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STRICT SCRUTINY UNDER THE EIGHTH AMENDMENT

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I. INTRODUCTION

The basic principle of the Supreme Court's interpretation of the Eighth Amendment is that the phrase "cruel and unusual" must draw its meaning from "the evolving standards of decency that mark the progress of a maturing society."[1] To implement this principle, the Court has considered whether "objective indicia" of prevailing community norms—such as the number of states that impose the pun-

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1. Trop v. Dulles, 356 U.S. 86, 101 (1958) (holding that punishing a deserter by taking away citizenship is unconstitutional).

ishment—support the finding of a national consensus against the punishment being challenged.[2]

The Court's reliance on objective indicia has been subjected to sustained scholarly criticism. While largely persuasive, the conventional critique has several shortcomings, the most significant of which is the failure of other scholars to provide a viable alternative to the Court's objective indicia approach. In this Article, I propose a novel alternative methodology based on a version of strict scrutiny for suspect classes of punishments, offenses, and offenders. This proposal is timely because the Supreme Court recently indicated for the first time, in *Miller v. Alabama*,[3] that it is poised to abandon the objective indicia approach. *Miller* does not provide a comprehensive replacement approach, however, leaving a methodological vacuum to be filled. The strict scrutiny approach provides a framework to flesh out the Court's new attitude at a time when there is a rare opportunity to influence the Court's constitutional decisionmaking.

The Eighth Amendment form of strict scrutiny approach draws on the insight that, contrary to conventional wisdom, the "evolving standards" approach neither requires recourse to objective indicia nor is unique to the Eighth Amendment. Interpretation of the Cruel and Unusual Punishment Clause is not as exceptional as most courts and commentators would have us believe. Properly understood, the demand that cruel and unusual must be understood through the lens of "evolving standards of decency" is nothing more than a repudiation of a narrow version of originalism. This disavowal of "original expected application"[4] is, of course, not limited to the Eighth Amendment. And outside the Eighth Amendment context, recourse to objective indicia is the exception rather than the rule; contemporary understandings of the Constitution's terms are ascertained and applied without reference to the purportedly objective criteria upon which the Court has relied when applying the Cruel and Unusual Punishment Clause. The Equal Protection Clause is a useful example. Living constitutionalists insist that the Clause should be understood through a contemporary rather than historical lens—in other words, that it should be read in light of the "evolving standards of decency that mark the progress of a maturing society."[5] But these same living constitution-

2. *See* Graham v. Florida, 130 S. Ct. 2011, 2022-23 (2010).

3. 132 S. Ct. 2455 (2012).

4. JACK M. BALKIN, LIVING ORIGINALISM 7 (2011) ("Original expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art). Thus, the original expected application includes not only specific results, but also the way that the adopting generation would have expected the relevant constitutional principles to be articulated and applied.").

5. *Trop*, 356 U.S. at 101. More specifically, living constitutionalism, also referred to as non-originalism, "is the thesis that facts that occur after ratification or amendment can properly bear—constitutively, not just evidentially—on how courts should interpret the

alists would surely balk at the suggestion that a prohibition on interracial marriage, for instance, only violates the Equal Protection Clause if a sufficient number of states allow interracial marriage. Nor does the Court feel the need to justify its Equal Protection Clause decisions by reference to objective indicia. Instead, the Court reflects contemporary appreciation for the invidiousness of racial distinctions by applying "the 'most rigid scrutiny' "[6] to cases involving suspect classifications such as race,[7] while applying a lower level of scrutiny to cases that do not involve suspect classifications.

I suggest an analogous—but, I stress, not identical—approach to the Cruel and Unusual Punishment Clause. I agree that the Clause should be understood in light of society's evolving standards, but I reject the notion that evolving standards can only be ascertained by analyzing the Court's objective indicia. The Eighth Amendment's core concept is that punishment not be excessive—that it be proportional to the punishment for which it is imposed.[8] That is, punishment must not be more severe than is necessary to achieve the legitimate goals of punishment. Our understanding of these legitimate goals (such as retribution, incapacitation, and deterrence), and of what is appropriate to achieving these goals, has evolved since the Eighth Amendment was first adopted. The Court can adhere to the evolving standards interpretive principle, then, by applying our current understandings of legitimate penological goals rather than the eighteenth century understanding of appropriate punishment. Similarly, society's understanding of the capacity, both mental and moral, of individuals with certain characteristics—for example, juveniles and the mentally retarded—have evolved substantially. By taking into account these modern (and widely accepted) understandings, the Court is able to interpret and apply the Cruel and Unusual Punishment Clause in light of society's evolving standards of decency—without having to rely on purportedly objective indicia in the form of legislative enactments, jury decisions, and so forth.

The difficulty with applying the excessiveness principle is in calibrating the precise level of punishment required (or allowed) by the justifications of punishment. There is room for reasonable people to reasonably disagree, not just about which goals of punishment are legitimate but also about the severity of punishment required for a particular offense or offender. The scope for such reasonable disagreement raises the specter that the Supreme Court Justices, free from the constraints that the original meaning of the Clause would

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Constitution (even when the original meaning is sufficiently clear)." Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 24 (2009).

6. Loving v. Virginia, 388 U.S. 1, 11 (1967) (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)).

7. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

8. *Miller*, 132 S. Ct. at 2463 (citing Roper v. Simmons, 543 U.S. 551, 560 (2005)).

provide, may impose their individual moral views under the guise of society's evolved standards. The Court's objective indicia approach is posited as the only way to avoid this problem.

But the Court's treatment of other sections of the Constitution, including the Equal Protection Clause, shows that the choice between raw judicial fiat and quantifiable external data is a false dilemma. There are other doctrinal mechanisms available for deciding cases in which neither side can marshal a knockout argument. One such mechanism is to impose different standards of review, and to shift the burden of persuasion, depending on whether we have reason to be suspicious of legislative action. In the Equal Protection Clause context, we are suspicious of—and strictly scrutinize—legislative distinctions based on race. (Legislative distinctions involve an implicit claim by the legislature that the distinctions achieve some legitimate government purpose; when the distinction is based on race, we are skeptical of this implicit claim.) In this Article, I argue that in the Eighth Amendment context, we should suspect—and more strictly scrutinize—the authorization of extreme punishments for certain classes of offenses and offenders, classes that we generally (and noncontroversially) accept involve lower than usual moral culpability. Legislative authorization of a particular punishment to a set of offenses or offenders involves the implicit claim that the punishment is proportional to those offenses, and for those offenders. My claim is that we have reason to be skeptical of this implicit claim when an extreme punishment—such as the death penalty or life without parole, which are understood as only being proportional to the "worst of the worst"—is authorized for a class of offenders or offenses that, as a general rule, we recognized as having *lessened* culpability.

For example, few would argue that the mentally retarded, as a class, and juveniles, as a class, have equivalent mental and moral capacity to that of fully competent adults. They therefore have less moral culpability for the offenses they commit, and less ability to conform their actions to the dictates of reason. Consequently, the distinctive attributes of mentally retarded and juvenile offenders "diminish the penological justifications for imposing the harshest sentences"[9] on offenders in those categories. There is therefore a great risk that harsh punishments such as death or life without parole will be excessive when imposed on an individual offender within one of these classes. In other words, there is a much greater likelihood that an extreme punishment will be excessive when it is applied to mentally retarded individuals or juveniles. Similarly, there is a much greater likelihood that these extreme punishments will be disproportionate when applied to strict liability crimes, or involve omissions rather than actions (such as failing to register as a sex offender).

9. *Id.* at 2458.

The Court should therefore give less deference in these cases to the legislature's implicit claim that the harsh punishment is not excessive, as that claim cuts against the general, contemporary understanding of the culpability of persons within these classes. In other words, the Court should impose stricter scrutiny when "suspect classes" are involved—suspect[10] in the sense that we have reason to doubt the legislature's implicit claim that legitimate penological aims necessitate the most severe punishments.[11]

This heightened scrutiny could take the form of a heavy burden on the legislature, in cases involving these suspect classes of offense or offender, to show that retribution, incapacitation, or deterrence require such harsh punishment. But when suspect categories are not involved—for example, if an adult with full capacity is sentenced to a term of years—the burden of showing excessiveness would be on the challenging party, with deference given to the legislature's view that the punishment is proportional.

In Part II of this Article, I describe the Supreme Court's standard model of Eighth Amendment analysis. My description includes a brief history of the development of the standard model, its application in influential cases, and its current doctrinal components—which I call "Objective Indicia Analysis" and "Individual Judgment Analysis." Part III of the Article outlines the shortcomings of the standard model, focusing on the Court's Objective Indicia Analysis and its conceptual relationship with the Individual Judgment Analysis. In Part IV of the Article, I address the relationship between evolving standards of decency and Objective Indicia Analysis through the lens of influential scholarship on constitutional interpretive theory, especially the work of Richard Fallon, Jack Balkin, and Mitch Berman. I argue that the evolving standards of decency principle differs in kind from Objective Indicia Analysis, and consequently that adherence to the former does not necessarily require application of the latter. I further argue that the evolving standards principle is consistent with a wide

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10. There is precedent for treating some classes of punishment as constitutionally suspect, although not along the lines I propose here. For example, in *Trop v. Dulles*, Chief Justice Warren stated that:

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is *constitutionally suspect*.

356 U.S. 86, 100 (1958) (emphasis added).

11. Moreover, the basis for treating juvenile and mentally retarded offenders as a suspect category—their diminished capacity and moral culpability compared to fully competent adults—is both a general principle of modern law and a view widely shared by and reflected in contemporary social standards. See the discussion of general legal attitudes towards mental retardation and juvenile status *infra* Part V.

range of interpretive theories, including all flavors of living constitutionalism and many versions of originalism.

I address the Court's recent decision in *Miller v. Alabama* in Part V. I point out that Justice Kagan, writing for the *Miller* Court, declined to apply Objective Indicia Analysis. Justice Kagan's opinion posits *Miller* as an exception to the methodological rule, but I argue that *Miller* signals the Court's readiness to abandon Objective Indicia Analysis across all its Eighth Amendment decisions.

I argue in Part VI that the Court *should* abandon its Objective Indicia Analysis and replace it with strict scrutiny when confronted with suspect classes of offenses and offenders. I propose that juveniles and the mentally retarded should be treated as suspect classes of offenders, and that strict liability and omission offenses should be considered suspect classes of offenses. I show that the strict scrutiny approach implements the evolving standards interpretive principle, without collapsing into mere judicial fiat, by drawing on contemporary understandings of the legitimate goals of punishment and of the lessened culpability of these offenders and for these offenses. I further argue that the strict scrutiny approach avoids both the practical and theoretical pitfalls of Objective Indicia Analysis.

II. THE STANDARD MODEL OF INTERPRETATION

The Supreme Court's approach to the Eighth Amendment is notoriously unclear and inconsistent.[12] In a recent string of decisions, however, the Court appeared to have entrenched a standard approach to its Eighth Amendment cases—or at least to a subsection of them. In *Graham v. Florida*,[13] Justice Kennedy divided the Court's prior Cruel and Unusual Punishment Clause jurisprudence cases into general classes. The first class "involves challenges to the length of term-of-years sentences given all the circumstances in a particular case."[14] The cases in this class involve "a gross proportionality challenge to a particular defendant's sentence."[15] The second set "comprises cases in which the Court implements the proportionality standard by certain categorical restrictions."[16] This Article focuses on the second set of cases, which implicate "a particular type of sentence

12. *See, e.g.*, 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, 1089 (2006) ("[T]he use of state legislation creates doctrinal chaos."); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 684 (2005) (describing the Court's approach to the Eighth Amendment as "ineffectual and incoherent"); Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005) (describing Eighth Amendment doctrine as a "mess").

13. 130 S. Ct. 2011 (2010).

14. *Id.* at 2021.

15. *Id.* at 2022.

16. *Id.* at 2021. Prior to *Graham*, the categorical restriction cases had all involved the death penalty. *Id* at 2022.

as it applies to an entire class of offenders."[17] Justice Kennedy outlines the Court's standard approach in these cases:

> In the cases adopting categorical rules the Court has taken the following approach. The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.[18]

In other words, the Court's standard approach involves two prongs of analysis: the Objective Indicia Analysis and the Independent Judgment Analysis.

A. Objective Indicia Analysis

1. The Development of Objective Indicia Analysis

The modern approach to interpreting the Eighth Amendment has its roots in *Weems v. United States*.[19] The Court asserted that the Cruel and Unusual Punishment Clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[20] Chief Justice Warren encapsulated this attitude in *Trop v. Dulles* by declaring that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[21] And Chief Justice Burger accepted this mode of interpretation in his dissenting opinion in *Furman v. Georgia*:

> For reasons unrelated to any change in intrinsic cruelty, the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The stand-

17. *Id.* at 2015.

18. *Id.* at 2022 (citations omitted).

19. 217 U.S. 349 (1910) (holding that the punishment of *cadena temporal*, involving fifteen years hard and painful labor while bound at the wrist day and night as well as "incidents" including permanent deprivation of the right to vote, to hold office, and to receive retirement pay, as well as the requirement to require written permission before any change in domicile after release, was disproportionate to the crime of falsifying public documents and was therefore cruel and unusual); *see also* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012) (arguing that the punishment of "civil death" has surreptitiously reemerged in American law as a result of the network of collateral consequences of criminal conviction).

20. *Weems*, 217 U.S. at 378.

21. 356 U.S. 86, 101 (1958).

> ard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.[22]

The notion that the scope of the Eighth Amendment "is not static"[23] has a great deal of appeal. There is little doubt that social attitudes toward punishment have evolved substantially since the Eighth Amendment was adopted. Many of the punishment practices of the eighteenth century are now widely acknowledged as barbaric, to the extent that few judges or commentators are willing to insist that present applications of the Eighth Amendment must adhere to the penal attitudes of the framing generation. In the face of the fact that the Framers accepted "public lashing, or branding of the right hand,"[24] for instance, even Justice Scalia's originalism becomes faint of heart.[25]

The wide agreement that the Eighth Amendment should be understood through the prism of modern attitudes evaporates when it comes to identifying the content of contemporary civilized standards. Opinion has been sharply divided on the moral justifications of punishment, which can be roughly divided into the two camps of retributivism and consequentialism.[26] And within each of these camps, there is no uniform view as to what punishment is allowed or required for a particular crime. For example, some retributivists believe that at least some murderers deserve death, and therefore that any punishment short of death would be a grave injustice.[27] On the other hand, other retributivists argue that no human being deserves to be put to death, no matter how terrible the crime committed.[28] Similarly, con-

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22. 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting). Chief Justice Burger's description of the Eighth Amendment as containing a static standard with dynamic application according to evolving standards is strikingly similar to Balkin's conception of "framework originalism." Framework originalism requires continued adherence to the original meaning of the Constitution's "broad principles," but the principles' "specific applications would be left to future generations to work out." BALKIN, *supra* note 4, at 26.

