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When Standards Collide: How the Federal Death Penalty Fails the Supreme Court's Eighth Amendment Evolving Standards of Decency Test When Applied to Puerto Rican Federal Capital Defendants

Cristina M. Quinones-Betancourt

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NOTE

WHEN STANDARDS COLLIDE: HOW THE FEDERAL DEATH PENALTY FAILS THE SUPREME COURT'S EIGHTH AMENDMENT "EVOLVING STANDARDS OF DECENCY" TEST WHEN APPLIED TO PUERTO RICAN FEDERAL CAPITAL DEFENDANTS

*Cristina M. Quiñones-Betancourt**

Although the Constitution of Puerto Rico expressly prohibits the death penalty, the U.S. federal government continues to try to impose the punishment against defendants in Puerto Rico convicted of federal capital crimes. This Note explores the constitutionality of the federal death penalty, as applied to Puerto Rican defendants, in light of the Eighth Amendment's prohibition of "cruel and unusual punishments" and the Supreme Court's Eighth Amendment "evolving standards of decency" test.

This Note focuses on several key factors to argue that the federal death penalty fails the Court's evolving standards of decency test and is, therefore, unconstitutional when applied against defendants in Puerto Rico. First, this Note observes that no court in the continental United States has ever used "objective indicia" gathered from Puerto Rican residents when determining the constitutionality of imposing the federal death penalty against defendants in Puerto Rico. Second, this Note examines Puerto Rico's unique political and cultural history to underscore the fact that Puerto Rico is so unlike any of the American states that objective indicia gathered from those states cannot be used to determine whether a national consensus opposes the imposition of the federal death penalty against capital defendants in Puerto Rico. Third, this Note em-

* B.A., *cum laude*, Le Moyne College, 2009; Candidate for J.D., Cornell Law School, 2014; Managing Editor, *Cornell Journal of Law and Public Policy*, Volume 23. I would like to thank my parents, Antonio Quiñones and Jeannette Betancourt, for their unconditional love and for teaching me to embrace my Puerto Rican heritage. I am also thankful to my brother, Gabriel Quiñones, for his unwavering love and support. I would like to express my gratitude to Professor Keir Weyble for encouraging me to pursue this note topic and for his thoughtful suggestions during the revision process. Finally, I would like to thank my colleagues on the *Cornell Journal of Law and Public Policy* and my friends at Cornell Law School for their insightful comments and suggestions.

phasizes the fact that the Puerto Rican consensus remains opposed to the application of the death penalty against Puerto Rican defendants. By analyzing these key factors within the framework of the Supreme Court’s evolving standards of decency test, this Note concludes that either the imposition of the federal death penalty against Puerto Rican defendants fails the evolving standards of decency test or the evolving standards of decency test itself is invalid and unworkable.

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INTRODUCTION

In August 2012, Edison Burgos Montes, a Puerto Rico resident, was convicted of killing his ex-girlfriend, Madelyn Semidey Morales.¹ Burgos Montes killed Morales after discovering that she was a U.S. Drug Enforcement Administration (DEA) informant and had been providing the DEA with information regarding his involvement in narcotics traf-

¹ Danica Coto, *Puerto Rico Jury Rejects Death Penalty*, HUFFINGTON POST (Sept. 27, 2012), <http://www.huffingtonpost.com/huff-wires/20120927/cb-puerto-rico-informant-slain>.

ficking.² Although the Constitution of Puerto Rico explicitly prohibits the imposition of the death penalty,³ Burgos Montes became eligible for the federal death penalty because he committed a federal capital offense under the Federal Death Penalty Act of 1994 (FDPA):⁴ intentionally killing a witness to impede the investigation or prosecution of an offense committed as part of a “continuing criminal enterprise.”⁵

