

As noted in Part II, two sets of actors dominate responsibility for death sentences: prosecutors through their charging and bargaining decisions and juries through their life or death verdicts.[199] It matters less whether prosecutors or jurors are more responsible for the disuse than it does how infrequently the penalty is imposed. Indeed, it might be impossible to totally disaggregate the respective roles of prosecutors and jurors, as a community's unwillingness to return a death verdict might signal to the prosecution that fewer cases should proceed to capital trials. Thus, this subsection focuses on the output of the decision to charge a case capitally: how often do we return death sentences?[200]

The high-water mark for death sentences was reached in 1996 when Americans doled out 315 sentences.[201] In 2012, juries across the United States handed down seventy-seven death sentences, which marks a 76% decrease from the 1996 figure and reflects the second lowest number of annual death sentences in the modern era.[202]

---

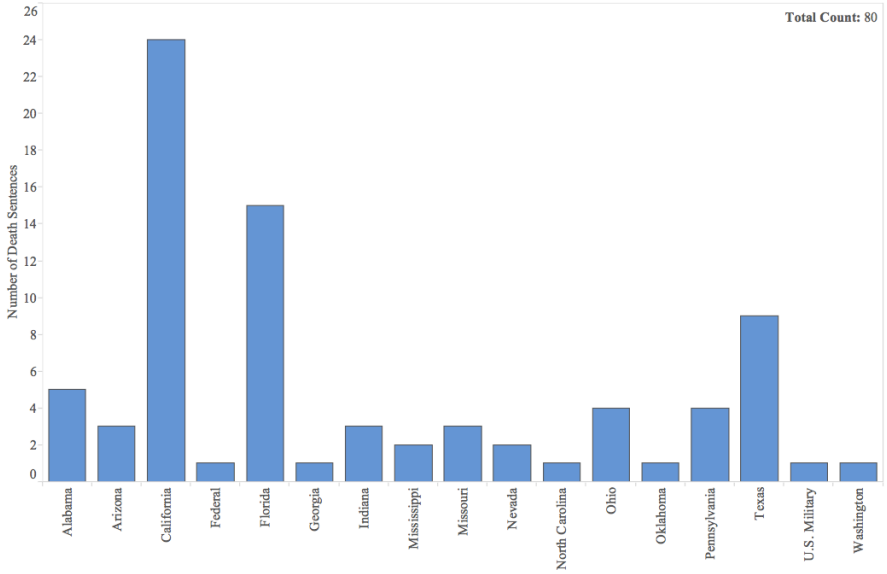
199 *See supra* Part II.

200 Moreover, as a practical matter, comprehensive national data about prosecutorial decision-making in capital cases are unavailable. Nonetheless, consider two snapshots of prosecutorial charging decisions: The first snapshot is from California, where prosecutors do not charge roughly 70% of death-eligible cases capitally. *See* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1261 (2013). Relevant data also exist for the federal death penalty. Federal prosecutors are required to seek authorization to pursue capital charges in every case in which a defendant is perceived to be death eligible. Yet, over the past quarter-century, the Attorney General has authorized capital charges in fewer than 500 cases. *Statistics—Federal Death Penalty*, FED. DEATH PENALTY RESOURCE COUNS. (May 14, 2014), http://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094. Thus, death penalty regimes in California and at the federal level suggest that prosecutors reject capital charges in the vast majority of death-eligible cases. We also have data on how many death-authorized cases proceed to a capital trial. Of the 454 death-authorized cases that have reached a resolution, more than half of the cases resulted either in a no-death plea-bargain or in the government de-authorizing death charges. This means that federal prosecutors do not pursue most eligible cases capitally, and, even when the initial decision to proceed capitally is made, prosecutors use their discretion to avoid a capital trial more often than not. To be clear, California and the federal death penalty might not be representative of broader usage. To this end, focusing on how many death verdicts result from the process—an inquiry for which comprehensive data exist—is the most reliable way to assess societal aversion to death sentences.