23. *Trop*, 356 U.S. at 101.

24. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

25. *Id.* ("Even if it could be demonstrated unequivocally that [public lashing or branding of the right hand] were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge—even among the many who consider themselves originalists—would sustain them against an eighth amendment challenge.").

26. *See, e.g.*, Richard W. Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193, 194 (1982) (noting that historically there have been two competing approaches to justifying punishment, namely retribution and consequentialism).

27. *See, e.g.*, Immanuel Kant, *The Metaphysics of Morals*, *in* KANT'S POLITICAL WRITINGS 156 (Hans Reiss ed., H. B. Nisbet trans., 1970) ("There is no *parallel* between death and even the most miserable life, so that there is no equality of crime and retribution [with respect to murder] unless the perpetrator is judicially put to death.").

28. *See, e.g.*, STEPHEN NATHANSON, AN EYE FOR AN EYE?: THE IMMORALITY OF PUNISHING BY DEATH 140 (2d ed. 2001) (arguing that the death penalty is inconsistent with the retributive value of human desert, because "by renouncing the use of death as a punish-

sequentialists disagree on whether the death penalty deters more murders than any lesser punishment, and therefore whether the death penalty is ever justified.[29]

Given the apparently intractable divergence of contemporary views about justified levels of punishment, there is a concern that judges, free from the constraints that the original scope of the Clause would provide, may impose their individual moral views under the guise of society's evolved standards. As the Court noted in *Gregg v. Georgia*, "[c]aution is necessary lest this court become, 'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.' "[30]

The risk that unelected Supreme Court Justices would impose their own personal moral values led the Court to declare the need for objective indicators of contemporary values about the infliction of punishment. The Court articulated this need in *Furman v. Georgia*, stating:

> The question under [the evolving standards] principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial task is to review the history of a challenged punishment and to examine society's present practices with respect to its use. Legislative authorization, of course, does not establish acceptance. The 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.[31]

This passage from *Furman* not only establishes that the Court will look to objective indicia of contemporary social standards, but also identifies the two most important indicia. Because courts "are not designed to be a good reflex of democratic society,"[32] the attitude of state legislatures and sentencers are better guides of social values than the subjective view of judges. The legislatures are the natural

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ment, we express and reaffirm our belief in the inalienable, unforfeitable core of human dignity").

29. *See, e.g.*, Louis P. Pojman, *For the Death Penalty*, *in* LOUIS P. POJMAN & JEFFREY REIMAN, THE DEATH PENALTY: FOR AND AGAINST 38 (1998) ("A consensus is wanting, so that at present we must conclude that we lack strong statistical evidence that capital punishment deters. . . . Precisely on the basis of this inconclusivity with regard to the evidence, some abolitionists . . . argue that deterrence cannot be the moral basis for capital punishment. . . . I think [they] are wrong about this.")

30. 428 U.S. 153, 176 (1976) (quoting Powell v. Texas, 392 U.S. 514, 533 (1968) (plurality opinion)).

31. 408 U.S. 238, 278-79 (1972) (Brennan, J., concurring). Four years later in *Gregg v. Georgia*, the Court reiterated that the assessment of contemporary values about punishment "does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction." 428 U.S. at 173.

32. *Gregg*, 428 U.S. at 175 (Frankfurter, J., concurring) (plurality opinion) (quoting Dennis v. United States, 341 U.S. 494, 525 (1951)).

forum of democratic values; presumably, a law providing for a particular punishment would not be passed without community acceptance at the time. It may, however, later fall into disrepute without being repealed. If the punishment becomes offensive to developing social values, it may simply fall out of use despite being retained.[33] The actions of sentencing judges and juries are therefore an important complement to legislative enactments in determining social standards.

2. Legislative Enactments

In *Furman*, the Supreme Court referred to the extreme rarity with which the death penalty was imposed by sentencing juries[34] but did not claim that the infrequency of imposition reflected a social consensus against the death penalty. Rather, the Court held that the rarity of application, combined with a complete lack of guidance to the jury about which convicted murderers should be sentenced to death, meant that the death penalty in the form it was then administered was so arbitrary and capricious as to be cruel and unusual.[35] Five years later, in *Gregg v. Georgia*, the Court held that the risk of arbitrary and capricious capital sentencing may be ameliorated by procedural mechanisms, such as providing the jury with guidance on whether to impose the death penalty and bifurcating capital trials into separate guilt and sentencing phases.[36] The Court relied on the enactment of such provisions in the wake of *Furman* not only as negating the claim that the death penalty was arbitrary and capricious, but also to as objective indicia that the death penalty was consistent with contemporary values:

> The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.
>
> The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the Unit-

33. This is reflected in the description of nations that no longer practice the death penalty, but have not repealed it, as "de facto abolitionist" countries. *See* ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 13 (4th ed. 2008) (describing countries as abolitionist de facto if there has been no execution for ten years, despite the legal availability of the death penalty).

34. 408 U.S. at 249 (Douglas, J., concurring).

35. *Id.* at 295 (Brennan, J., concurring).

36. 428 U.S. at 188-95 (plurality opinion).

> ed States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death.[37]

The fact that thirty-five state legislatures and the Federal Congress had recently enacted legislation imposing the death penalty for at least some crimes suggested community endorsement of the death penalty. The *Gregg* court acknowledged that "[t]he jury also is a significant and reliable objective index of contemporary values."[38] But this acknowledgement came with the caveat that

> the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *per se*. Rather, the 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.[39]

In other words, while the jury is a reliable objective barometer of contemporary values, the fact that juries rarely impose the death sentence does not necessarily indicate that the death penalty is contrary to contemporary values. There is an alternative explanation for the low frequency of death sentences that is consistent with community endorsement of the death penalty, namely that juries (mirroring society) believe the death penalty is appropriate for—and only for—the worst of the worst offenders. As we shall see in Part III, this amenability of objective indicia to multiple explanations—some implying that a punishment is contrary to social standards, others consistent with community approval of the punishment—undercuts the role of objective indicia as determinative decisionmaking tools for the Court.

The Supreme Court relied more directly on Objective Indicia Analysis when it struck down the Georgia statute providing the death penalty for rape in *Coker v. Georgia*.[40] The Court pointed out that

> if the "most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*," it should also be a telling datum that the public judgment with respect to rape, as reflected in the statutes providing the punishment for that crime, has been dramatically different.[41]

In the wake of *Furman*'s invalidation of all the extant death penalty statutes, "only three [states] provided the death penalty for the rape of an adult woman in their revised statutes."[42] Two of those statutes made the death penalty for rape mandatory and were struck down in

37. *Id.* at 179-80 (footnote omitted).
38. *Id.* at 181.
39. *Id.* at 182.
40. 433 U.S. 584, 595 (1977) (plurality opinion).
41. *Id.* at 594 (citation omitted) (quoting *Gregg*, 428 U.S. at 179-80 (plurality opinion)).
42. *Id.* (Georgia, Louisiana, and North Carolina).

Woodson v. North Carolina[43] and *Roberts v. Louisiana.*[44] That left Georgia as "the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child."[45] The Court concluded that while "[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, . . . it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."[46] The *Coker* Court found that jury sentencing practices also supported the inference of community prohibition on the death penalty for rape. More than nine out of ten Georgia juries declined to impose the death sentence for rape.[47]

Since *Coker*, the Court has engaged in Objective Indicia Analysis—tallying the number of states that authorize the challenged pen-

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43. 428 U.S. 280 (1976) (holding that mandatory imposition of the death penalty violates the Eighth Amendment).

44. 428 U.S. 325 (1976) (holding that scheme which mandatorily imposed death penalty for narrowly-defined categories of first-degree murder was unconstitutional, even though the scheme required jury instructions on manslaughter and second-degree murder in all cases).

45. *Coker*, 433 U.S. at 595-96 (plurality opinion). The Court was not persuaded by the counterargument that

> 11 of the 16 States that authorized death for rape in 1972 attempted to comply with *Furman* by enacting arguably mandatory death penalty legislation and that it is very likely that, aside from Louisiana and North Carolina, these States simply chose to eliminate rape as a capital offense rather than to *require* death for *each* and *every* instance of rape.

Id. In other words, it is likely that state legislatures faced with *Furman*'s denunciation of unbridled jury discretion in death penalty cases—including the sixteen states that authorized the death penalty for rape—decided that compliance with the Eighth Amendment would be best achieved by eliminating jury discretion entirely; that is, by making the death penalty mandatory. But if the death penalty had to be mandatory, that meant that the only way to authorize the death penalty for rape was to *require* the death penalty for *each* and *every* instance of rape. So it is possible, perhaps even very likely, that these eleven states that chose not to include rape in their post-*Furman* death statute did so *not* because they rejected the appropriateness of the death penalty for rape but because they rejected the appropriateness of the *mandatory* death penalty for rape. On their understanding of *Furman*, a discretionary statute that authorized the death penalty for the worst, but not all, rapes was off the table. Therefore, so the argument goes, the fact that they did not include rape in their new death penalty statute *does not* demonstrate that imposing death for *any* rape was repugnant to social standards. I am not proposing that this argument convincingly demonstrates that the death penalty for rape was supported by a national social consensus at the time *Coker* was decided. I am making the more modest, but nonetheless important, point that the objective indicia are murkier than a mere recitation of the number of states allowing a punishment might suggest. See *infra* Part III for further explication of this and similar lines of argument.

46. *Coker*, 433 U.S. at 596 (plurality opinion).

47. *Id.* at 597. In contrast to the Court's comments in *Gregg*, the *Coker* Court seems not to have been swayed by Georgia's argument that "as a practical matter juries simply reserve the extreme sanction for extreme cases of rape and that recent experience surely does not prove that jurors consider the death penalty to be a disproportionate punishment for every conceivable instance of rape, no matter how aggravated." *Id.*

alty, determining the proclivity of juries to impose the punishment, and drawing inferences of underlying social norms—in numerous cases.[48] The point of Objective Indicia Analysis, as it has developed, is to examine the relevant legislative and sentencing data and determine from them whether a societal or national consensus exists that the death penalty is disproportionate or excessive.[49]

What counts as a consensus has never been entirely clear. The standard usage of "consensus" suggests being in agreement or speaking with one voice,[50] but the Court has not translated this into a precise numerical requirement. As *Coker* demonstrates, unanimity is not required—indeed, a requirement of unanimity would be self-defeating, as the fact that the punishment is being challenged means that at least one jurisdiction allows and implements it.[51] One would expect that a national consensus would require, if not unanimity, more than a bare majority—and that, at the very least, a minority does not a consensus make.

A handful of illustrative examples are useful at this point. In *Enmund*, the Court held that there was a national consensus when thirty-three states did not authorize the death penalty for any unin-

48. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (striking down mandatory life without parole for juveniles); Graham v. Florida, 130 S. Ct. 2011, 2033 (2010) (striking down life without parole for juveniles convicted of nonhomicide offenses); Kennedy v. Louisiana, 554 U.S. 407, 446 (2008) (holding that the death penalty is unconstitutional for the offense of raping a child); Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that the death penalty is unconstitutional when applied to juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the death penalty is unconstitutional when applied to mentally retarded offenders); Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (holding mandatory life sentence without the possibility of parole, imposed for possession of 672 grams of cocaine, did not violate the Eighth Amendment); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the execution of sixteen and seventeen-year-old offenders does not violate the Eighth Amendment); Penry v. Lynaugh, 492 U.S. 302, 338 (1989) (holding that there was not sufficient evidence of a national consensus against executing mentally retarded offenders, since the practice was only explicitly prohibited by statute in one state, and the petitioner did not offer any evidence of the general behavior of juries or prosecutors with respect to the sentencing of mentally retarded offenders); Thompson v. Oklahoma, 487 U.S. 815, 832 (1988) (holding that the execution of an offender under the age of sixteen "is now generally abhorrent to the conscience of the community" and therefore violates the Eighth Amendment); Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding that the death penalty is constitutional for felony murder, provided the offender was a major contributor to the felony, even if he did not have a specific intent to kill); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (holding that executing an insane person violates the Eighth Amendment); Enmund v. Florida, 458 U.S. 782, 797 (1982) (holding the death penalty unconstitutional for felony murder where the defendant participated in the felony but did not cause the death).

49. *See, e.g.*, *Tison*, 481 U.S. at 147 ("This Court, citing the weight of legislative and community opinion, found a broad societal consensus, with which it agreed, that the death penalty was disproportional to the crime of robbery-felony murder" in the circumstances presented by *Enmund*, 458 U.S. at 786.).

50. The Merriam-Webster Dictionary online defines consensus as: "1. *a* **:** general agreement **:** unanimity; *b* **:** the judgment arrived at by most of those concerned; 2 **:** group solidarity in sentiment and belief." *Consensus Definition,* MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/consensus (last visited July 3, 2013).

51. *Coker*, 433 U.S. at 592.

tended felony murder.[52] The Court summarized the consensus in the following terms:

> While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.[53]

In contrast, *Penry v. Lynaugh* held that there was not a national consensus against executing mentally retarded defendants at the time it was decided.[54] In the Court's view, "the two state statutes prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, do not provide sufficient evidence at present of a national consensus."[55]

But thirteen years later, when the Court reconsidered the execution of mentally retarded defendants in *Atkins v. Virginia*,[56] a further eighteen states and Congress had enacted prohibitions on any individual with mental retardation from being sentenced to death.[57] The Court declared that "the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[58] As Chief Justice Rehnquist's dissent pointed out, the Court found a consensus against executing mentally retarded in-

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52. 458 U.S. at 792-93. Note that the simple statement of these figures hides some underlying issues about which states to count as contributing to the national consensus. The Court noted that eight states allowed the death penalty "to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed." *Id.* at 792. Another nine states allowed the death penalty to be imposed for unintended felony murder when the aggravating factors outweighed the mitigating factors—including, notably, "the defendant's minimal participation in the murder." *Id.* The Court suggested that it was unclear which number—eight or seventeen—represented the extent of disagreement with the death penalty for felony murder, but concluded that "even if" the larger number was used, "only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die." *Id.* It is worth pointing out, however, that seventeen states represents about half of the states that authorized the death penalty at all, which raises the question of how to characterize the non-death penalty states' attitude towards capital felony murder. Should they be counted as against it, since they are against the death penalty generally, or should they be taken as not having a view, since they do not address it "directly," so to speak? These issues are considered *infra* Part III.

53. *Enmund*, 458 U.S. at 792-93 (citation omitted) (quoting *Coker*, 433 U.S. at 596).

54. 492 U.S. 302 (1989).

55. *Id.* at 334.

56. 536 U.S. 304, 310 (2002).

57. The states were Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, Nebraska, Nevada, New Mexico, New York, Texas, Virginia, and Washington. *Id.* at 314-15.