The constitutionality of imposing the federal death penalty in Puerto Rico has been hotly debated since Congress first passed the FDPA.⁶ Much of this debate centers around the fact that Puerto Rico is an unincorporated territory—Congress never intended for it to become a state, thus only the most fundamental parts of the U.S. Constitution apply to its residents.⁷ Consequently, although the 3.7 million Puerto Ricans living on the island⁸ have United States citizenship⁹ and fundamental constitutional rights, such as due process,¹⁰ they lack some of the most basic rights available to American citizens living in the states.¹¹ One of the most important rights Puerto Rico residents lack is the right to vote in the presidential elections.¹² In addition, Puerto Rico is not represented by a voting member of Congress but rather by a resident commissioner who lacks congressional voting power.¹³ Yet, although Puerto Rico has no voice in the U.S. federal lawmaking process, many federal laws still apply to its residents, including the highly controversial FDPA.¹⁴

² *Id.*

³ P.R. CONST. art. II, § 7.

⁴ Pub. L. No. 103-322, §§ 60001–60026, 108 Stat. 1796 (codified as amended at 18 U.S.C. §§ 3591–3598 (2006) and in scattered sections of 18 U.S.C.).

⁵ 18 U.S.C. § 3591(b)(2) (2006).

⁶ See, e.g., Ricardo Alfonso, *The Imposition of the Death Penalty in Puerto Rico: A Human Rights Crisis in the Path Towards Self-Determination*, 76 REV. JUR. U.P.R. 1077 (2007); Monique Marie Gallien, Note, “No Existira la Pena de Muerte”: Does the United States Violate Regional Customary Law by Imposing the Death Penalty on Citizens of Puerto Rico?, 30 BROOK. J. INT’L L. 727 (2005); Elizabeth Vicens, *Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350 (2005).

⁷ See *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922).

⁸ *Population; Total in Puerto Rico*, TRADING ECON., <http://www.tradingeconomics.com/puerto-rico/population-total-wb-data.html> (last visited Aug. 18, 2013).

⁹ 8 U.S.C. § 1402 (2006).

¹⁰ See *Balzac*, 258 U.S. at 312–13.

¹¹ See *id.* Throughout this Note, the term “states” refers to the individual American states.

¹² *Iguartua de la Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) (holding that Puerto Rico residents have no right under Article II of the U.S. Constitution to vote in presidential elections because the President is selected by electors chosen by each state).

¹³ See 48 U.S.C. § 891 (2006). For a more detailed history of the Resident Commissioner position, see William R. Tansill, *The Resident Commissioner to the United States from Puerto Rico: An Historical Perspective*, 47 REV. JUR. U.P.R. 68 (1978).

¹⁴ Interestingly, Congress has not made all federal laws applicable in Puerto Rico. For example, Puerto Rico residents are exempt from paying federal taxes. 48 U.S.C. § 734 (2006).

The majority of Puerto Rico's residents remain opposed to the application of the federal death penalty against Puerto Rican defendants on moral, historical, and cultural grounds.¹⁵ Moreover, because the Constitution of Puerto Rico specifically states that the "death penalty shall not exist,"¹⁶ Puerto Rican residents maintain that, by attempting to impose the death penalty, Congress has violated the compact¹⁷ made between Puerto Rico and the United States in 1950 under the Puerto Rico Federal Relations Act (PRFRA), commonly known as the Jones Act,¹⁸ which granted the Puerto Rican government the power to author its own constitution.¹⁹ The Puerto Rican consensus against the application of the death penalty against Puerto Rican defendants is further demonstrated by the fact that no Puerto Rican jury has ever sentenced a Puerto Rican defendant to death under the FDPA, regardless of the severity of the defendant's crime.²⁰ In keeping with this tradition, on September 27, 2012, a Puerto Rican jury sentenced Burgos Montes to life in prison for Morales's murder.²¹

The federal death penalty has already survived constitutional challenges raised by stateside defendants alleging that the imposition of the penalty violates federal capital defendants' Fifth Amendment due process rights.²² Likewise, in *United States v. Acosta-Martinez*, Puerto Rican defendants Hector Oscar Acosta-Martinez and Joel Rivera-Alejandro unsuccessfully raised a due process challenge to the application of the federal death penalty in Puerto Rico upon receiving notice that the prose-

¹⁵ See, e.g., Alfonso, *supra* note 6, at 1093 (2007) ("As the First Circuit recognized, there are widespread political, philosophical, cultural, as well as religious views, supporting consensus in Puerto Rico condemning the death penalty."). The term "Puerto Rican defendant" and other similar terms are used throughout this Note to refer to defendants charged with committing federal capital crimes in Puerto Rico.