201 THE DEATH PENALTY IN 2012: YEAR END REPORT, DEATH PENALTY INFORMATION CENTER 5 (2012), *available at* http://deathpenaltyinfo.org/documents/2012YearEnd.pdf. These sentencing data do not reflect resentences. We have been persuaded that death verdicts are best measured by how many people society believes deserve the ultimate sentence, rather than how many times society had the opportunity to impose a death sentence multiple times (i.e., reaffirming a previous determination that this offender is among the worst of the worst). However, due to countervailing considerations, and especially the argument that a second or successive death sentence demonstrates that the local community still considers capital punishment as an appropriate response to a specific crime, this Article footnotes resentence data for sentences imposed between 2004–2009 (the only time period from which the authors are in possession of resentence data). These data also do not include the federal death sentences, which are considered separately within this subsection, or sentences imposed in states that subsequently abolished the death penalty.

202 *Id.*

Map 2: New Death Sentences in 2013



The number of new death sentences has fallen steadily over the past decade. The period spanning 2002–2011 brought an average of 115 death sentences per year.[203] Compared to the previous decade (1992–2001) where juries handed down an average of 273 death sentences per year, the decline is remarkable.

Thirty states have either abolished the death penalty or else imposed an average of one or fewer death sentences per year since 2004.[204] Capital sentences are imposed at the county level, however, and thus the portrait of disuse comes into sharper focus when we zoom in to the local level.[205] America has over 3143 counties. Fewer than 400 counties have returned a single death sentence. Nearly six in ten Americans live in one of the counties that have not imposed a new death sentence.[206] Only eighteen counties—less than 1% of American counties

203 SNELL, *supra* note 169, at 18, tbl. 14.

204 Professor David McCord has compiled information about each person sentenced to death between 2004–2012. We entered this information into a database and independently verified the accuracy of entry.

205 Federal death sentences are imposed at the federal district level, which encompasses multiple counties including the county where the offense occurred. The federal government has imposed seventy-two death sentences since Congress reinstated the penalty in 1988. Congress authorizes the death penalty for every murder perpetrated with a firearm that occurs during a crime of violence. Americans suffered from 8775 murders committed with a firearm in 2010 alone. The net result is an average of three death sentences per year.

206 *Id.* This figure barely changes if resentences are counted: 58% of Americans live in a county or county equivalent that has imposed a death sentence (or resentence) since 2004. *See* Appendix A (containing county and state level death sentence information from 2004–2012, including resentences through 2010). Appendix A is available online at

representing 13% of Americans—returned an average of at least one death sentence annually. Two counties—Los Angeles and Maricopa—averaged at least three sentences annually.[207] Those two counties encompass 4% of Americans,[208] yet account for 10% of death sentences nationally over that time period.[209] Again, for context, Los Angeles County suffered 617 homicides in 2010[210] and Maricopa suffered 202.[211] Nationally, there were over 10,000 homicides in 2010.

It is helpful to pause for a moment and consider that the number of death sentences imposed since 2004 likely overstates the degree to which contemporary decency supports use of capital punishment. Death qualification—the removing from capital juries of any citizen who would always (or never) vote for the death penalty upon a murder conviction regardless of the facts of the individual case—eliminates from juries community members who believe that the death penalty should not be a possible punishment.[212] The exclusion of such jurors has a significant impact on usage data because, as Justice Stevens has observed, a "cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust" and in the vast majority of American jurisdictions a single vote against the death penalty is enough to block a death verdict in the same way that a single not guilty vote blocks a conviction in an ordinary criminal trial.[213] The impact of death qualification likely is greater today in terms of citizens excluded from capital juries than it was when the Court decided *Furman*.[214] One juror was removed from the pool in *Furman*'s trial for answering that he would refuse to impose a death sentence.[215] Today, experts note that courts sometimes "summon over ten or even twenty times" the number of prospective jurors in capital cases than in non-

http://www.cardozolawreview.com/content/35-6/Smith.35.6/AppendixA.pdf.