58. *Id.* at 315-16.

dividuals "despite the fact that the laws of 19 other States besides Virginia continue to leave the question of proper punishment to the individuated consideration of sentencing judges or juries."[59]

One interesting aspect of *Atkins* was the Court's reference to the importance of a consistent trend in favor of prohibiting the relevant punishment practice. After reciting the states that prohibited executing mentally retarded defendants, Justice Stevens stated for the Court that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[60] The Court also pointed to the significance of "the trend toward abolition of the juvenile death penalty" in *Roper v. Simmons*.[61] In *Roper*, the Court was reconsidering whether the Eighth Amendment barred capital punishment for juveniles.[62] The Court had previously held that there was not a national consensus against capital punishment for juveniles over the age of fifteen in *Stanford v. Kentucky*.[63] The *Roper* Court pointed out that "[f]ive States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years—four through legislative enactments and one through judicial decision."[64] The Court, through Justice Kennedy, argued that "[t]hough less dramatic than the change from *Penry* to *Atkins* . . . we still consider the change from *Stanford* to this case to be significant."[65] Pointing to the fact that "[s]ince *Stanford*, no state that previously prohibited capital punishment for juveniles ha[d] reinstated it," Justice Kennedy concluded that "[a]ny difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change."[66]

This opened up the possibility that a national consensus against (or for) a punishment could be found even when only a minority of states prohibited (or authorized) the punishment, provided there was a sufficiently consistent trend in one direction. The State of Louisiana made precisely this argument in *Kennedy v. Louisiana*, relying on the fact that in the previous thirteen years, six states had made child rape a capital offense, whereas only five states had changed their position in the fifteen years between *Stanford* and *Roper*.[67] Jus-

59. *Id.* at 322 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist went on to say that "the Court's assessment of the current legislative judgment regarding the execution of defendants like petitioner more resembles a *post hoc* rationalization for the majority's subjectively preferred result rather than any objective effort to ascertain the content of an evolving standard of decency." *Id.*

60. *Id.* at 315 (majority opinion).

61. 543 U.S. 551, 566 (2005).

62. *Id.* at 555-56.

63. 492 U.S. 361, 377 (1989).

64. 543 U.S. at 565.

65. *Id.*

66. *Id.* at 566.

67. *See* Kennedy v. Louisiana, 554 U.S. 407, 432 (2008). The respondent had argued that the Court's Objective Indicia Analysis should take into account another five states in

tice Kennedy again wrote for the Court and conceded that "[c]onsistent change might counterbalance an otherwise weak demonstration of consensus."[68] However, Justice Kennedy rejected Louisiana's argument by distinguishing the total number of states at play in *Roper* from the number in *Kennedy*:

> Respondent argues the instant case is like *Roper* because, there, only five States had shifted their positions between 1989 and 2005, one less State than here. But in *Roper*, we emphasized that, though the pace of abolition was not as great as in *Atkins*, it was counterbalanced by the total number of states that had recognized the impropriety of executing juvenile offenders.[69]

Whether legislative enactments demonstrate a national consensus, then, depends on a combination of two factors: the total number of states that allow or prohibit the challenged punishment, and the extent to which there is a recent, consistent trend in the legislative enactments.

3. Sentencing Practices

While legislative enactments have provided most of the objective grist for the Court's analytical mill, they are not the only data that the Court has relied on as reflecting community standards. The Court has also looked to the frequency with which available punishments are actually imposed. The reluctance of sentencing bodies to impose a punishment may indicate that the punishment has fallen out of favor, despite still being legally available; conversely, the willingness of sentencing bodies to frequently impose a punishment suggests endorsement of that punishment by the community.

Graham v. Florida is perhaps the clearest example of the Court's use of sentencing practices to find a national consensus against a punishment despite its widespread availability.[70] In that case, the Supreme Court held that the Eighth Amendment prohibits life with-

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which "legislation authorizing capital punishment for child rape is pending." *Id.* at 431. The Court declined to do so, saying "[i]t is not our practice, nor is it sound, to find contemporary norms based upon state legislation that has been proposed but not yet enacted." *Id.*

68. *Id.*

69. *Id.* at 432 (citation omitted). It is perhaps worth noting that the *Roper* Court (viz., Justice Kennedy himself) did not in fact emphasize that the slower pace of abolition was counterbalanced by the total number of states. In fact, as quoted above, Justice Kennedy asserted that the less dramatic pace of abolition was "counterbalanced by the *consistent direction of the change*." *Roper*, 543 U.S. at 566 (emphasis added). The change in *Kennedy* was just as consistent as the change in *Roper*. Nonetheless, the total number of states in *Roper* and *Kennedy* is telling. In *Roper*, a total of thirty of the fifty states did not authorize the death penalty for juveniles: twelve states had rejected the death penalty altogether, and eighteen death penalty states had prohibited executing juvenile offenders. *Id.* at 564. In contrast, even after the "recent trend" leading up to *Kennedy*, only six states authorized capital punishment for child rape. *Kennedy*, 554 U.S. at 433.

70. 130 S. Ct. 2011, 2023 (2010).

out parole for a juvenile offender who did not commit homicide.[71] At the time, thirty-seven states, the District of Columbia, and federal law "permit[ted] sentences of life without parole for a juvenile offender in some circumstances."[72] The Court reiterated that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[73] But the Court reminded us that "[t]here are measures of consensus other than legislation,"[74] the most important being "actual sentencing practices in jurisdictions where the sentence in question is permitted by statute."[75] The data indicated that "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."[76] The rarity with which juvenile life without parole was imposed, especially against the backdrop of the large number of cases in which the sentence *could* have been imposed,[77] "disclose[d] a consensus against its use."[78]

Not all sentencing practices are equally illustrative of community consensus, however. In the recent decision of *Miller v. Alabama*, the Supreme Court declared that the Eighth Amendment prohibited mandatory imposition of life without parole for juvenile offenders, including those convicted of nonhomicide offenses.[79] As I will discuss in detail later, the Court did not rely on an analysis of the objective indicia to reach this conclusion, but it did declare that analysis of the objective indicia "does not preclude our [holding]."[80] Life without parole was an available—indeed, mandatory—punishment for some juvenile offenders in twenty-nine jurisdictions, but the Court argued that the actual sentencing practices in those jurisdictions were "unilluminating."[81] Writing for the Court, Justice Kagan pointed out the difference between *Miller* and *Graham*:

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71. *Id.* at 2033.
72. *Id.* at 2023.
73. *Id.* (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).
74. *Id.* (quoting Kennedy v. Louisiana, 554 U.S. 407, 433 (2008)).
75. *See id.*
76. *Id.* at 2024. The Court determined that "there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of these, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia." *Id.* (citation omitted).
77. *Id.* at 2025 ("Although it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences, the comparison suggests that in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual.").
78. *Id.* at 2023.
79. 132 S. Ct. 2455 (2012).
80. *Id.* at 2473.
81. *Id.* at 2472 n.11.

> Here, we consider the constitutionality of mandatory sentencing schemes—which by definition remove a judge's or jury's discretion—so no comparable gap between legislation and practice can exist. Rather than showing whether sentencers consider life without parole for juvenile offenders appropriate, the numbers of juveniles serving this sentence merely reflects the number who have committed homicide in mandatory-sentencing jurisdictions.[82]

The Court was therefore able to conclude that mandatory juvenile life without parole violated society's evolving standards of decency, even though a majority of states both authorized and imposed mandatory juvenile life without parole.[83]

B. Independent Judgment Analysis

While the Court has engaged, on the one hand, in the complex analysis of objective indicia described above, it has also insisted that reliance on indicators of public opinion does not amount to the Court abrogating its own responsibility to interpret the Constitution.[84] Hence the Court's declaration in *Gregg* that "our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive"[85] of whether the punishment being challenged violated the Constitution. In *Coker v. Georgia*, the Court made clear that this question was to be answered by the Justices applying their own independent judgment of the punishment practice, stating that "recent events evidencing the attitude of state legislatures and sentencing judges do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of [the challenged punishment] under the Eighth Amendment."[86]

The application of independent judgment has not always enjoyed the Court's consensus. For example, Justice Scalia asserted in his plurality opinion in *Stanford v. Kentucky* that "[i]n determining what standards have 'evolved,' however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole."[87] After determining that American society at that time did

82. *Id.* at 2471 n.10 (citation omitted).

83. *Id.* at 2459 ("In any event, the 'objective indicia of society's standards,' that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment." (citation omitted) (quoting *Graham*, 130 S. Ct. at 2022)).

84. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575 (2005) (stating that "the task of interpreting the Eighth Amendment remains our responsibility"); Gregg v. Georgia, 428 U.S. 153, 174 (1976) ("This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.").

85. 428 U.S. at 173.

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

87. 492 U.S. 361, 369 (1989).

not consider the challenged punishment (namely, juvenile capital punishment) to be indecent, Justice Scalia declared:

> The punishment is either "cruel *and* unusual" (*i.e.*, society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. For as we stated earlier, our job is to *identify* the "evolving standards of decency"; to determine, not what they *should* be, but what they *are*. We have no power under the Eighth Amendment to substitute our belief in the scientific evidence for the society's apparent skepticism. In short, we emphatically reject petitioner's suggestion that the issues in this case permit us to apply our "own informed judgment" regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds.[88]

The plurality's rejection in *Stanford* of Independent Judgment Analysis has itself since been repudiated. In *Atkins v. Virginia,* Justice Stevens' majority opinion explained that "in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[89] And when the Supreme Court reexamined the juvenile death penalty in *Roper v. Simmons*, it not only held that standards of decency had turned against the juvenile death penalty, it also reaffirmed the legitimacy of Independent Judgment Analysis:

> The [*Atkins* Court's] inquiry into our society's evolving standards of decency did not end there. The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead, we returned to the rule, established in decisions predating *Stanford*, that "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[90]
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> . . . The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own in-

88. *Id.* at 378 (citation omitted).

89. 536 U.S. 304, 313 (2002) (citation omitted) (quoting *Coker*, 433 U.S. at 597); *see also* Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (confirming that the attitudes of state legislatures and sentencers do not wholly determine the acceptability of a punishment under the Eighth Amendment).

90. Roper v. Simmons, 543 U.S. 551, 563 (2005) (quoting *Atkins*, 536 U.S. at 312).

> dependent judgment, whether the death penalty is a disproportionate punishment for juveniles.[91]

That national consensus is not dispositive—that analysis of the objective indicia is accompanied by the Court applying its own objective judgment—has been reiterated by *Kennedy* and *Graham*, so that Individual Judgment Analysis is now an entrenched component of the Court's standard approach.[92] In applying their independent judgment, the Justices are informed by "the Eighth Amendment's text, history, meaning, and purpose."[93] This has usually involved the Justices addressing whether the challenged punishment is disproportionate or excessive in light of legitimate penological goals, primarily retribution and deterrence.[94]

For example, in *Enmund v. Florida*, the Court expressed its own judgment that the death penalty was an excessive punishment for felony murder because executing a person who did not intentionally kill was not justified by either retribution or deterrence. With respect to deterrence, the Court stated:

> We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation."[95]

The Court's judgment with respect to retribution was similar:

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.[96]

Since the challenged punishment did not contribute to either of the legitimate penological goals, it was " 'nothing more than the purposeless and needless imposition of pain and suffering,' and hence an

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91. *Id.* at 564. Justice Scalia later responded to the resurrection of Individual Judgment Analysis with the declaration that "[p]urer expression cannot be found of the principle of rule by judicial fiat." Baze v. Rees, 553 U.S. 32, 93 (2008) (Scalia, J., concurring).

92. Graham v. Florida, 130 S. Ct. 2011, 2022-23 (2010); Kennedy v. Louisiana, 554 U.S. 407, 421, 427 (2008).

93. *Kennedy*, 554 U.S. at 421.

94. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183 (1976) (observing that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders").

95. 458 U.S. 782, 798-99 (1982) (quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)).

96. *Id.* at 801.

unconstitutional punishment."[97] In *Enmund*, it was the defendant's lack of homicidal intent that made an extreme punishment (the death penalty) excessive for the purpose either of deterrence or retribution. In other cases concerning mentally ill or juvenile offenders, it has been the defendant's reduced mental and moral capacity that has reduced the extent to which severe punishment contributes to these legitimate penological goals. In *Atkins*, for example, the Court judged that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution."[98] Nor would executing mentally retarded offenders contribute to the goal of deterrence:

> [I]t is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information.[99]

When the Court struck down life without parole for juvenile nonhomicide offenders in *Graham*, the Court adjudged that characteristics of both the class of offenders (juveniles) and the class of offenses (nonhomicides) meant that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[100] The Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[101] As a result of their lesser moral culpability and mental capacity, "none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification" for imposing life without parole on juvenile nonhomicide offenders.[102]

It is worth noting, however, that the Supreme Court Justices' independent judgment about these issues have diverged dramatically. Whether the imposition of severe punishments on mentally retarded and juvenile offenders is justified by legitimate penological goals, for instance, is a hotly contested issue on the Court. Justice Thomas' dissent in *Graham* asserts that the imposition of life without parole on juvenile nonhomicide offenders *does* serve legitimate goals—at a min-

97. *Id.* at 798 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).
98. Atkins v. Virginia, 536 U.S. 304, 319 (2002).
99. *Id.* at 320.
100. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010).
101. *Id.* at 2026.
102. *Id.* at 2028 (citation omitted).

imum, the goals of incapacitation and deterrence.[103] And whether the punishment is proportional in light of these goals is ultimately a *moral* question that cannot be definitively resolved by the sort of research that the majority relies on.[104] Justice Scalia made this point more emphatically in *Stanford*:

> According to petitioners, [the death penalty] fails to deter because juveniles, possessing less developed cognitive skills than adults, are less likely to fear death; and it fails to exact just retribution because juveniles, being less mature and responsible, are also less morally blameworthy. In support of these claims, petitioners and their supporting *amici* marshal an array of socioscientific evidence concerning the psychological and emotional development of 16- and 17-year-olds.
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> If such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishments Clause would be unnecessary; the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis. But . . . it is not demonstrable that no 16-year-old is "adequately responsible" or significantly deterred. It is rational, even if mistaken, to think the contrary. The battle must be fought, then, on the field of the Eighth Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon.[105]

In other words, no scientific evidence can conclusively prove that a particular punishment does not serve a legitimate penological goal. People may have differing, but nonetheless rational, judgments on the issue. So it is illegitimate for the Justices to impose their own views of proportionality in preference over the (reasonable) contrary views of elected legislatures. To do so, argues Justice Scalia, "is to replace judges of the law with a committee of philosopher-kings."[106]

C. The Relationship Between Objective Indicia and Independent Judgment

This brings us full circle. The concern Justice Scalia enunciates about judges imposing their subjective moral preferences is, of course, the justification for Objective Indicia Analysis. By employing both Objective Indicia Analysis and Independent Judgment Analysis, the Court is trying to balance competing concerns. Objective Indicia Analysis is meant to force the Court to apply society's *actual* evolving standards rather than the Court's own standards. But there is a wor-

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103. *Id.* at 2053 (Thomas, J., dissenting).