¹⁶ P.R. CONST. art. II, § 7.

¹⁷ See, e.g., *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 312 (D.P.R. 2000) ("[A]s part of the bilateral agreement governing the federal government's relations with Puerto Rico, the Commonwealth Constitution, even if considered a federal statute, may not be unilaterally altered by Congress."); Alfonso, *supra* note 6, at 1087 (noting that the U.S. government's ability to impose the death penalty against Puerto Rican defendants makes the existence of a compact "simply a castle in the air").

¹⁸ Pub. L. No. 81-600, 64 Stat. 319 (codified at 48 U.S.C. § 731b (2006)).

¹⁹ 48 U.S.C. § 731b (2006).

²⁰ Francisco Rodríguez Burns, *Edison Burgos Montes Sentenciado a Cadena Perpetua*, PRIMERA HORA (Sept. 27, 2012), <http://www.primerahora.com/edisonburgosmontes-sentenciadoacadenerpetua-703835.html>.

²¹ *Id.*

²² See *United States v. Fell*, 360 F.3d 135, 145–46 (2d Cir. 2004) (holding that admitting evidence that is ordinarily inadmissible under the Federal Rules of Evidence during the penalty phase of an FDPA capital trial does not automatically render the statute unconstitutional because the FDPA requires that evidence be excluded where its probative value is outweighed by its prejudicial nature); *United States v. Quinones*, 313 F.3d 49, 66–70 (2d Cir. 2002) (holding that the FDPA does not violate Fifth Amendment due process rights because there is no fundamental right to a continual opportunity for exoneration).

cution intended to seek the death penalty against them.²³ In *Acosta-Martinez*, the defendants argued that Congress had an obligation to respect the prohibition of the death penalty provided by the Constitution of Puerto Rico, in part, because residents of Puerto Rico lack congressional representation and cannot vote in presidential elections.²⁴ While the Puerto Rico District Court agreed with the defendants,²⁵ the First Circuit Court of Appeals determined that Congress has the authority to impose penalties for federal offenses in Puerto Rico and reinstated the defendants' death penalty notice.²⁶

Although the imposition of the federal death penalty in Puerto Rico has been widely criticized on constitutional grounds, none of these criticisms have been specifically premised on the notion that the federal death penalty, as applied in Puerto Rico, violates the Eighth Amendment's prohibition of "cruel and unusual punishments"²⁷ under the Supreme Court's "evolving standards of decency" test.²⁸ This test is derived from Supreme Court precedent, which holds that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²⁹ When conducting this evolving standards of decency analysis, the Court compares each state's most reliable "objective indicia" of societal values, which is usually comprised of state legislative and state jury sentencing data, to determine whether a national consensus opposes the application of a specific punishment upon a particular class of defendants.³⁰

This Note will argue that Puerto Rico is so politically, historically, and culturally different from the American states that a national consensus regarding the imposition of the federal death penalty in Puerto Rico cannot be determined by comparing the objective indicia gathered from Puerto Rico residents to the objective indicia gathered from the states. Thus, the imposition of the federal death penalty against Puerto Rican capital defendants can only pass constitutional muster under the Supreme Court's evolving standards of decency test if the objective indicia of societal values gathered *solely* from Puerto Rico residents fails to demonstrate an opposition to the penalty. Part I of this Note will provide a general overview of the Eighth Amendment and an in-depth analysis of the Supreme Court's evolving standards of decency test. Part II will give an overview of the federal death penalty, explain how it applies in Puerto

²³ 252 F.3d 13, 20–21 (1st Cir. 2001).

²⁴ *Id.*

²⁵ See *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 322 (D.P.R. 2000).

²⁶ *Acosta-Martinez*, 252 F.3d at 20–21.

²⁷ U.S. CONST. amend. VIII.

²⁸ *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958).