207 *See* Appendix A. Four counties—Los Angeles, Maricopa, Riverside, and Duval—averaged three or more sentences (or resentences) per year. Those four counties account for 16% of sentences (including resentences) and 6% of the population. *Id.* Perhaps tellingly, California does not regularly execute its offenders. It has executed only one person since 2004. *See* Appendix B (detailing execution by state and county from 2004–2012). Appendix B is available online at http://www.cardozolawreview.com/content/35-6/Smith.35.6/AppendixB.pdf.

208 *See* Appendix A.

209 *Id.*

210 OFFICE OF THE ATTORNEY GEN., HOMICIDE IN CALIFORNIA 2010, at 17 (2011), *available at* http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/homicide/hm10/preface.pdf?.

211 ARIZ. DEP'T OF PUB. SAFETY, CRIME IN ARIZONA 2010, at 53 (2011), *available at* http://www.azdps.gov/About/Reports/docs/Crime_In_Arizona_Report_2010.pdf.

212 G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87 (2008).

213 Uttecht v. Brown, 551 U.S. 1, 35 (2007) (Stevens, J., dissenting).

214 Brief for Respondent at 60, Furman v. Georgia, 408 U.S. 238 (1972) (No. 69-5003).

215 *Id.* at 64.

capital cases because of the number of prospective jurors removed because of their opposition to the death penalty.[216]

4. Execution Frequency

The most dramatic view of the portrait of disuse emerges when examined through the lens of executions. Death-sentenced inmates are rarely executed. Americans executed forty-three offenders in 2012, down 56% and representing a steady decrease from a post-*Furman* high-water mark of ninety-eight executions in 1999.[217] Let us focus for a moment on 1999: the year in which America executed the most offenders in the modern era. That year the fraction of executed offenders (98) to homicides (15,552)[218] was roughly 1 to 150. Or consider California and Pennsylvania, which together have executed sixteen offenders since 1976 despite having sentenced a combined 1352 people to death over the same period.[219] This subsection demonstrates that an execution—the putative goal of capital punishment—is an infrequent event compared to instances in which a death sentence is imposed and a shockingly infrequent occurrence compared to the instances where the death penalty is a punishment option. We begin by examining executions since 1976, and then switch gears to document that executions are becoming even more infrequent since 2004.

a. 1976–2012

Americans have executed only 15% of inmates sentenced to death since *Furman*. Twenty-five states have either no valid death penalty statute or else have not performed a single execution of a non-volunteer since 1976.[220] Indeed, most Americans live in a state that either has no

---

216 Liebman & Clarke, *supra* note 52, at 309–10 (citing WASH. STATE BAR ASS'N, FINAL REPORT OF THE DEATH PENALTY SUBCOMMITTEE ON PUBLIC DEFENSE 14–17 (2006)). In addition to death qualification, there are four other factors that tend to suggest our consensus analysis underestimates consensus against the death penalty: (1) an endemic of bad or underfunded lawyering, *see, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1993); (2) overreliance on the threat of the death penalty to try to coerce pleas—a practice prohibited by the Department of Justice, but frequently employed in the states; (3) many citizens facing the death penalty suffer from severe mental illness, which restricts their ability to communicate and cooperate with counsel and to rationally consider a plea-offer that avoids the death penalty; and (4) a non-trivial number of capital defendants represent themselves at trial.

217 SNELL, *supra* note 169, at 12.

218 *Id.*; *see also* U.S. CENSUS BUREAU, LAW ENFORCEMENT, COURTS, AND PRISONS 200 tbl.312, *available at* http://www.census.gov/prod/2011pubs/12statab/law.pdf (illustrating national homicide trends from 1980 to 2008).

219 SNELL, *supra* note 169, at 19.

220 In addition to the nineteen states without the death penalty, two states—Kansas and New Hampshire—have not performed an execution in the modern era. SNELL, *supra* note 169, at 15. An additional four states—Idaho, Oregon, Pennsylvania, and South Dakota—have not executed

valid capital punishment scheme or has performed fewer than one execution per decade on a non-volunteer in the modern era.[221] Two-thirds of Americans live in a jurisdiction that has either abolished the death penalty or else executes non-volunteers at a rate of fewer than one execution every two and a half years since 1976. The mean execution rate among these jurisdictions is one execution every four years.