104. *Id.* at 2056 ("The question of what acts are 'deserving' of what punishments is bound so tightly with questions of morality and social conditions as to make it, almost by definition, a question for legislative resolution.").

105. Stanford v. Kentucky, 492 U.S. 361, 377-78 (1989) (citation omitted).

106. *Id.* at 379.

ry that Objective Indicia Analysis alone "would largely return the task of defining the contours of Eighth Amendment protection to political majorities"[107]—while "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy."[108] So the Court also applies its own independent judgment—independent of the judgment reflected in legislative enactments or sentencing behavior—about whether the challenged punishment is cruel and unusual.

But it is not at all clear how these two prongs of analysis fit together. The Supreme Court has said surprisingly little about the relationship between them—whether they are weighed against each other, whether one form of analysis trumps the other, and if so why—and what little the Court has said has been unhelpful and inconsistent. In earlier cases such as *Coker v. Georgia* and *Thompson v. Oklahoma*, the Court began its opinions by engaging its independent judgment, and then looked to the objective indicia to "confirm" its judgment.[109] Later, in *Atkins v. Virginia*, the Court described the role of its independent judgment as determining "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[110]

Most recently, in *Kennedy* and *Graham*, the Court explained its approach as beginning with analysis of the objective indicia followed by application of its independent judgment.[111] In both cases, the Court concluded that the challenged punishment was unconstitutional "[b]ased both on consensus and our own independent judgment."[112] This gives us little insight into the hierarchical relationship, if any, between the two modes of analysis. We know that if both the objective indicia and the Court's independent judgment converge against applying the punishment, then the Court will conclude that the punishment is cruel and unusual. And presumably, if the Objective Indicia Analysis and Independent Judgment Analysis both confirm the punishment's legitimacy, the Court will uphold the punishment. But what about if the objective indicia and independent judgment point in opposite directions? Does a national consensus of evolving standards trump the views of individual Justices, or does the

107. *Id.* at 391 (Brennan, J., dissenting).

108. *Id.* (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

109. *See* Thompson v. Oklahoma, 487 U.S. 815, 823 (1988) (explaining that the objective "indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty"); Coker v. Georgia, 433 U.S. 584, 597 (1977) ("Nevertheless, the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate punishment for the crime of raping an adult woman.").

110. Atkins v. Virginia, 536 U.S. 304, 313 (2002).

111. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010); Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).

112. *Kennedy*, 554 U.S. at 421.

Court's independent judgment about constitutional meaning have supremacy over the views expressed via other branches of government?

The answers to these questions remain elusive. As it happens, the Court has never been forced to clarify the tension between the two prongs, for they have never led to divergent conclusions. In every case in which the Court has expressly relied on both Objective Indicia Analysis and Independent Judgment Analysis, the results of the two inquiries have converged.[113] The same is true for the dissenting Justices who engage in both inquiries: the dissenting Justices' analysis of the objective indicia of social standards in each case accords with their independent judgment.[114] Apparently each Justice's independent judgment has always accorded with (that Justice's understanding

113. In fact, in every such case the Court has concluded that the Objective Indicia and Independent Judgment analyses have both supported striking down the challenged punishment practice. *See, e.g.*, *Graham*, 130 S. Ct. 2011; *Kennedy*, 554 U.S. 407; Roper v. Simmons, 543 U.S. 551 (2005); *Atkins*, 536 U.S. 304; *Thompson*, 487 U.S. 815; Solem v. Helm, 463 U.S. 277 (1983); Enmund v. Florida, 458 U.S. 782 (1982); *Coker*, 433 U.S. 584; *see also* Miller v. Alabama, 130 S. Ct. 2455, 2464, 2471 (2012) (arguing that life without parole is an excessive punishment for juvenile offenders, "[b]ecause juveniles have diminished culpability and greater prospects for reform," and that while objective indicia are not relevant, "[i]n any event, the 'objective indicia' that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment"); Baze v. Rees, 553 U.S. 35, 83 (2008) (Stevens, J., concurring); Spaziano v. Florida, 468 U.S. 447, 485 (1984) (Stevens, J., concurring). In *Stanford v. Kentucky*, the majority found that the objective indicia did not establish a consensus against juvenile execution, but argued that the Court should not engage in a separate "proportionality" analysis. 492 U.S. 361 (1989). In fact, according to the *Stanford* Court, "the two methodologies blend into one another, since 'proportionality' analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences." *Id.* at 380.

114. *See, e.g.*, *Graham*, 130 S. Ct. at 2048 (Thomas, J., dissenting) ("Neither objective evidence of national consensus nor the notions of culpability on which the Court's 'independent judgment' relies can justify the categorical rule it declares here."); *Roper*, 543 U.S. at 587 (O'Connor, J., dissenting) ("The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling."); *Atkins*, 536 U.S. at 347, 351 (Scalia, J., dissenting) (referring to "the Court's Most Feeble Effort to fabricate 'national consensus' " against executing mentally retarded offenders and pronouncing that no "principle of law, science, or logic" supports the Court's conclusion that capital punishment is excessive for mentally retarded offenders); *Enmund*, 458 U.S. at 823, 826 n.42 (O'Connor, J., dissenting) (claiming that "[f]ar from 'weighing very heavily on the side of rejecting capital punishment as a suitable penalty for' felony murder, these legislative judgments indicate that our 'evolving standards of decency' still embrace capital punishment for this crime," and concluding that the petitioner had not shown that "capital punishment is ineffective as a deterrent . . . [or did not] [serve] the admittedly legitimate goal of retribution" (quoting *Coker*, 443 U.S. at 596)). Tonja Jacobi also made this observation regarding the Supreme Court's decisions prior to 2006. Jacobi, *supra* note 12, at 1103 ("The Court has never explained what its conclusion would be if the various methodologies suggested conflicting conclusions. It has never had to. In each case, both the majority and dissents have always found that the national consensus confirms their proportionality, culpability and international law conclusions." (footnote omitted)). What was true in 2006 is true today. The Court has kept its hitting streak alive through *Kennedy, Graham,* and *Miller*.

of) society's judgment—even when that Justice's independent judgment conflicts with those of his or her brethren, *and* when that Justice's interpretation of the objective indicia conflicts with the interpretation of his or her colleagues.

We are entitled to be surprised that the Court's independent judgment and society's moral consensus simply coincide in every case. The consistent convergence of the two inquiries suggests an inference, namely that the Court's determinations of social standards, purportedly based on objective indicia, are in reality informed by the Justices' subjective moral views—which is, of course, the precise mischief that Objective Indicia Analysis is meant to avoid.

III. CRITICISMS OF THE STANDARD MODEL

The Supreme Court's standard model of analysis has been subjected to forceful criticism, both from some members of the Court itself and from other commentators. In the hope of providing some order to my discussion, I shall divide the criticisms into several categories. I first address the practical problems associated with Objective Indicia Analysis—that is, the problems in its application. I then address the more theoretical problems of Objective Indicia Analysis, by which I mean arguments that Objective Indicia Analysis would be constitutionally inappropriate even if there were no problems of application. Third, I discuss criticisms of the Court's Independent Judgment Analysis, and finally, I describe the additional problems that arise from the union of these two avenues of analysis.

A. Practical Problems of Objective Indicia Analysis

There are numerous difficulties with applying Objective Indicia Analysis in a particular case, most of which involve the vagueness and uncertainty regarding whether the "objective" factors indicate a national consensus against the challenged punishment practice. To be sure, all legal rules have a degree of uncertainty of application, and hence are underdetermined, but Objective Indicia Analysis, if not unique in kind, is extreme in the degree and multiplicity of the associated vagueness. The analysis involves uncertainty across multiple dimensions, each of which magnifies the underdeterminacy (and, therefore, malleability) of the ultimate decision about whether the punishment violates evolving standards.

1. Defining the Universe of Objective Factors

The first dimension of uncertainty relates to deciding what we count in the objective indicia calculus, about how we define the universe of objective indicia. While legislation and jury sentencing have regularly been referred to as the best exemplars of community stand-

ards, the Court has also flirted with the idea of including public opinion polls[115] and the attitudes expressed in foreign law.[116] And even if we consider only legislation and sentencing practices in U.S. jurisdictions, there is still significant disagreement as to what counts. In terms of legislation, there is dispute about whether all jurisdictions that allow (or prohibit) the challenged punishment should be included, or only those jurisdictions whose legislatures have addressed the issue directly. So, for example, some Justices have argued that states that have abolished the death penalty entirely should not count for the purpose of determining whether there is a national consensus against a certain subset of capital punishment—such as whether there is a national consensus against executing mentally retarded or juvenile offenders. Because the legislatures in abolitionist states have not considered the precise question of whether to execute, specifically, mentally retarded or juvenile offenders, they cannot be said to reflect a separate community consensus against this practice.[117] Similarly, the Court in several cases excluded from its consensus calculations many jurisdictions that required the mandatory imposition of life without parole for some juvenile offenders. In those jurisdictions, the availability of juvenile life without parole was the product of the interaction between two separate statutory provisions: the provision by which allowed juveniles to be transferred into the adult criminal justice system, and the law imposing mandatory life without parole once in adult court. Justice Kagan explained this approach recently in *Miller v. Alabama*:

> Most jurisdictions authorized the death penalty or life without parole for juveniles only through the combination of two independent statutory provisions. One allowed the transfer of certain juvenile offenders to adult court, while another (often in a far-removed part of the code) set out the penalties for any and all individuals tried there. We reasoned that in those circumstances, it was impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice). In *Thompson*, we found that the statutes "t[old] us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but

115. *See, e.g.*, *Atkins*, 536 U.S. at 316 n.21.

116. *See, e.g.*, *Roper*, 543 U.S. at 575; *Thompson*, 487 U.S. at 830-31; *Enmund*, 458 U.S. at 796 n.22; *Coker*, 433 U.S. at 596 n.10 (plurality opinion).

117. *See, e.g.*, *Roper*, 543 U.S. at 609 (Scalia, J., dissenting) (arguing that "[w]ords have no meaning if the views of less than 50% *of death penalty States* can constitute a national consensus" (emphasis added)). The counterargument is that the greater necessarily includes the lesser: if the community considers the death penalty to be morally repugnant for *any* crime and *any* offender, then it necessarily considers the death penalty to be morally repugnant for a subset of those offenders. That is all that's required for a national consensus against the practice; there is no reason to require a distinct, additional prohibition (for independent reasons) against executing juveniles *qua* juveniles, or mentally retarded offenders because of their mental retardation.

> t[old] us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders." And *Graham* echoed that reasoning: Although the confluence of state laws "ma[de] life without parole possible for some juvenile nonhomicide offenders," it did not "justify a judgment" that many States actually "intended to subject such offenders" to those sentences.[118]

These considerations demonstrated, according to Kagan, that "simply counting legislative enactments can present a distorted view"[119] of whether there is a national consensus against a punishment.[120] Other Justices have argued that simply counting legislative *enactments* and ignoring pending legislation also presents a distorted view. Justice Alito, dissenting in *Kennedy v. Louisiana*, pointed to five states that had considered bills that would have authorized the death penalty for child rape. In his view, the absence of current capital child-rape laws in those states "cannot be viewed as evidence of a moral consensus against such punishment."[121]

Justice Alito's *Kennedy* dissent addresses another complication in determining which jurisdictions count in the tallying process. Evidence of a relevant evolving community standard may be found, Justice Alito suggests, in legislation other than that which directly addresses the challenged punishment. For example, hardening attitudes towards child sex offenders in general provide support for "a new evolutionary line"[122] regarding capital child-rape laws:

> [R]eported instances of child abuse have increased dramatically; and there are many indications of growing alarm about the sexual abuse of children. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, which requires States receiving certain federal funds to establish registration systems for convicted sex offenders and to notify the public about persons convicted of the sexual abuse of minors. All 50 States have now enacted such statutes. In addition, at least 21 States and the District of Columbia now have statutes permitting the involuntary commitment of sexual preda-

118. Miller v. Alabama, 132 S. Ct. 2455, 2472-73 (2012) (citations omitted) (quoting *Thompson*, 487 U.S. at 826; *Graham*, 130 S. Ct. 2011 at 2025).

119. *Id.* at 2459.

120. *See id.* at 2473 ("That Alabama and Arkansas can count to 29 by including these possibly (or probably) inadvertent legislative outcomes does not preclude our determination that mandatory life without parole for juveniles violates the Eighth Amendment.").

121. Kennedy v. Louisiana, 554 U.S. 407, 459 (Alito, J., dissenting). While two of the legislative initiatives had failed by the time *Kennedy* was decided, Justice Alito argued that "there is no evidence of which I am aware that these legislative initiatives failed because the proposed laws were viewed as inconsistent with our society's standards of decency. On the contrary, the available evidence suggests otherwise." *Id.* at 458.

122. *Id.* at 456.

> tors, and at least 12 States have enacted residency restrictions for sex offenders.[123]

These "changes in our society's thinking since *Coker* was decided"[124] are consistent with contemporary society believing that child rapists deserve harsher punishment than was believed appropriate thirty years earlier.[125]

Just as there is room for substantial dispute about which jurisdictions should count in the tallying of legislation, so too is there room for disagreement with respect to the sentencing decisions of judges and juries. For example, the Court pointed out in *Miller* that one can hardly expect a low frequency of the imposition of life without parole on juveniles when the sentence is mandatory in some circumstances.[126] Imposition of a mandatory punishment does not show that the sentencer morally endorses the punishment; rather, it shows the sentencer had no choice but to impose the punishment, regardless of the sentencer's moral views. One can make a similar argument about the frequency with which juries impose the death penalty in jurisdictions with "death-qualified" juries. When potential jurors who would refuse to impose the death penalty because they consider it immoral are routinely excluded from capital juries,[127] it becomes difficult to argue that the willingness of these vetted juries to impose the death penalty demonstrates a moral consensus in support of capital punishment.[128]

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123. *Id.* at 455-57 (footnotes omitted) (citation omitted).

124. *Id.* at 455.

125. Note that this is the converse of the position put forward by Justice Scalia that abolitionist states should not be included as objective indicia of a prohibition about subspecies of the death penalty. *See* Roper v. Simmons, 543 U.S. 551, 609 (2005) (Scalia, J., dissenting); *supra* text accompanying note 117. According to Justice Scalia, the fact that the legislature had declared a judgment against the death penalty in general did not indicate a judgment against the death penalty as applied to mentally retarded or juvenile offenders (despite this being a lesser included death penalty, as it were, with the general law applying to the particular punishment practice being challenged). But for Justice Alito, the general trend towards harsher treatment of child sex offenders *is* relevant to determining whether there is a consensus against capital child-rape laws—despite the fact that the new laws *do not* apply to the particular punishment practice being challenged.