²⁹ *Id.*

³⁰ *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (plurality opinion).

Rico, and examine the facts of *Acosta-Martinez*. Part III will demonstrate how the evolving standards of decency test should be applied to Puerto Rican defendants.

I. THE EIGHTH AMENDMENT “EVOLVING STANDARDS OF DECENCY” TEST

A. *General Overview of the Eighth Amendment*

The Eighth Amendment states that “cruel and unusual punishments [shall not be] inflicted.”³¹ The imposition of “cruel and unusual punishments” is also proscribed under the Due Process Clauses of the Fifth and Fourteenth Amendments.³² Although it is widely accepted that the Framers included the Eighth Amendment in the Bill of Rights to prevent the legislature from having “unfettered power to prescribe punishments for crimes,”³³ the express meaning of the term cruel and unusual punishments has been the subject of many Supreme Court decisions due to its ambiguity.³⁴

In *Furman v. Georgia*, one of the Supreme Court’s landmark decisions that helped define the meaning of cruel and unusual punishments, Justice Brennan acknowledged that the term is “not susceptible of precise definition,” but that the Court has a duty, “when the issue is properly presented, to determine the constitutional validity of a challenged punishment.”³⁵ He then quoted the words of Patrick Henry from the Virginia Ratifying Convention: “[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.”³⁶

Justice Brennan noted that a government imposes cruel and unusual punishments where it “arbitrarily . . . subject[s] a person to an unusually severe punishment that *society has indicated it does not regard as acceptable*, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment.”³⁷ Justice Brennan’s formulation of the cruel and unusual punishments test identifies three criteria that must be met for a punishment to comport with the Eighth Amendment’s prohibition of cruel and unusual punishments: the

³¹ U.S. CONST. amend. VIII.

³² *Robinson v. California*, 370 U.S. 660, 675 (1962).

³³ *Furman v. Georgia*, 408 U.S. 238, 263 (1972) (Brennan, J., concurring).

³⁴ *See, e.g., id.* at 258 (Brennan, J., concurring) (“Almost a century ago, this Court observed that ‘[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.’”).

³⁵ *Id.*

³⁶ *Id.* at 260–61.

³⁷ *Id.* at 286 (emphasis added); *see also id.* at 312 (White, J., concurring) (noting that the death penalty violates the Eighth Amendment when it provides “only marginal contributions to any discernible social or public purposes”).

punishment must not be so severe as to degrade human dignity;³⁸ must not be arbitrarily inflicted;³⁹ and cannot be unacceptable to contemporary society.⁴⁰

A punishment can be cruel due to its unreasonable severity or when it is imposed on defendants based on their innate characteristics rather than their culpability for a particular crime.⁴¹ The prohibition of the arbitrary or “unusual” infliction of severe punishment is derived from a similar notion that “the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others,”⁴² and discriminates against a defendant due to “race, religion, wealth, social position, or class” or if it imposes severe punishments “under a procedure that gives room for the play of such prejudices.”⁴³

The notion that a punishment’s retributive and deterrent values should be considered when determining whether a punishment is cruel and unusual protects defendants by ensuring that they are only subject to punishments that are proportionate to their crime.⁴⁴ Moreover, by recognizing the importance of having societal approval for criminal punishments, the Supreme Court has implicitly acknowledged the need for additional safeguards against the application of cruel and unusual punishments upon defendants.⁴⁵

³⁸ *Id.* at 273–74 (Brennan, J., concurring).

³⁹ *Id.* at 274.

⁴⁰ *Id.* at 277.

⁴¹ *See id.* at 272–73 (“The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.”).

⁴² *Id.* at 274.

⁴³ *Id.* at 242 (Douglas, J., concurring). Black capital defendants disproportionately sentenced to death by white southern juries are a primary example of the type of discriminatory and arbitrarily imposed punishments that the *Furman* Court was trying to prevent when it temporarily invalidated the death penalty. In his concurrence, Justice Marshall noted the following statistics:

Regarding discrimination, it has been said that “[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court-appointed attorney—who becomes society’s sacrificial lamb” Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.

Id. at 364–65.