Still another way to evaluate execution usage is to ask whether counties are obtaining good returns on their death sentences. In other words, what percentage of Americans live in counties that imposed a death sentence that the respective state carried out via execution? 454 counties (of 3141 counties and county equivalents in the United States) representing 44% of the population have sentenced someone to death that has been executed in the modern era.[222] Over 90% of Americans live in a county that has seen an average return of one execution every five years or less; while only three counties in America (holding 3.5% of the population) have seen an average return of one execution per year. For context those three counties are: Oklahoma County, Oklahoma with thirty-seven death sentences resulting in executions in thirty-five years;[223] Dallas County, Texas with forty-four executions;[224] and Harris County, Texas, which is responsible for 115 executions in thirty-five years.[225] For context, Oklahoma County suffered sixty homicides in 2010 alone;[226] Dallas County had 184,[227] and Harris County had 364.[228]

---

a non-volunteer since 1976. John H. Blume, *Killing the Willing: "Volunteers," Suicide, and Competency*, 103 MICH. L. REV. 939, 966 (2005). "'Volunteer' is the term generally used for a death-row inmate who waives his appeals in the academic literature as well as in the capital defense community." *Id.* at 940 n.5.

221 *See* Appendix C. Appendix C is available online at http://www.cardozolawreview.com/content/35-6/Smith.35.6/AppendixC.pdf. One might adjust the execution rates presented above by accounting for variations in state homicide rates. Executing-states suffered from 72% of homicides nationwide since executions resumed in 1977, a percentage roughly proportionate with the percentage of the population that lives in those states. As with the population adjustments noted in-text, however, the disproportionality lies right beneath the surface. States that account for 54% of executions account for just 13% of homicides, while states that account for 80% of executions in the modern era only account for one-third of homicides nationally. Viewed from another angle: 40% of the homicides that occurred in the United States between 1977–2010 took place in states that collectively account for 3.5% of executions. *See* Appendix C (death sentences and executions, adjusted for population and homicide rates).

222 *See* Appendix D. Appendix D is available online at http://www.cardozolawreview.com/content/35-6/Smith.35.6/AppendixD.pdf.

223 *Id.*

224 *Id.*

225 *Id.*

226 OKLA. STATISTICAL ANALYSIS CTR., OKLAHOMA COUNTY CRIME STATISTICS 2010, *available at* http://www.ok.gov/osbi/documents/2010%20UCR%20Annual%20Report.pdf.

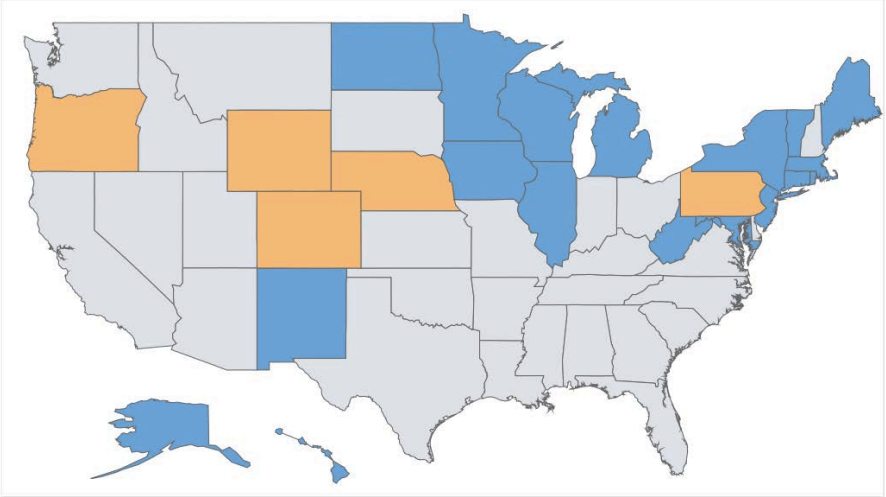
227 TEX. DEP'T OF PUB. SAFETY, 2010 TEXAS CRIME BY JURISDICTION 118–22, *available at* http://www.txdps.state.tx.us/crimereports/10/citCh10.pdf.