126. Miller v. Alabama, 132 S. Ct. 2455, 2471 n.10 (2012).

127. *See, e.g.*, Richard Salgado, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green, 2005 BYU L. REV. 519, 519-20 (2005) ("Prosecutorial preference for death-qualifying a jury—preemptively removing potential jurors who 'would automatically vote against the imposition of capital punishment' or would otherwise be unable to perform their sentencing duties as jurors in a capital case—is well recognized among criminal law scholars and practitioners.").

128. The Supreme Court ruled in *Witherspoon v. Illinois* that it is unconstitutional to disqualify jurors purely because they indicate opposition to the death penalty, because it would weaken the capacity of juries to reflect evolving social standards. 391 U.S. 510, 519-20 (1968). The Court diluted this rule, however, in *Adams v. Texas*, allowing for disqualification when a potential juror's views on the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 448 U.S. 38, 45 (1980).

Each of these disputes demonstrates the difficulty of even taking the first step in Objective Indicia Analysis. Simply deciding which things to count turns out to be not so simple. There is room for disagreement about whether to include opinion polls, foreign law, or even which domestic legislative and sentencing behavior to consider. With room for disagreement comes a need for individual judgment. The universe of "objective" factors turns out not to be very objective in the relevant sense—the relevant sense being, providing a basis for decisionmaking external to and independent of the subjective preferences or value judgments of individual Justices.

2. How Many States Does a Consensus Make?

Putting aside the issue of which jurisdictions to include in the analysis, there is still the vexing question of how many jurisdictions are required to constitute a consensus. I discussed the amorphous nature of the concept of "consensus" in Part II, so I will be relatively brief here. The crux is that it is unclear at which point the scales tip over from a divided opinion, with a majority on one side unless opinion is divided perfectly evenly, to a consensus against a certain punishment. The Court has applied a relatively capacious conception of "consensus," especially in relatively recent cases. Indeed, one could argue that the Court has risked conflating "consensus" with "majority." Such is the result suggested by Justice Kennedy's finding in *Kennedy* that "[t]he evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows *divided opinion but, on balance, an opinion against it*."[129] To put this criticism another way, the Court has at times confused a lack of consensus in favor of a punishment with a consensus against the punishment.

3. The Commensurability Problem

Of course, as I conceded above, the mere fact that concept of consensus has a penumbra of uncertain meaning[130] is not, by itself, a reason to discard Objective Indicia Analysis. But the uncertainty of Objective Indicia Analysis is compounded by the fact that some of the factors may weigh more heavily in the analysis than others. That the federal government does not authorize a punishment may be stronger evidence of a national consensus than lack of authorization by a state, or even several states.[131] But should a more populous state's

129. *Kennedy*, 554 U.S. at 426 (emphasis added).

130. H.L.A. HART, THE CONCEPT OF LAW 124-36 (2d ed. 1994).

131. It may also arguably be weaker evidence of a national consensus. *See, e.g.*, *Kennedy*, 554 U.S. at 459 (Alito, J., dissenting) ("The Court notes that Congress has not enacted a law permitting a federal district court to impose the death penalty for the rape of a child,

view have more weight than a smaller state? And how do you compare a case in which a large number of states allow a punishment but infrequently impose it, to a case in which a small number of states impose a punishment regularly? What counts as "infrequently" or "regularly" anyway? And should a state that has not imposed a punishment for ten years count more than a state that has not imposed it in five? Or has imposed it once in the same period? How should we count a state that retains the challenged punishment and imposes it occasionally, but for which polls routinely show strong opinion against the punishment?

Even when focusing solely on legislation, there is the possibility that some jurisdictions may have greater force in determining a national consensus. Express legislation prohibiting a punishment arguably should weigh more heavily than lack of legislation authorizing the punishment. Furthermore, the Court has held that a legislative decision to prohibit a harsh punishment is especially telling, because of the general popularity of anti-crime legislation (and correlative unpopularity of legislation protecting offenders' rights).[132] Similarly, the Court has stated that "[t]he evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition."[133]

4. Total States Versus Trends

Another way in which some legislation (and therefore, some jurisdictions) can have more weight in the Objective Indicia Analysis relates to how recently the legislative action occurred. As I discussed above, it is not only the total number of states for or against a punishment that matters. The Court has also considered a consistent trend towards abandoning a punishment practice as evidence of a nascent evolving standard that would prohibit the practice. And evidence of a growing trend "might counterbalance an otherwise weak demonstration of consensus."[134] In both *Roper* and *Atkins*, the Court found that a (slim) majority of states had abandoned the death penal-

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but due to the territorial limits of the relevant federal statutes, very few rape cases, not to mention child-rape cases, are prosecuted in federal court. Congress' failure to enact a death penalty statute for this tiny set of cases is hardly evidence of Congress' assessment of our society's values." (citations omitted)).

132. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 566 (2005) (arguing that the fact that, since *Stanford*, no states had reinstated capital punishment for juveniles "carries special force in light of the general popularity of anticrime legislation"); Atkins v. Virginia, 536 U.S. 304, 315-16 (2002) ("Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.").

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

134. *Kennedy*, 554 U.S. at 431.

ty for juvenile and mentally retarded offenders respectively, and this majority position was supported by the fact there was a recent and consistent trend towards prohibiting the death penalty in these circumstances. In both those cases, then, both the total number of states and the "recent trend" cut in the same direction: towards abolition of the penalty, and therefore towards a social standard against the punishment practice. This combination of a majority of states and consistent trend convinced the Court that standards of decency were evolving towards a consensus against imposing the death penalty in the relevant circumstances.

In *Kennedy* on the other hand, according to the raw numbers, only a small minority of states authorized capital punishment for child-rape offenders. But the legislation in each of these states was of recent vintage: all six jurisdictions that authorized the death penalty for child rape[135] had enacted the relevant law within the past twelve years, and three of those six had done so within two years.[136] In the

135. The states that authorized the death penalty for child-rape in this period were Louisiana (1995), Montana (1997), Georgia (1999), Oklahoma (2006), South Carolina (2006), and Texas (2007). It is worth noting that Montana, Oklahoma, South Carolina, and Texas only authorized the death penalty if the offender had a prior rape conviction. Under Georgia's statute, child rape is a capital offense when aggravating circumstances are present; a prior rape conviction is one among many aggravating circumstances listed in the statute. *Id.* at 423. This raises the additional difficulty of how the Court should frame the relevant prevailing norm. It is at least arguable that the relevant norm relates to whether it is appropriate to impose the death penalty on a child rapist for a first offense, rather than a repeat offense. One could argue that the explicit restriction of the death penalty to repeat offenders indicates the considered view that the death penalty should *not* be imposed on those defendants for whom this is the first sex offense. There is significant evidence to suggest a norm that a second sexual offense deserves substantially more punishment than a first offense. For example, twenty-four states have a statute that imposes more severe punishment on a *second* failure to register as a sex offender, with punishments including maximums of up to twenty years (Louisiana and Nebraska) and life (Georgia). *Bradshaw v. State*, 671 S.E.2d 485, 491-92 (Ga. 2008) (holding that the mandatory sentence of life imprisonment for a second violation of the sex offender registration law constituted cruel and unusual punishment in violation of the Eighth Amendment).

136. It is also worth noting that the total number of jurisdictions should perhaps tally seven rather than six, since in 2006, Congress also passed a statute authorizing the imposition of the death penalty for persons convicted of rape in courts-martial. 10 U.S.C. § 856 (2006), *amended by* National Defense Authorization Act for Fiscal Year 2006, § 552(b), 119 Stat. 3136, 3264. The existence of the death penalty for rape in the federal military code was not mentioned in any of the ten briefs filed in *Kennedy*. *See* Linda Greenhouse, *Justice Dept. Admits Error in Not Briefing Court*, N.Y. TIMES (July 3, 2008), www.nytimes.com/2008/07/03/us/03scotus.html?_r=0. Consequently, both Justice Kennedy's opinion for the Court and Justice Alito's dissenting opinion included claims that the Congress had not authorized the death penalty for raping a child. *Kennedy*, 554 U.S. at 423; *id.* at 459 (Alito, J., dissenting). The oversight was first pointed out by civilian Air Force lawyer Dwight Sullivan three days after the decision was announced. Greenhouse, *supra*. The State of Louisiana and the U.S. Solicitor General's Office requested a rehearing in the case. The Court denied the request, instead issuing new opinions with minor amendments acknowledging that the death penalty could be imposed for rape in military trials. *See, e.g.*, *Kennedy*, 554 U.S. at 459 n.6. Calling attention to military penalties raises an additional question of commensurability, to wit: How much does the existence of a penalty under military law contribute to a national moral consensus—if at all—given that the penalty is not available under federal civilian law?

same period, no state had removed a law authorizing the death penalty for child rape. Assuming for the sake of argument that states with pending legislation should not be considered, there is nonetheless a colorable argument for the existence of a consistent trend in support of allowing child-rapists to be executed. But in *Kennedy*, unlike in *Atkins* and *Roper*, the recent trend and the total number of states in support of the punishment pulled in opposite directions. The *Kennedy* Court considered the trend data insufficient to overcome the weaker showing of a consensus in favor of the death for child-rape. Or perhaps it would be more conceptually accurate to say that the recent trend in favor of capital child-rape was insufficient to overcome the indicia suggesting a national consensus *against* capital child rape.

In sum, then, applying Objective Indicia Analysis to particular cases involves many layers of vagueness, with each layer requiring another judgment call and magnifying the room for justices to (intentionally or unintentionally) apply their own values regarding the punishment being challenged. The Court's Objective Indicia Analysis is therefore a misnomer. I can think of no method for resolving these issues of uncertain application that could be described as "objective," in the sense that it would prevent judges from imposing their own norms, or at the very least restrain them from too easily assuming that society in general shares their personal values.[137]

B. Theoretical Criticisms of Objective Indicia Analysis

In addition to the multi-vector vagueness of its application, the Court's Objective Indicia Analysis has been subjected to more theoretical, or fundamental, critiques. These include the challenge that Objective Indicia Analysis rests on an illegitimate inference from legislation to social values, that the Analysis is inconsistent with federalism, and that the Analysis allows the scope of individual rights to be defined by the very majorities against which constitutional rights are supposed to protect.

1. The Inference from Legislation to Moral Standards

The belief that legislative enactments and sentencing practices are accurate barometers of prevailing social norms is at the core of the Court's study when engaging in Objective Indicia Analysis. I argue that this belief is incorrect—that we cannot necessarily make an inference from the content of legislation (or sentencing practices) in a jurisdiction to the prevailing moral norms of the state's people. This inference, I argue, is least warranted when drawn from the *lack* of

137. For other critiques of the indeterminacy of Objective Indicia Analysis, see Jacobi, *supra* note 12, at 1089 (arguing that using state legislation to establish a national consensus "is so methodologically indeterminate as to be entirely subjective").

legislation authorizing a punishment practice, since there will often be a multitude of alternative explanations for the lack of legislative authorization. That is, it requires little imagination to construct a scenario in which a state's citizens support a punishment practice, but there is no legislation authorizing its use.

In fact, I argue that no imagination is required at all, for the circumstances of *Kennedy v. Louisiana* provide an evocative example of my point. In *Kennedy*, the Court inferred a national consensus against capital child-rape from the fact that it was not available in forty-five jurisdictions.[138] But this assumes that the *reason* for the lack of legislation in each jurisdiction is a moral standard according to which it would be immoral or unjust to execute child rapists. We have enough information about at least some of these states, however, to seriously doubt that this is the case—and enough information to show that there was simply no causal connection between the content of legislation and community standards.

Consider Florida. The Florida legislature authorized the death penalty for child rape several decades ago, but the law was struck down as unconstitutional by the Florida Supreme Court in *Buford v. State*.[139] The Florida Supreme Court relied on the United States Supreme Court decision in *Coker v. Georgia*, which held that the death penalty was disproportionate to the rape of an *adult* woman and therefore violated the Eighth Amendment.[140] The Florida Supreme Court stated that the "reasoning of the justices in *Coker v. Georgia* compels" the conclusion that a death sentence is grossly disproportionate to the crime of child sexual assault and therefore prohibited by the federal Eighth Amendment.[141] This holding, of course, accurately predicted the U.S. Supreme Court's decision twenty-five years later in *Kennedy*.

The decision of the Supreme Court of Florida is *not*, however, a reflection of the prevailing norms in Florida about child sexual assault and the death penalty. It does not purport to be. The moral norms of Floridians played no part in the Florida Supreme Court's analysis. In fact, one could argue that the Florida Supreme Court struck down the legislation in accordance with the reasoning in *Coker despite* the fact that the prevailing norms in Florida *permitted* the death penalty for child rape—as indicated by the legislation authorizing the practice. The respondents in *Kennedy* made precisely this ar-

138. Forty-four states plus federal law, at least in the civilian context. *See Kennedy*, 554 U.S. at 423; *supra* text accompanying notes 135-36.

139. 403 So. 2d 943 (Fla. 1981). Despite this holding of unconstitutionality, the statute has not been amended.

140. Curiously, the victim in *Coker* was treated as an adult, despite being only sixteen years old, perhaps because she was married and had a child of her own. *See* Coker v. Georgia, 433 U.S. 584, 605 (1977).

141. *Buford*, 403 So. 2d at 951.

gument, claiming that Florida should be included "among those States that permit the death penalty for child rape"[142] when evaluating the objective indicia of a national consensus. Justice Kennedy failed to substantively address this specific claim, merely pointing out that "[d]efinitive resolution of state-law issues is for the States' own courts, and there may be disagreement over the statistics."[143] Despite these disagreements, Justice Kennedy asserted that the statistics "allow us to make certain comparisons with the data cited in the *Atkins*, *Roper*, and *Enmund* cases."[144] Given the relative numbers, one jurisdiction more or less would not affect the overall conclusions to be drawn from that comparison.

The claim that Florida should be included in the statistics, however, suggests an issue that extends beyond the inclusion of one state: it calls into question the Court's general inference from an absence of legislation authorizing a penal practice to the existence of a prevailing social or moral norm *prohibiting* the practice. The respondent argued that the Florida statute authorizing the death penalty for child rape was struck down as a result of the Florida Supreme Court's application of the reasoning in *Coker*, and not as a result of a prevailing norm prohibiting the execution of child rapists.[145] A similar argument was made with respect to other states in which *no* law had been enacted authorizing the practice in question. Some state legislatures interpreted *Coker* as applying to the rape of a child as well as an adult woman.[146] A belief in the unconstitutionality of such a law amply explains the fact that legislation to that effect was never passed—it would be both pointless (and costly) to enact legislation likely to be struck down, as well as a possible violation of the legislature's duty of fidelity to the Constitution. Given an independent sufficient explanation for the absence of the death penalty for child rape, it is inappropriate to infer a prevailing norm prohibiting the practice in those states.