⁴⁴ *See id.* at 312 (White, J., concurring).

⁴⁵ *Id.* at 277 (Brennan, J., concurring).

B. The “Evolving Standards of Decency” Test

The Supreme Court’s Eighth Amendment evolving standards of decency test embodies the idea that a penalty for a particular offense may be impermissible today, regardless of whether or not the penalty was imposed in the past for the same offense.⁴⁶ Although not expressly established until the twentieth century, the test has been present in American jurisprudence, at least in essence, for over a century.⁴⁷ In *Weems v. United States*, one of the first decisions to examine public opinion when considering the constitutionality of punishments under the Eighth Amendment, the Court held that a Philippine court’s sentence of fifteen years imprisonment for falsifying government documents was unconstitutionally severe.⁴⁸ To reach this conclusion, the Court determined that the prohibition of cruel and unusual punishments “is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁴⁹ The *Weems* holding is historically significant because it marked the first time the Supreme Court invalidated a penalty prescribed by a legislature for a particular offense, thus demonstrating that the legislature should not be given unchecked discretion to impose punishments that fail to comport with the societal norms that embody current standards of fairness and justice.⁵⁰

The Supreme Court incorporated its Eighth Amendment analysis from *Weems* in *Trop v. Dulles* and developed the evolving standards of decency test by determining that the Eighth Amendment is not static and “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁵¹ The Court reinforced this conclusion in its decision in *Furman v. Georgia*, which invalidated all then-existing American capital sentencing schemes for violating the Eighth Amendment’s proscription of cruel and unusual punishments.⁵² Although the *Furman* dissent remained unconvinced that the Eighth Amendment’s prohibition of cruel and unusual punishments rendered the death penalty unconstitutional, it acknowledged that society plays a critical role in determining whether a punishment is, in fact, constitutionally acceptable:

A punishment is inordinately cruel . . . chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessa-

⁴⁶ See *id.* at 329–30 (Marshall, J., concurring).

⁴⁷ See *id.*

⁴⁸ 217 U.S. 349, 380–81 (1910).

⁴⁹ *Id.* at 378.

⁵⁰ See *Furman*, 408 U.S. at 325 (Marshall, J., concurring).

⁵¹ 356 U.S. 86, 100–01.

⁵² *Furman*, 408 U.S. at 239 (per curiam).

rily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.⁵³

In his concurrence, Justice Marshall also drew an important distinction between the weight that should be given to public opinions based on all of the available relevant facts and the weight that should be given to public opinions that reflect beliefs formed independently from the relevant facts.⁵⁴ He noted that the evolving standards of decency analysis, as applied to the death penalty, does not hinge on “whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but [on] whether they would find it to be so in the light of all information presently available.”⁵⁵ This distinction helped define the outer limits of the evolving standards of decency test by identifying the specific type of public opinion courts can use to guide their Eighth Amendment analyses.

The Supreme Court continued to shape, define, and clarify the evolving standards of decency test in many of its post-*Furman* Eighth Amendment capital punishment cases. In its 1976 decision in *Gregg v. Georgia*, the Court noted:

[A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. . . . [T]his assessment 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.⁵⁶

The requirement that courts examine objective indicia to determine public opinion was reinforced by the Court’s subsequent decisions.⁵⁷ The Court ultimately determined that the two most reliable means of determining public opinion are state legislation, the strongest indicator which cumulatively represents national consensus ratified through elected rep-

⁵³ *Id.* at 382–83 (Burger, J., dissenting).

⁵⁴ *See id.* at 362 (Marshall, J., concurring).

⁵⁵ *Id.*

⁵⁶ 428 U.S. 153, 173 (1976) (plurality opinion).