228 *Id.* at 145–50.

b. 2004–2012

If we focus solely on usage since 2004—the period in which six jurisdictions have repudiated the death penalty legislatively (New Jersey, New Mexico, Illinois, Connecticut, and Maryland) or judicially (New York)—then an additional five states (Colorado, Nebraska, Oregon, Pennsylvania, and Wyoming) have not performed an execution.[229] Thus, twenty-eight states have not performed an execution upon a non-volunteer since 2004. Meanwhile, twenty-five states have not performed an execution at all.

Map 3: Abolitionist & Non-Executing States



5. Geographic Isolation

A final thread for measuring contemporary attitudes about the death penalty is to assess to what degree the usage that remains is clustered or isolated. In terms of both death sentences and executions, death penalty usage in America is extraordinarily isolated.

a. Death Sentences

Four states—Alabama, California, Florida, and Texas—are responsible for over half of all death sentences since 2004.[230] Perhaps not coincidently, two of these states—Alabama and Florida—are among the

229 *See* Appendix B.

230 *See* Appendix E (reporting state totals of death sentences imposed between 2004 and 2012). Appendix E is available online at http://www.cardozolawreview.com/content/35-6/Smith.35.6/AppendixE.pdf.

three states nationally that permit non-unanimous death verdicts.[231] The number of non-unanimous jury recommendations that lead to death sentences in Alabama and Florida between 2004–2009 is quite staggering:[232] forty-eight of sixty-two sentences in Alabama (77%)[233] and sixty-eight of ninety sentences in Florida (76%).[234] Given that Alabama and Florida account for such a disproportionate number of death sentences, and three-quarters of the sentences imposed in those states were returned by non-unanimous juries, what passes as "geographic isolation" might depend less on the idiosyncrasies of the people of Alabama and Florida, and more on the procedural rules that prevail in those states.[235] Along those same lines, death sentences in Texas have dropped dramatically from their mid-1990s peaks—so much that it is very possible that Texas will not be on the list of the most active death sentencing jurisdictions of the current decade. Though a number of causes have been analyzed, at least one factor in the Texas decline is another procedural rule: the ability of prosecutors to seek life without parole without first charging the case capitally.[236]

The influence of idiosyncratic procedural rules aside, the fact that death sentencing is clustered around a few jurisdictions comes into focus when considering that just ten states are responsible for over 75% of state-imposed death sentences since 2004.[237] Of the forty remaining states, three imposed three or fewer sentences per year; eight imposed two or fewer per year; and ten imposed one or fewer per year.[238] Turning to counties only intensifies the clustering. Thirty-eight counties encompassing 19% of the population are responsible for half of death

---

231 In other words, Alabama and Florida (and Delaware) permit the imposition of death sentences over the explicit dissent of one or more of the jurors that listened to the evidence and found the death penalty to be an inappropriate punishment.

232 The analysis is limited to 2004–2009 because it is difficult to gain an accurate assessment of jury votes from news reports alone, and thus the 2009 end point permits a review of the respective state court opinions on direct appeal.

233 *Id.*

234 *Id.*

235 *Id.* Though these sentences should not be discounted to zero because it is impossible to determine how many of these juries would have reached a unanimous death recommendation if unanimity had been the decision rule, since the generally accepted standard for jury verdicts is unanimity it follows that these 116 non-unanimous verdicts—which includes roughly three-quarters of Florida and Alabama death sentences—should be discounted significantly when gauging consensus.

236 *See also* Steiker & Steiker, *supra* note 180, at 234 ("The emergence of LWOP is likely the single most important causal factor in the extraordinary decline in American death sentencing over the past fifteen years."); Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1943 (2006) ("The increased availability of life without parole as a sentencing option undoubtedly has contributed to a decline in death sentences both at the pretrial and trial stages.").

237 *See* Appendix E.