Justice Kennedy's response to this argument is sophistry at its best—which is to say, sophistry at its worst. First, Justice Kennedy points out that the *Coker* "opinion does not speak to the constitutionality of the death penalty for child rape, an issue not then before the Court."[147] To read *Coker* as declaring the execution of child rapists unconstitutional is to have "an erroneous understanding of this Court's Eighth Amendment jurisprudence."[148] The state legislatures, furthermore, had no excuse for making this mistake. The state courts,

142. *Kennedy*, 554 U.S. at 424.
143. *Id.* at 425.
144. *Id.*
145. *Id.* at 428-31.
146. *Id.*
147. *Id.* at 428.
148. *Id.* at 426.

"to which the state legislators look for guidance on these matters . . . have been *uniform* in concluding that *Coker* did not address the constitutionality of the death penalty for the crime of child rape."[149]

While Justice Kennedy's assertion about the rationale of *Coker*, and the conclusions of the state courts on the matter, may be true in a narrow and technical sense, it is both misleading and beside the point. The relevant issue is not whether *Coker* declared unconstitutional the death penalty for child rape. The relevant issue is whether, as a result of the *reasoning* of *Coker*, state legislatures could or should have formed the belief that the Supreme Court would strike down any legislation they passed authorizing the death penalty for child rape. This is precisely the sort of predictive endeavor we would expect of a state legislature acting in good faith that is genuinely concerned with the constitutional restrictions that apply to the exercise of state legislative power. It was *entirely reasonable* in the wake of *Coker* to predict that a law authorizing the death penalty for child rape would be held to violate the Eighth Amendment's Cruel and Unusual Punishment Clause. *Buford* is a case in point. Justice Kennedy is correct, as far as it goes, that the *Buford* Court acknowledged that *Coker* only dealt with the crime of raping an adult woman. But the *Buford* Court also held that, more importantly, the reasoning enunciated in *Coker* compelled the conclusion that executing child rapists was constitutionally disproportionate and excessive punishment.[150]

Nor is *Buford* the only case in point: in *Kennedy* itself, the Supreme Court (at its first opportunity) struck down the death penalty for child rape, just as predicted by the *Buford* Court in Florida and by those state legislatures with an "erroneous understanding" of the Supreme Court's Eighth Amendment jurisprudence.[151] There is a certain irony (to say the least) in describing as "unsound"[152] a state legislature's belief that a child-rape death penalty statute would be struck down, in the very same opinion in which the Court strikes down the first child-rape death penalty statute to come before it.[153]

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149. *Id.* at 429 (emphasis added). Justice Kennedy admitted that "[t]here is, to be sure, some contrary authority," but nonetheless asserted that the courts have been uniform in their conclusions by dismissing the contrary authority as either dicta, or as the "decision of a state intermediate court that has been superseded by a more specific statement of the law by the State's supreme court." *Id.* at 430.

150. Buford v. State, 403 So. 2d 943, 951 (Fla. 1981).

151. *Kennedy*, 554 U.S. at 426.

152. *Id.* at 427.

153. It is worth keeping this point in mind when considering the ramifications of the *Kennedy* case itself. The Court frames its conclusion as requiring "adherence to a rule reserving its use, at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim." *Id.* at 447. This indicates, quite strongly, that the Court would strike down any state legislation authorizing the death penalty for some crime against individuals, other than child rape, in which no one was killed. The only issue before the Court, however, was whether the death penalty could be constitutionally imposed upon a child rapist. The reference to a rule reserving its use for crimes that take

Justice Kennedy supports his position on this issue by casting the argument about legislative motive as mere speculation:

> Respondent cites no reliable data to indicate that state legislatures have read *Coker* to bar capital punishment for child rape and, for this reason, have been deterred from passing applicable death penalty legislation. In the absence of evidence from those States where legislation has been proposed but not enacted *we refuse to speculate about the motivations and concerns of particular state legislators*.[154]

This is an important insight—but one that actually undercuts the methodology Justice Kennedy (and the Court) employs. In the absence of evidence, we should not simply presume that state legislatures were motivated by particular concerns. We should not presume, for instance, that particular state legislatures would have authorized the death penalty for child rape but chose not to because they believed the legislation would be struck down. Yet this reasoning cuts both ways. We should similarly refrain from presuming that the absence of relevant legislation is the result of a prevailing moral norm prohibiting the execution of child rapists.

There are many factors that could explain the absence of legislation authorizing the death penalty for child rapists despite the absence of a prevailing norm to the effect that such a law would be disproportionate and therefore unjust. A prediction that the legislation would be declared unconstitutional is only one explanatory factor, albeit a particularly plausible factor in this instance. Expanding the death penalty to include child rape may be considered too expensive. A small number of suitably placed representatives could stop a proposed law in committee because it violated *their* moral norms (despite being supported by a large majority of the state's residents). The issue may be bitterly contested within the state, so that there is no consensus either for or against executing child rapists. Given these other plausible explanations for the absence of relevant laws, the Court is wrong to automatically infer from the absence of legislative authorization a prevailing norm prohibiting the death penalty for child rape.

In other words, when the Court draws inferences from the content of legislation to the existence of moral norms, that inference involves speculating about the motives and concerns of particular state legislators. The enterprise of Objective Indicia Analysis rests, ultimately

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the life of the victim can therefore be construed as *dicta*. Should a well-intentioned legislature, facing an electorate demanding a non-fatal crime be punishable by death but desiring to comply with the Constitution, comply with this rule?

154. *Id.* at 429 (emphasis added).

and fundamentally, on this speculation. To borrow from Bentham, Objective Indicia Analysis is speculation upon stilts.[155]

2. The Objection from Federalism

The inherently speculative nature of Objective Indicia Analysis, and its consequent inability to accurately capture prevailing social norms, is not the only conceptual problem with the Court's approach. Were this the only issue, we could resolve it by engaging a mechanism that more accurately captured community moral standards. We could, for example, conduct careful and sophisticated surveys of people's attitudes about what punishments are permissible and about which punishments are proportional to what crimes.[156] But I suspect that direct use of opinion poll data, no matter how sophisticated, would merely serve to increase criticism of the Court's Objective Indicia Analysis. For even if legislative enactments and sentencing decisions were an accurate mechanism for determining the prevailing majority (or consensus) sentiment, these sentiments are fundamentally the wrong target. That is, the meaning of a constitutional provision should not turn upon the prevailing sentiments of contemporary opinion, whether measured directly or via legislative action and sentencing decisions.

One ground of criticism of the national consensus approach is that it is "contrary to basic notions of federalism."[157] Tonja Jacobi argues that the search for a national consensus undermines both the federal-state balance and "horizontal federalism."[158] The federal-state balance is compromised because "the incorporation of a wholesale ban on a type of [punishment] in the U.S. Constitution eliminates the capacity of state regulation in this regard."[159] Horizontal federalism is affected by allowing the legislatures (or citizens) of some states to dictate the legislative capacity of other states.[160]

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155. Jeremy Bentham, *Nonsense Upon Stilts*, *in* THE COLLECTED WORKS OF JEREMY BENTHAM, RIGHTS, REPRESENTATION, AND REFORM: NONSENSE UPON STILTS AND OTHER WRITINGS ON THE FRENCH REVOLUTION 317 (Philip Schofield et al. eds., 2002).

156. For discussion of the use of empirical studies to determine moral norms, see generally Shaun Nichols & Joshua Knobe, *Moral Responsibility and Determinism: The Cognitive Science of Folk Intuitions*, 41 NOÛS 663 (2007). For empirical work on moral intuitions and criminal law and sentencing, see, for example, Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007). There have, of course, been a great many opinion polls about capital punishment. *See, e.g.*, Jacobi, *supra* note 12, at 1116-17 & nn.127-37 (citing state and national opinion polls about the execution of juveniles and mentally retarded offenders). Jacobi argues that "[t]his admittedly incomplete evidence suggests there may be a large consensus against the execution of both juveniles and the mentally retarded, even among states that do not have legislation that exempts those defendants." *Id.* at 1117.

157. Jacobi, *supra* note 12, at 1089.

158. *Id.* at 1105 n.69 ("Horizontal federalism refers to the principle of the mutual independence of institutions at the same level of government, particularly among states.").

159. *Id.* at 1105.

160. *See id.*

Jacobi argues that "the notion of constitutionally enshrining popular views in the form of judicial aggregation of a majority of states' preferences" is contrary to the ideal that federalism protects against the tyranny of the majority.[161] In fact, it may even allow for tyranny of the minority. To the extent that consensus requires more than a bare majority, a "minority bloc" of states is capable of "consistently defining the constitutional landscape for the remainder."[162] And according to Jacobi, giving some states the power to take away legislative authority from other states is exacerbated by the fact that "constitutionally enshrining a consensus creates an irreversible ratchet, which cannot be undone by future changes in state legislation."[163]

I do not find the "irreversible ratchet" argument persuasive in this context. Imagine that, tomorrow, every state in the Union simultaneously enacted legislation explicitly endorsing some punishment practice. According to Objective Indicia Analysis, this would be objective evidence of a shift in attitudes; it would be evidence that there was now a national consensus in favor of the moral acceptability of the newly authorized punishment. There is nothing in the notion of looking at legislative action or popular opinion that requires a one-way ratchet; the prevailing norms in the future need not be less severe than the currently prevailing norms.[164]

This rebuttal of the "irreversible ratchet" creates its own problems, however. Under the aegis of Objective Indicia Analysis, state legislatures could not only curtail other states, they could also constitutionally endorse their own actions. At least in theory, by acting together, states could constitutionalize their enactments—with the constitutional validity of those enactments ensured by the very fact of having been enacted by a sufficient number of states.

3. The Majoritarian Difficulty

Jacobi's federalism argument applies mainly to the Court's current conception of Objective Indicia Analysis, which posits legislative enactments as the primary indicium of prevailing norms, and to a lesser extent, the alternative version of the approach in which norms are assessed on a state-by-state basis. But, as the "irreversible ratch-

161. *Id.* at 1106.

162. *Id.* at 1111. Jacobi goes further and argues that a single state could restrict the legislative capacity of all other states since "at some point the addition of a state will constitute the tipping point, at which a previously constitutional type of [punishment] is rendered unconstitutional by the action of one additional state legislature." *Id.*

163. *Id.* at 1106.

164. The term "evolving standards" is misleading in this regard. The word "evolving" evokes the idea that community standards are following a set or pre-ordained trajectory. I argue, however, that evolving standards are correctly understood as the changing standards that society accepts from time to time. It is conceptually possible that a "maturing" society could come to realize that maximizing legitimate penological goals requires harsher punishment than was previously realized.

et" discussion indicates, Jacobi's federalism concerns are connected to the problem of tying the meaning of a constitutional right to the views of the public. John Stinneford reflects the concerns of several commentators[165] by arguing that

> the evolving standards of decency test also suffers from a deeper theoretical problem, in that it appears to make the rights of criminal defendants dependent upon public opinion. Individual rights—the right to free exercise of religion and the right to free speech, for example—are typically thought to be necessary to protect unpopular individuals or groups when public opinion becomes enflamed against them. By contrast, the evolving standards of decency test only lets the Cruel and Unusual Punishments Clause come into play after public opinion has already turned in favor of, not against, criminal defendants. . . .
>
> Because the evolving standards of decency test ties the meaning of the Cruel and Unusual Punishment Clause to public opinion, the Eighth Amendment provides little protection when public opinion becomes enflamed and more prone to cruelty.[166]

This is a powerful objection. Corinna Lain states the objection in even more powerful language than Stinneford: "Explicitly majoritarian doctrine shatters the conventional understanding of the Court as a countermajoritarian institution, challenges the theoretical underpinnings of judicial review, and casts the story of 'Our Federalism' in an entirely new light. It shakes the bedrock principle of constitutional law."[167]

If this challenge correctly portrays the Supreme Court's interpretation of the Eighth Amendment, then the Amendment is self-defeating. It merely prohibits the majority from imposing all punishments except those the majority approves of. The Court appears to

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165. *See* Jacobi, *supra* note 12, at 1113 ("[D]eclaring an action unconstitutional because a significant number of states prohibit the practice leaves the Supreme Court enforcing constitutional protections only in cases where they are least needed."); Susan Raeker-Jordan, *A Pro-Death, Self-Fulfilling Constitutional Construct: The Supreme Court's Evolving Standard of Decency for the Death Penalty,* 23 HASTINGS CONST. L.Q. 455, 556 (1996).

166. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1753-54 (2008) (footnotes omitted). In support of the proposition that the Bill of Rights is typically understood as a protection against the tyranny of the majority, Stinneford cites, for example, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."), and 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 982, at 697 (Carolina Academic Press 1987) (1833) ("[A] bill of rights is an important protection against unjust and oppressive conduct on the part of the majority of the people themselves.").

167. Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 369-70 (2009) (footnote omitted). Lain argues that majoritarian doctrine is not restricted to the Eighth Amendment, a position that I largely agree with except for two important caveats. I discuss those caveats below.

be trapped in a dilemma by the evolving standards of decency paradigm. On the one hand, the Court cannot simply impose its own view about what punishment is appropriate, since the Court's view may not align with the community's prevailing norms. On the other hand, if the Court *does* apply the community's prevailing norms, it neuters the Eighth Amendment by allowing the community to set its own standards of cruelty.[168]

But despite its force, this position involves a crucial error—a subtle yet decisive mistake that previous commentators have failed to recognize. Critics such as Stinneford pose the majoritarian quandary as a "deeper theoretical problem" for the "*evolving standards of decency test*." [169] However, the problem actually lies with the Objective Indicia Analysis mechanism for identifying evolving standards, not with the evolving standards approach per se. The two are not identical; there is conceptual space between evolving standards and objective indicia. As I argue below, they are in fact different *kinds* of constitutional rules. The evolving standards principle is an example of what Berman calls "constitutional operative propositions," while Objective Indicia Analysis (indeed, the standard approach more generally) is a "constitutional decision rule."[170]

The mistake made by those who argue that the evolving standards of decency test allows public opinion to define defendants' rights is to conflate evolving standards and objective indicia. Once we recognize the difference, and keep the two separate, it becomes clear that we can (and should) jettison Objective Indicia Analysis, but retain the principle that the Eighth Amendment should be understood in light of society's evolving standards. I develop the argument for prying apart evolving standards of decency and Objective Indicia Analysis in Part IV of this Article.

4. Meaning Versus Expected Application

A further weakness of Objective Indicia Analysis is that it makes the mistake of equating meaning with expected application. The distinction between meaning and application has been used as a powerful critique of some schools of originalism (in which context, of course, the distinction is between original meaning and original expected ap-

168. This dilemma is expressed (presumably inadvertently) in *Gregg v. Georgia*'s requirements that the Court should "reflect the public attitude toward a given sanction," but should not "become embroiled in the passions of the day." 428 U.S. 153, 173, 175 (1976) (quoting Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)).