⁵⁷ *See Roper v. Simmons*, 543 U.S. 551, 564 (2005) (“The beginning point is a review of objective indicia of consensus. . . . These data give us essential instruction.”); *Atkins v. Virginia*, 536 U.S. 304, 339–40 (2002) (Scalia, J., dissenting) (“Under our Eighth Amendment jurisprudence, a punishment is ‘cruel and unusual’ if it falls within . . . modes of punishment that are inconsistent with modern ‘standards of decency,’ as evinced by objective indicia, the most important of which is ‘legislation enacted by the country’s legislatures.’” (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330–31 (1989) and *Ford v. Wainwright*, 477 U.S. 399, 405 (1986))); *Coker v. Georgia*, 433 U.S. 584, 603 (1977) (plurality opinion) (“Final resolution of the question [of whether a punishment is constitutionally valid] must await careful inquiry into objective indicators of society’s ‘evolving standards of decency,’ particularly legislative enactments and the responses of juries in capital cases.”).

representatives, and state jury sentencing data, which embodies the “link between community values and the penal system.”⁵⁸

Today, the Supreme Court maintains that national consensus alone is not dispositive as to whether a punishment is cruel and unusual.⁵⁹ Courts must still consider the Supreme Court’s precedent and prior interpretations of the Eighth Amendment when determining the constitutionality of a particular punishment.⁶⁰ In addition, courts are obligated to ensure that their Eighth Amendment holdings are not based solely on the subjective views of their presiding judges.⁶¹

The Supreme Court often includes national consensus in its opinions when the national consensus supports the Court’s interpretations of its own precedent and the Eighth Amendment.⁶² Interestingly, while the Court includes evidence of public opinion in its constitutional analyses when it buttresses its own conclusions, the Court has never rendered an opinion in which the majority admits to contradicting national consensus.⁶³ While it is possible that this coincidence may be explained by assuming that the Supreme Court has never contradicted national consensus, it is much more realistic to assume that the Court either ignores unfavorable legislative and jury sentencing data or simply manipulates the relevant data to conform with its preferred outcome.⁶⁴

⁵⁸ *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968). The Supreme Court has also considered international opinion while attempting to determine national consensus, but this consideration has traditionally been given considerably less weight than state legislation and jury sentencing data and, thus, has not been considered in all Supreme Court cases involving the “evolving standards of decency” test. For an example of the Supreme Court’s use of international opinion to determine national consensus, see *Enmund v. Florida*, in which the Court notes that another country’s acceptance of a particular punishment for a specific offense can weigh into the “evolving standards of decency” analysis. 458 U.S. 782, 796 n.22 (1982) (citing *Coker*, 433 U.S. at 596 n.10).

⁵⁹ *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).

⁶⁰ *Id.*

⁶¹ *Coker*, 433 U.S. at 592 (plurality opinion).

⁶² See, e.g., Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 65–66 (2005) (noting that because the majority in *Roper v. Simmons* ignored evidence that contradicted its desired result, the majority’s use of objective indicia favoring its position was not “distinct from the advocacy of the decision in the Court’s opinion”). Additional examples are provided later in Part I.C.

⁶³ See *infra* Part I.C.

⁶⁴ See generally, Posner, *supra* note 62; Bethany Siena, Note, *Kennedy v. Louisiana Reaffirms the Necessity of Revising the Eighth Amendment’s Evolving Standards of Decency Analysis*, 22 REGENT U. L. REV. 259 (2010) (noting the difficulty of determining national consensus by using objective indicia of societal values due to the Supreme Court’s propensity to selectively employ the evolving standards of decency analysis to support its own conclusions). See Part I.C for specific examples of how members of the Court have reached different conclusions when analyzing the same objective indicia data.

C. *Irregularities in the Application of the “Evolving Standards of Decency” Test*

The evolving standards of decency test is widely criticized for being highly manipulable because it lacks a specific standard for how to correctly interpret objective indicia.⁶⁵ Comparing the Supreme Court’s treatment of objective indicia in previous decisions demonstrates this manipulability.