238 *Id.*

sentences.[239] Four-fifths of sentences stem from 145 counties representing 30% of the population.[240] Only 42% of Americans live in one of the 330 counties (i.e. roughly 10% of the 3143 U.S. counties or county equivalents) that have sentenced anyone to death.[241]

In roughly two-thirds of the states that have imposed a death sentence (19 of 30) over half of the population lives in a county in which no death sentence has been imposed.[242] Even within the four most active death sentencing states, a solid majority of residents live in a county that averaged one or fewer death sentences per year: Alabama (75%),[243] California (54%),[244] Florida (83%),[245] and Texas (60%).[246] Or, viewed from a slightly different angle, in some places a relatively few state residents are responsible for sentencing a disproportionately large number of offenders to death. For example:

- Four counties in Alabama—Jefferson (19), Houston (11), Mobile (9), and Etowah (4)—encompassing 27% of the population are responsible for 51% of death sentences.[247]
- In Florida, eight counties—Duval (25), Polk (10), Volusia (8), Brevard (7), Seminole (7), Clay (5), Escambia (4), and St. Lucie (4)—encompassing 20% of the population are responsible for 51% of death sentences;[248] while Duval and Clay counties—the Fourth Judicial Circuit—alone account for 22% of sentences and 6% of the Florida population.[249]
- This appears to be a trend even outside of the most active death sentencing states. Consider Caddo Parish in Louisiana, which encompassed 6% of the state population, yet is responsible for nearly one-third (32%) of Louisiana's death sentences since

239 *See* Appendix A.

240 *Id.*

241 *Id.*

242 *Id.*

243 *Id.*

244 *Id.*

245 *Id.*

246 *Id.* Those numbers increase considerably when assessing the percentage of state residents that live in a county that sentenced an average of two or fewer people to death each year: Alabama (86%), California (60%), Florida (92%), and Texas (84%). *Id.*

247 *Id.*

248 *Id.*

249 *Id.* There are three caveats to this point. First, in some states (Arizona and Nevada are good examples), a very large percentage of the population lives in one county (e.g., Maricopa contains 60% of Arizonans; Clark contains 72% of Nevada residents). In these places, the differential between population and sentences is far less stark. Second, in some places, the county responsible for the most death sentences is not the biggest sentence-to-population outlier (e.g., Los Angeles County is larger than Riverside County and Los Angeles is responsible for a larger percentage of California's death sentences, but Riverside is a bigger per capita death sentencing jurisdiction). Finally, these population-sentence disparities disappear in some—but not most—locations when one accounts for homicide rates.

> 2004.[250] Three Louisiana Parishes—Caddo, East Baton Rouge, and Jefferson—encompass roughly one-quarter of the state population yet are responsible for two-thirds of Louisiana death sentences.[251]

b. Executions

The clustering is even more dramatic in the execution context. Texas alone accounts for 37% of executions in the modern era.[252] Three states—Texas, Virginia, and Oklahoma—are responsible for over half of executions.[253] One fifth of states account for more than four-fifths of executions.[254] Since 2004, Texas is responsible for 41% of executions.[255] Four states—Alabama, Ohio, Oklahoma, and Texas—account for 65%.[256] Just over one-fifth of the states encompassing account for 90% of executions.[257] None of the remaining states averaged more than one execution per year.[258]

6. Is There a National Consensus Against the Death Penalty?

a. The "Zero" Jurisdictions

A majority of jurisdictions—twenty-nine of fifty-two, including twenty-seven states, the federal government, and the District of Columbia—possess one or more of the following characteristics: no legislatively authorized death penalty; no executions performed since 2004; or no new death sentences imposed since 2004.[259]

b. The "Zero + Local Majority Zero" Jurisdictions

Four-fifths of American jurisdictions—forty-three of fifty-two, including forty-one states, the federal government, and the District of Columbia—possess one or more of the following characteristics: no legislatively authorized death penalty; no executions performed since 2004; no new death sentences imposed since 2004; or a majority of state

---

250 *Id.*
251 *Id.*
252 *See* Appendix D.
253 *Id.*
254 *Id.*
255 *See* Appendix B.
256 *Id.*
257 *Id.*
258 *Id.*
259 *See* Appendix A, B. A majority of jurisdictions—twenty-seven of fifty-two, including twenty-five states, the federal government, and the District of Columbia—possess no legislatively authorized death penalty or else have either performed zero executions since 2004. Two additional jurisdictions—Utah and Montana—have performed one execution since 2004, but have not sentenced anyone to death over the same time period.