169. Stinneford, *supra* note 166, at 1753 (emphasis added).

170. *See generally* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004). Berman defines constitutional operative propositions as "essentially, judge-interpreted constitutional meaning," and defines constitutional decision rules as "rules that direct courts how to decide whether a given operative proposition has been, or will be, complied with." *Id.* at 51.

plication).[171] I suggest that Objective Indicia Analysis involves a contemporary version of this mistake—that is, Objective Indicia Analysis confuses current meaning with current expected application.

Some originalists, when arguing for a particular understanding of a piece of constitutional text, point to the way the text was originally *applied* as demonstrating what the text originally *meant*. As Balkin describes it, "[o]riginal expected application asks how people living at the time the text was adopted would have expected it would be applied using language in its ordinary sense (along with any legal terms of art)."[172] But the expected result of applying a piece of text need not correlate with the meaning of the text. Ronald Dworkin explains the difference between meaning and expected application as follows:

> This is the crucial distinction between what some official intended to *say* in enacting the language they used, and what they intended—or expected, or hoped—would be the *consequence* of their saying it. Suppose a boss tells his manager (without winking) to hire the most qualified applicant for a new job. The boss might think it obvious that his own son, who is an applicant, is the most qualified; indeed he might not have given the instruction unless he was confident that the manager would think so too. Nevertheless, what the boss *said*, and *intended* to say, was that the most qualified applicant should be hired, and if the manager thought some other applicant better qualified, but hired the boss's son to save his own job, he would not be following the standard the boss had intended to lay down.[173]

Similarly, when we attempt to discern the original intended *meaning* of the Cruel and Unusual Punishment Clause, or any other constitutional text, we should not be "limited to those applications specifically intended or expected by the framers and adopters of the constitutional text."[174] Instead, the *meaning* of the text is found in the concepts and underlying principles embodied in the text.

When the Supreme Court looks to objective indicia in an attempt to determine the meaning of cruel and unusual punishment, the Court is actually considering the current *expected application* of the Eighth Amendment. It is looking at data about what society *thinks* about the meaning of the Eighth Amendment, and consequently, what society *expects* should be the result of applying the Eighth Amendment. But the majority of society could be wrong about the

171. *See, e.g.*, Ronald Dworkin, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 116-17 (Amy Guttman ed., 1997) (distinguishing between semantic originalism and expectations originalism); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295-97 (2007).

172. Balkin, *supra* note 171, at 296.

173. Dworkin, *supra* note 171, at 116-17.

174. Balkin, *supra* note 171, at 295.

meaning of the Eighth Amendment. The core concept—the *meaning*—of the Cruel and Unusual Punishment Clause is that punishment ought not be excessive. We should not presume that what members of society consider to be excessive (or not) is automatically so.

C. Criticisms of the Union of Objective Indicia Analysis and Independent Judgment Analysis

Before delving fully into the project of differentiating evolving standards and objective indicia, one other fundamental problem with the Court's standard model of determining categorical Eighth Amendment cases must be mentioned. As I outlined in Part II, the standard model comprises both Objective Indicia Analysis and Independent Judgment Analysis. The Court has insisted that Objective Indicia Analysis is not dispositive. Depending on which case you read, either objective indicia are used to confirm the Court's independent judgment about the challenged punishment, or the Court applies its independent judgment to determine whether there is reason to depart from the national consensus.

But if the objective indicia of national consensus is not dispositive—if the Court can depart from the objectively determined prevailing norms whenever, in its own independent judgment, there is reason to do so—then it is unclear how the Objective Indicia Analysis provides a meaningful constraint on independent, subjective judicial morals. The Court's application of its independent judgment negates the raison d'être of Objective Indicia Analysis.

IV. SEPARATING EVOLVING STANDARDS FROM OBJECTIVE INDICIA ANALYSIS

To understand the non-identical relationship between evolving standards and objective indicia, let us return to the beginning. The basic principle by which the Supreme Court interprets the Eighth Amendment is, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[175] The primary original justifications for this principle were that "the words of the Amendment are not precise, and that their scope is not static."[176]

The Eighth Amendment is not, of course, the only portion of the U.S. Constitution that fits the description of having imprecise language and dynamic scope. It is a commonplace that much of the Constitution, especially those sections that protect individual rights, consists of broad language and often appeals to moral concepts. Nor is the Eighth Amendment the sole subject of the exhortation that the

175. Trop v. Dulles, 356 U.S. 86, 101 (1958).
176. *Id.* at 100-01.

Constitution's meaning should be determined according to contemporary attitudes and understandings, rather than by reference to the attitudes and understandings of the framing generation. This claim is nothing more than a denial of originalism—in fact, it is something less. It is a denial of a subset of originalism, in which both the meaning and application of constitutional provisions are set at the time the provisions are adopted. It rules out only the flavor of originalism that Balkin and others call "original expected application."[177] Understood as such, it is clear that the evolving standards principle is not unique to the Eighth Amendment. It is, rather, a ubiquitous (though disputed) principle of constitutional interpretation.[178]

We can see the unexceptional nature of the evolving standards approach by comparing the Court's comments about how the Eighth Amendment should be interpreted with statements by the Court about other constitutional provisions. Chief Justice Burger stated that the scope of the Cruel and Unusual Punishment Clause varied not because the concept of cruelty changed, but because society's perceptions of cruelty evolved. In other words, "[t]he standard itself remains the same, but its applicability must change as the basic mores of society change."[179] To take one example for comparison, this is strikingly similar to Chief Justice Sutherland's declaration, in the context of the Constitutional rights to liberty and property, that "while the meaning of constitutional guaranties never varies, the

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177. BALKIN, *supra* note 4, at 6-7.

178. Lain makes a similar claim in her excellent article, *The Unexceptionalism of "Evolving Standards," supra* note 167, at 368-69. But Lain's claim is different from mine—and, I believe, mistaken—in two important respects. First, Lain makes the same mistake as Stinneford in conflating evolving standards and objective indicia. Lain claims to be demonstrating the unexceptionalism of the former, but actually addresses the unexceptionalism of the latter. She argues that

> death penalty scholars routinely assume that the sort of state nose-counting that the Supreme Court does under the "evolving standards" doctrine does not occur elsewhere. In the larger academy, too, the reigning assumption is that explicitly majoritarian doctrine is an exclusively Eighth Amendment affair—an approach limited to the Cruel and Unusual Punishments Clause and the death penalty cases that dominate this corner of constitutional law.

Id. at 367-68. The state nose-counting to which Lain refers is Objective Indicia Analysis, and not the evolving standards approach per se. This is not to say that Lain's *actual* conclusion—that Objective Indicia Analysis is applied outside the Eighth Amendment—is wrong. Lain marshals a compelling case for the unexceptionalism of Objective Indicia Analysis. But I am arguing that the evolving standards principle is a much broader general principle of constitutional interpretation than its objective indicia gloss. And therefore, I argue that evolving standards is far more ubiquitous than Lain suggests. My second quibble with Lain relates to the defense (or purported defense) of the Court's majoritarian Eighth Amendment doctrine. Lain says that "the leading defense of the 'evolving standards' doctrine" is the word "unusual" in the Eighth Amendment's text. *Id.* at 367 n.5, 369 n.10. But I argue that the Court has also justified its evolving standards approach either by reference to the term "cruel" and, more importantly, to the concept of proportionality derived from the Cruel and Unusual Punishments Clause as a whole.

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

scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."[180]

Similarly, we can get a sense of the ubiquity of the general evolving standards approach through a simple word replacement exercise. I would be surprised if any of the advocates of applying evolving standards to the Eighth Amendment would be troubled by the following sentiment: "The Equal Protection Clause must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." In this context, the decency at issue would relate to equal treatment rather than punishment, but in either case, the notion invoked is that of evolving moral norms.

The Equal Protection Clause parallel is useful in another important way: it demonstrates that the evolving standards approach does not necessarily entail Objective Indicia Analysis. Those who endorse the idea that the Equal Protection Clause should be understood in light of evolving moral standards of equal dignity do *not* insist that the Court should locate those standards in the quantity of state legislative and executive action. We would think it strange in the extreme, I suggest, were the Court to simply count the number of states that prohibited, for instance, interracial marriage and determine the constitutional valence of the practice by reference to its prevalence.

The solution—or at least the key to the solution—to interpreting the Cruel and Unusual Punishment Clause can be found in this contrast with the Equal Protection Clause. The Court determines equal protection issues not tallying jurisdictions for or against a practice, but by applying different "tiers of scrutiny" to different classes of legislative distinctions. The Court applies strict scrutiny to laws that distinguish on the basis of suspect categories (paradigmatically race),[181] intermediate scrutiny to classes such as gender,[182] and rational basis review to other, non-suspect classifications.[183] The tiers of scrutiny doctrine reflects contemporary moral values—evolving standards of decency—to the extent that the Court is informed by contemporary values in determining which classes of individuals deserve heightened review.

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180. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

181. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 719 (3d ed. 2009) ("Discrimination based on race and national origin is subjected to strict scrutiny. Also, generally, discrimination against aliens is subjected to strict scrutiny, although there are several exceptions.").

182. *Id.* ("Intermediate scrutiny is used for discrimination based on gender and for discrimination against non-marital children.").

183. *Id.* at 720 ("All laws not subjected to strict or intermediate scrutiny are evaluated under the rational basis test.").

V. TIERS OF SCRUTINY UNDER THE EIGHTH AMENDMENT

The Court should apply a tiers-of-scrutiny approach to the Eighth Amendment that mirrors its method for determining issues of equal protection. Society's evolving standards should be located in the general principles of crime, culpability, and punishment, rather than state legislation regarding the particular punishment practice in question. In certain classes of crimes, punishments, or criminals where we have reason to be skeptical that the punishment is proportional to the crime (the heart of the Eighth Amendment's prohibition), the Court would apply strict scrutiny to the class in question. Examples of the classes of circumstances in which strict scrutiny would apply include where the punishment is absolute and incapable of being calibrated to the particular offense or offender (such as the death penalty and life without parole), where the defendant has diminished capacities and therefore presumptively diminished culpability (such as minors and the mentally ill), and where the crime is one in which the traditional culpability does not apply (such as strict liability offenses, and offenses of omission such as failure to register as a sex offender).

The Court should give up its present practice of searching for norms specific to the case at hand, such as executing the mentally retarded or imposing life prison terms for failure to register as a sex offender. The Court should rather focus on tracking the evolution of the broader concepts associated with our understanding of cruel and unusual. These broader concepts can provide guidance to the Court beyond the individual values of its constituent Justices, while avoiding the peculiar paradox of determining the constitutional validity of democratically enacted legislation by reference to majority opinion. The principles can lay claim to being more than merely the idiosyncratic opinion of individual Justices. Few would argue, for example, that *in general*, juveniles and mentally retarded individuals have diminished capacity to conform their actions to the dictates of criminal law and diminished ability to understand (and potentially be deterred by) the punitive consequences of their behavior. It is also relatively uncontroversial that *as a general matter*, these characteristics result in lesser moral culpability on the part of most juveniles[184] and

184. *See, e.g.*, FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 76-80 (1998) (describing the generally accepted characteristics of juvenile development that may render youth less culpable than adults for the same behavior, including the lack of fully developed cognitive abilities and a lower capacity to control impulsiveness); Barry C. Feld, *Competence, Culpability, and Punishment: Implications of* Atkins *for Executing and Sentencing Adolescents*, 32 HOFSTRA L. REV. 463, 542 (2003) ("As a matter of crime policy, youths' developmentally diminished responsibility and limited adjudicative competence render them less culpable than adult offenders; as a matter of youth policy, adolescence is a period of rapid growth and transition, and youths are 'works in progress' who have not yet become the people they will be as adults."); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*,

mentally retarded individuals.[185] These notions are reflected in the differences in treatment of these classes of offenders under the criminal justice system. Similarly, the law treats certain categories of offenses as generally involving lesser culpability. This is reflected in the Court's refusal to allow the death penalty to be imposed for a crime other than homicide;[186] death is different as a crime as well as a punishment. Other examples of offense categories which are routinely accepted as involving less moral culpability are strict liability offenses,[187] and offenses of omission rather than commission.[188]

The disagreement arises, *inter alia*, with respect to whether there is *ever* a justification to apply a particular punishment to members of these groups. Individual juveniles, for instance, may have developed sufficiently to have capacities and culpabilities on par with adults. And even if juveniles, mentally retarded offenders, and those who commit crimes of omission are usually accepted as having lesser

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81 TEX. L. REV. 799, 825 (2003) (noting that society views young actors as less culpable than adult criminals because of their unformed and evolving moral character).

185. James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 420 (1985) (attributing reform of the criminal justice system's treatment of mentally retarded offenders to a more general movement toward fuller recognition of the rights of retarded people in all areas of American law); Lyn Entzeroth, *Constitutional Prohibition on the Execution of the Mentally Retarded Criminal Defendant*, 38 TULSA L. REV. 299, 307 (2002) (noting that the common law has recognized for centuries that mental retardation is an attribute that may affect an individual's capacity to be held liable for criminal conduct or correspondingly be subjected to criminal punishment); Case Comment, *Implementing* Atkins, 116 HARV. L. REV. 2565, 2570 (2003) (noting that mental health research "has unquestionably contributed to the existing consensus regarding the suitability of execution for the mentally retarded: many of the current state bans adopt medical definitions of mental retardation nearly word for word").

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

187. Staples v. United States, 511 U.S. 600, 616-17 (1994) ("In a system that generally requires a 'vicious will' to establish a crime, imposing severe punishments for offenses that require no *mens rea* would seem incongruous." (citation omitted)); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 841 (1999) (explaining the mitigating principle of "constitutional innocence," under which criminal punishment must be predicated on some independent culpability with regard to offense elements in order for the legislature to have the power to punish); Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1076-78 (1997) (arguing that strict liability is a genuine problem for retributive theory when it punishes morally blameless conduct); John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1105 (1999) (noting that the analysis of the *Staples* court suggested that mandatory culpability should be limited as to serious crimes but not for petty crimes).

188. *See, e.g.*, Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 385 (2008) ("Anglo-American criminal law generally has not criminalized omissions. Perhaps because of the deontological constraint against appropriating the bodies and labor of some to reduce the risks faced by others, and perhaps as well because of the difficulties in administrability, affirmative acts are rarely mandated by the criminal law."); Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207 (2009) ("The prospect of liability for 'inchoate omissions'—involving no act and no harm—exists at the frontier of the state's authority to criminalize conduct and, whether allowed or rejected, effectively determines the outer boundaries of that authority."); Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958) (noting that "our criminal law in its progress has only occasionally and almost reluctantly admitted the offense of omission within its scope").

moral culpability than others similarly situated, this does not necessarily mean that none of the legitimate penological goals will be satisfied by punishing them—perhaps even by punishing them harshly. Reasonable people can—and do—disagree about whether a certain level of punishment advances penological goals sufficiently to justify the imposition of that punishment, instead of a less harsh alternative.