residents live in a county that has not imposed a single death sentence since 2004.[260] The fourth-fifths of states figure only drops to three-fourths of states if we increase the percentage of state residents in a non-death sentence county requirement so that it states: Two-thirds of state residents live in a county that has not imposed a single death sentence since 2004.[261]

c. The "Obsolescence" Jurisdictions

Four-fifths of American jurisdictions—forty-two of fifty-two including forty states, the federal government, and the District of Columbia—possess one or more of the following defining characteristics: no legislatively authorized death penalty, an average of fewer than one execution annually since 2004, or an average of fewer than one death sentence annually since 2004.[262] In only one jurisdiction in the country—Arizona—has the state legislatively authorized the death penalty, imposed an average of one or more death sentences annually since 2004, had a majority of residents live in a county responsible for sentencing an average of at least one person to death annually since 2004, and executed an average of one person annually since 2004.[263]

The preceding configurations illustrate that while most states authorize the death penalty, evidence of declining use and, indeed, obsolescence exists right below the surface. In *Atkins* and *Simmons*, thirty states had abolished the death penalty for mentally retarded and juvenile offenders respectively. In *Graham*, the Court struck down the punishment practice as unconstitutional based on infrequent use of the punishment despite its widespread legislative authorization. Viewing contemporary standards of decency through the lens of our composite sketches illustrates that in four-fifths of American jurisdictions—forty-three of fifty-two—either most residents live in a county that has not sentenced anyone to death since 2004 or else the state has not executed anyone over the same time period. These numbers strongly suggest that Americans have repudiated capital punishment. They illustrate that

---

260 *Id.* A majority of jurisdictions—twenty-seven of fifty-two, including twenty-five states, the federal government, and the District of Columbia—possess no legislatively authorized death penalty or else have either performed zero executions since 2004. Two additional jurisdictions—Utah and Montana—have performed one execution since 2004, but have not sentenced anyone to death over the same time period.

261 *Id.*

262 Over three-quarters of American jurisdictions—forty-one of fifty-two including thirty-nine states, the federal government, and the District of Columbia—either possess no legislatively authorized death penalty or else have performed an average of less than one execution annually since 2004. One additional state—Indiana—performed an average of one execution annually since 2004, but has imposed only two death sentences over the same time period.

263 *Id.*

concept while both respecting the decisions of state legislatures in a federalist system and accounting for the unmistakably clear message of residents in some states that the death penalty is not an acceptable punishment practice regardless of its availability.

To recap, this section has painted the portrait of disuse of capital punishment in America. It has illustrated that state legislatures are beginning to turn away from the punishment. Even where the death penalty is authorized by statute, Americans rarely impose death sentences. Even the unlucky few murderers who receive the death penalty are very unlikely to be executed. Finally, the little usage that remains—in terms of death sentence and executions—is isolated among a relatively few states and, indeed, among very few counties.

CONCLUSION

This Article explored the way the Court conducts consensus analysis and proposed a modified approach to measuring consensus that would require the Court to create composite profiles of each jurisdiction based upon consideration of each of the indicia of consensus—and to do so explicitly and in every case. Before proposing our more robust approach to gauging consensus, we isolated the various factors that the Court considers when it gauges consensus; specifically: legislative authorization; prosecutorial charging and bargaining decisions; jury verdicts; sentences performed; and geographic isolation. We also explained the importance of each of these factors and suggested why the Court might consider giving priority to some of these factors (e.g., executions performed) over others (e.g., legislative authorization). Armed with a theoretical justification for the factors used to gauge consensus, and a modified approach to using those factors to measure consensus in future cases, we applied the new approach to a hypothetical challenge to the constitutionality of the death penalty. In doing so, we concluded that the legislatively repealed state statutes, declining sentence and executions, and increased geographic isolation all point to the same conclusion: The death penalty is fast becoming obsolete.