The Court's Independent Judgment Analysis fails because of this reasonable disagreement. Individual Justices differ on whether there is reason to believe that the death penalty or life without parole sufficiently advance penological goals, either in general or as applied to classes of offenses or offenders. Similarly, when there is room for such disagreement, there is an argument to be made that the Court should defer to the (putatively reasonable) position taken by the state whose legislation is being challenged. The problem, of course, is that the possibility of reasonable disagreement—especially about moral issues—is so all-encompassing[189] that the logical end-point is universal deference to the legislature, resulting in the Eighth Amendment becoming a dead letter.

My alternative is that the Court should vary the degree of deference it provides to legislatures depending on the class of offenders and offenses. It is generally accepted that the most severe punishments—capital punishment and life-without-parole, both of which are final and absolute in their own way—are only appropriate and proportional to a small minority of the most culpable offenders.[190] So when a legislature authorizes one of these punishments for a category of offenders usually considered to be *less* culpable than the average offender, the Court has reason to be skeptical of the legislature's implicit claim that the punishment satisfies proportionality. The legislature in these circumstances loses the benefit of deference; it loses the presumption on the part of the Court that the punishment sufficiently satisfies legitimate penological goals. On the other hand, when a punishment does not apply to a suspect class—that is, a class for which we have reason to be skeptical that the most extreme sanctions will be proportional—then deference to the legislative judgment is appropriate. This is especially the case when the punishment involves a term of years sentence; there is room for reasonable disagreement about how to calibrate the precise number of years that is proportional to a given offense.

Heightened scrutiny could therefore take the form of placing on the state the burden of demonstrating that the harsh punishment—the death penalty or life without parole[191]—is necessary to satisfy

189. *See generally* RICHARD H. FALLON, JR, IMPLEMENTING THE CONSTITUTION (2001).

190. Proportionality requires that the worst offenses should be treated most severely, and that lesser crimes should be treated less severely, and so on.

191. Note that there are some similarities between this approach and the Court's notion that death is different. I am drawing the line (on the punishment side) at life without

legitimate penological goals. When heightened scrutiny does not apply, the state would merely have to show a rational basis for believing that the punishment is proportional or not excessive—that there is a rational basis for believing that the punishment practice advances legitimate penological goals. Given the extent to which these issues are in dispute, the level of scrutiny that the Court applies is likely to be decisive in most cases—but that should come as no surprise to anyone familiar with tiered review in other constitutional contexts.

VI. ABANDONING OBJECTIVE INDICIA

Not surprisingly, commentary on the cases handed down by the Supreme Courts at the end of its 2011 Term has centered on *National Federation of Independent Business v. Sebelius*,[192] in which the Court substantially upheld the federal Patient Protection and Affordable Care Act. But with so much attention focused on *Sebelius*, there is a risk that the significance of *Miller v. Alabama* could be lost in the kerfuffle. Three days prior to *Sebelius*, the Court decided *Miller v. Alabama*, holding that mandatory life without parole for juveniles violates the Eighth Amendment's prohibition on cruel and unusual punishment.[193] I argue that despite being narrowly framed, *Miller* indicates a fundamental shift in the Court's Eighth Amendment methodology.

Justice Kagan's opinion posits *Miller* as an exception to the methodological rule, but I argue that *Miller* signals that the Court is poised to abandon Objective Indicia Analysis across all its Eighth Amendment decisions.

A. The Miller *Decision*

In *Miller*, the Court held that mandatory life without parole for juvenile offenders violates the Eighth Amendment.[194] Justice Kagan, writing for the Court, reiterated the requirement that cruel and unusual be understood in light of evolving social standards of decency. But she eschewed the use of objective indicia to determine current social standards. Rather, Justice Kagan's opinion asserted that "the

parole, which happens to track the Court's application of the Eighth Amendment in *Graham* and *Miller*. I am also taking into account categories of offenses and offenders. This has some parallel in the Court's death penalty doctrine (the line between homicide and non-homicide for instance) and also resonates with Justice Kagan's attitude towards the Eighth Amendment, as demonstrated by her *Miller* opinion. As Justice Kagan pointed out, "if (as *Harmelin* recognized) 'death is different,' children are different too. Indeed, it is the odd legal rule that does *not* have some form of exception for children. In that context, it is no surprise that the law relating to society's harshest punishments recognizes such a distinction." Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012).

192. 132 S. Ct. 2566 (2012).

193. 132 S. Ct. 2455.

194. *Id.*

confluence of these two lines of precedent leads to the conclusion" that such sentences are unconstitutional.[195] The first line of precedent involves categorical bans on a particular punishment for a class of offenders, the most recent and relevant of which is *Graham*'s ban on life without parole for nonhomicide juvenile offenders. The second line of precedent consists of those cases prohibiting mandatory imposition of capital punishment, beginning with *Woodson v. North Carolina*.[196] From the former set of cases, Justice Kagan elicits the principle that life without parole is to juveniles as the death penalty is to adult offenders;[197] from the latter line of cases, she draws the demand for "individualized sentencing" when imposing the death penalty.[198] The syllogistic combination of these two principles leads to the Court's conclusion that imposition of life without parole on a juvenile requires consideration of individual factors, including, most importantly, the youth of the offender and the effect that has on his or her culpability.[199]

Perhaps the most striking aspect of *Miller* is Justice Kagan's assertion that Objective Indicia Analysis is inapposite in this case. She argues that *Miller* and its companion case "are different from the typical one in which we have tallied legislative enactments."[200] The typical tallying case, Justice Kagan claims, involves a categorical bar against imposing a penalty on a class of offenders or offense, whereas *Miller* "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[201]

By adopting this position, Justice Kagan avoids justifying her position by reference to the number of states that subject juveniles to mandatory life without parole; she only refers to the data to refute the State's claim that the objective indicia support upholding the punishment.[202] But she does not explicitly declare that Objective Indicia Analysis will no longer be employed in other types of Eighth Amendment cases, most notably "categorical bar" cases. There are, however, several reasons that suggest the Court will—and should—disavow Objective Indicia Analysis across the Eighth Amendment board.

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195. *Id.* at 2458.
196. 428 U.S. 280 (1976).
197. *Miller*, 132 S. Ct. at 2466.
198. *Id.* at 2468.
199. *Id.* at 2465-66.
200. *Id.* at 2471.
201. *Id.*
202. *Id.* ("In any event, the 'objective indicia' that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment.").

B. The Methodological Implications of Miller

Despite Justice Kagan's framing of *Miller* as addressing only the mandatory imposition of juvenile life without parole, there are strong indications that the Court will forsake Objective Indicia Analysis in a broader range of cases, including those involving a "categorical bar."

The Court's recent history demonstrates a steady accretion in the Eighth Amendment's reach. When the Court has imposed a bar on punishment, it has framed its holding narrowly, carefully distinguishing the set of practices to which the ban applies from the broader set of practices not affected by the holding. But when the Court has later been confronted with a punishment of the kind distinguished in a prior case, it has routinely construed the prior decision as *not* ruling that *only* the punishments banned by the prior holding are cruel and unusual. Justice Kagan's treatment of *Graham* is a case in point. She acknowledges that "*Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm."[203] But she argues that none of what *Graham* said about child offenders—"about their distinctive (and transitory) mental traits and environmental vulnerabilities"—is limited to nonhomicide.[204] These factors apply equally to juveniles convicted of homicide. Despite *Graham*'s holding being expressly limited to juvenile nonhomicide cases, the reasons that undergird *Graham*'s rationale also support a ban encompassing juvenile homicide offenders.

We can expect a similar fate for *Miller*. While the *Miller* Court limited its methodology to "process" cases, and expressly distinguished "categorical bar" cases, this line is unlikely to remain. First, Justice Kagan's argument distinguishing *Miller* from the Objective Indicia Analysis cases is unconvincing. As we have discussed, Justice Kagan argues that *Miller* is different from the typical Objective Indicia Analysis case because *Miller* involves prohibiting a process—mandatory imposition of a punishment—rather than a category of punishments. But Justice Kagan's opinion ignores the fact that the paradigmatic process case, *Woodson v. North Carolina*, itself employs Objective Indicia Analysis.[205] And none of the cases following *Woodson* suggest that Objective Indicia Analysis is inapplicable to deter-

203. *Id.* at 2465.

204. *Id.*

205. *See* Woodson v. North Carolina, 428 U.S. 280, 288 (1976) ("Central to the application of the Amendment is a determination of contemporary standards regarding the infliction of punishment. As discussed in *Gregg v. Georgia*, indicia of societal values identified in prior opinions include history and traditional usage, legislative enactments, and jury determinations." (footnotes omitted) (citation omitted)).

mining the constitutionality of mandatory punishments.[206] In other words, there is no doctrinal reason to apply a different methodology in "process" cases; the force of prior mandatory sentencing cases is quite to the contrary.

Furthermore, Justice Kagan's distinction between "categorical bar" and "process" cases is fundamentally different from the distinction employed in earlier cases in which the "standard model" was outlined. Recall that when Justice Kennedy outlined the Court's two-step approach to "categorical bar" cases in *Graham*, he distinguished "categorical bar" cases not from "process" cases, but rather cases in which the Court considers the proportionality of an *individual's* sentence "given all the circumstances of a particular case."[207]

In addition, the rationale for whether to apply Objective Indicia Analysis applies equally to both "process" and "categorical bar" cases. The Court's opinion in *Miller* affirms that the meaning of cruel and unusual is always determined in light of evolving standards of decency; the evolving standards lens applies both to substantive categories of punishment, and to the processes by which punishments are imposed those described as procedural—including mandatory imposition, such as in *Miller* itself. (The Court has never suggested, for instance, that whether the death penalty may be imposed is determined by current social mores—but whether it can be mandatory is determined by the original understanding of cruel and unusual.) In other words, whether mandatory juvenile life without parole is cruel and unusual depends on contemporary standards of decency. But the justification for Objective Indicia Analysis is that it provides a barometer of current standards of decency, based on factors independent of the Justices' individual moral preferences. It is far from self-evident, however, why the Court would require this objective guidance to determine whether a category of punishment accords with current standards, but does not need objective data to determine contemporary social views about the permissibility of punishment processes. Given the retention of the evolving standards interpretive principle, it makes little sense to reject Objective Indicia Analysis in "process" cases, but continue to employ it in "categorical bar" cases.

In combination, these two factors—the trend of extending the Eighth Amendment's application, and the weakness of justifications for cabining *Miller*'s methodology to "process" challenges—suggest that the Court is likely to follow *Miller* in declining to employ Objec-

206. *See, e.g.*, Sumner v. Shuman, 483 U.S. 66 (1987) (striking down a mandatory death penalty for murder committed while serving life without parole); Eddings v. Oklahoma, 455 U.S. 104 (1982) (holding that state courts must consider difficult upbringing as a mitigating circumstance when determining whether to impose the death penalty); Lockett v. Ohio, 438 U.S. 586 (1978) (invalidating death penalty statute for not permitting the requisite individualized consideration of mitigating circumstances).

207. Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).

tive Indicia Analysis, and that ultimately, the methodology will be abandoned entirely.

C. The Affinity Between Miller *and "Tiers of Scrutiny"*

If the Supreme Court is moving to abandon Objective Indicia Analysis, the pressing question is: what methodology will take its place? The Court's *Miller* opinion does not provide a complete answer; the essence of the Court's reasoning is simply that the result in *Miller* flows inevitably from the confluence of the two lines of precedent discussed above. The *Miller* opinion does, however, contain some hints as to how the Court will assess whether a punishment is cruel and unusual in cases that the Court cannot claim are so directly controlled by precedent. I argue that those hints indicate that the Court's evolving attitude towards the Eighth Amendment has much in common with the "tiers of scrutiny" approach.

The *Miller* Court endorses the view that the central concept of the Eighth Amendment is that punishment must be not be excessive, but instead must be proportional to the offender and the offense.[208] A punishment is excessive if it goes beyond what is necessary to achieve the legitimate penological goals of punishment, such as retribution, deterrence, and incapacitation.[209] But it is incredibly difficult to calibrate the precise level of punishment that is required (or allowed) by these justifications for a given offense or offender, and there is room for people to reasonably disagree.[210] The individual judgment portions of the Justices' opinions, which essentially consist of that Justice's judgment about whether a punishment is justified by legitimate penological goals, reflect this disagreement—hence the recourse to Objective Indicia Analysis. Because this analysis is neither objective nor indicative of social standards, we need an alternative decision rule to resolve reasonable disagreement.

The Court's opinion in *Miller* suggests a different way to resolve the issue. Justice Kagan writes that "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses *too great a risk* of disproportionate punishment."[211] This claim reflects the notion that, for some sets of punishments and offenders, we have specific reasons to be suspicious that the punishment will be disproportionate in an individual case—just as we have reason to suspect in Equal Protection analysis that distinctions based on race or gender are illegitimate. In the Eighth Amendment context, one such set is juvenile offenders, who as a class

208. *Miller*, 132 S. Ct. at 2463.

209. *See, e.g.*, *id*. at 2465-66.

210. This is especially true of cases involving a term of years, which is one reason why the Supreme Court has shown great deference to legislative determinations that a punishment of a term of years is proportional for a given offense. *See* discussion *supra* Part V.

211. *Miller*, 132 S. Ct. at 2469 (emphasis added).

lack the mental capacity of adults. As a result, "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile[s]."[212] We therefore have reason to be suspicious of a legislative determination that a harsh punishment is proportional for juvenile offenders. Moreover, the basis for treating juvenile offenders as a suspect category—their diminished capacity and moral culpability compared to adults—is both a general principle of modern law, and a view widely shared by and reflected in contemporary social standards.

VII. CONCLUSION

By holding that mandatory life without parole is cruel and unusual punishment, *Miller* continues the Supreme Court's gradual expansion of the Eighth Amendment over the past ten years. But it does so by departing from the Court's now-familiar methodology. Unlike its predecessors, *Miller* does not rely on objective indicia of evolving standards of decency to support its holding. The Court's opinion purports to distinguish *Miller* from earlier cases involving objective indicia, but this distinction will not last long. The Court, led in this sphere by Justice Kagan, is moving towards abandoning objective indicia as a mechanism for applying the Cruel and Unusual Punishments Clause. Justice Kagan has not yet set forth a fully developed alternative methodology, but her *Miller* opinion demonstrates a concern that there is an unacceptable risk that severe punishments, such as death or life without parole will be disproportionate when applied to members of classes usually treated as less culpable. The suspect classes approach I outline in this Article provides a framework to fill the methodological vacuum that will soon result from *Miller*. According to this approach, the Court would apply heightened scrutiny when considering a category of crime or offender that contemporary society and the modern legal system generally regard as involving less moral culpability. This approach not only reflects evolved standards of decency, but also provides a mechanism for deciding Eighth Amendment cases even though reasonable persons may differ about whether the punishment at issue is excessive. In doing so, the suspect classes approach allows the Court to escape the dilemma—of either allowing majority opinion or personal judicial values to dictate constitutional meaning—that manifest in the standard approach to the Eighth Amendment.

212. *Id.* at 2458.