In *Stanford v. Kentucky*, the Court ruled that the imposition of capital punishment for murders committed by sixteen- and seventeen-year-olds was not a cruel and unusual punishment⁶⁶ because the defendants failed to demonstrate a national consensus opposed to it.⁶⁷ The Court noted that, of the thirty-seven death penalty states, only fifteen, or 40.5%, declined to impose the death penalty on sixteen-year-old capital offenders and twelve, or 32.4%, declined to impose it on seventeen-year-old capital offenders.⁶⁸ While the Court acknowledged that relatively few juries sentenced capital juvenile defendants to death, it attributed this low figure to the fact that juveniles commit fewer capital crimes than adults.⁶⁹ Rather than using jury sentencing data to consider whether the juvenile death penalty was cruel and unusual, the Court simply concluded that the fact that juvenile defendants accounted for only fifteen out of 2,105 death sentences delivered between 1982 and 1988 and only 2% of executions carried out between 1642 and 1986 failed to demonstrate a national consensus against the juvenile death penalty.⁷⁰

A plurality of justices also refused to consider alternative objective indicia, such as public opinion polls and the views of interest groups and professional organizations.⁷¹ The plurality stated that these alternative types of evidence had “uncertain foundations” and that a permanent, nationwide prohibition of the juvenile death penalty required that a national

⁶⁵ See, e.g., Wayne Myers, *Supreme Court Review: Roper v. Simmons: The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY 947, 986 (2006) (“[I]f a majority of the Court believes, based on their own moral judgment, that it is disproportionate punishment to execute an offender, then the death penalty itself could be declared unconstitutional so long as it was accompanied by a facade of a corresponding trend in the indicia of a national consensus.”); Posner, *supra* note 62; Siena, *supra* note 64, at 263–64.

⁶⁶ 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

⁶⁷ *Id.* at 373.

⁶⁸ *Id.* at 370–71.

⁶⁹ *Id.* at 373–74.

⁷⁰ *Id.*; *but see* Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring) (“When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily.”).

⁷¹ *Stanford*, 492 U.S. at 377 (opinion of Scalia, J.).

consensus against the penalty “appear in the operative acts, or the laws and the application of laws, that the people have approved.”⁷²

The *Stanford* dissent reached the opposite conclusion by adding the fifteen non-death penalty states and Washington D.C. to the twelve states prohibiting capital punishment for sixteen- and seventeen-year-old offenders.⁷³ The dissent also argued that, although nineteen death penalty states lacked a minimum age for capital defendants, it could not be assumed that those states affirmatively chose to allow the imposition of the juvenile death penalty simply because their state legislatures had failed to consider the issue.⁷⁴ Moreover, the dissent pointed out that the death penalty was rarely imposed on juveniles⁷⁵ and that respected expert organizations, such as the American Bar Association, opposed the infliction of the death penalty upon juvenile defendants.⁷⁶ These indicators persuaded the dissent that the death penalty violated evolving standards of decency when imposed against juvenile defendants.⁷⁷

As in *Stanford*, the majority in *Kennedy v. Louisiana* reached the opposite conclusion as the dissent despite relying on many of the same objective indicia.⁷⁸ In *Kennedy*, the Supreme Court held that capital punishment is unconstitutional when imposed for child rape.⁷⁹ The Court based its decision on the fact that: only six out of forty-two states allowed capital punishment for child rape;⁸⁰ that Louisiana was the only state to sentence a defendant to death for child rape since 1964;⁸¹ and that Congress, although it had passed the FDPA and expanded the number of death-eligible federal crimes, including some for non-homicide offenses, had not enacted a law permitting the imposition of the death penalty for child rape.⁸²

In sharp contrast to the majority, the *Kennedy* dissent argued that the fact that only six states allowed the death penalty for child rape was an unreliable indicator of national consensus.⁸³ The dissent maintained that that figure failed to reflect the opinions of state legislators who were deterred from permitting the imposition of the death penalty in child rape cases following the Supreme Court’s holding in *Coker v. Georgia*, in

⁷² *Id.*

⁷³ *Id.* at 384 (Brennan, J., dissenting).

⁷⁴ *Id.* at 385.

⁷⁵ *Id.* at 386–87.

⁷⁶ *Id.* at 388.

⁷⁷ *Id.* at 405.

⁷⁸ 554 U.S. 407 (2008).

⁷⁹ *Id.* at 421.

⁸⁰ *Id.* at 423.

⁸¹ *Id.* at 434.

⁸² *Id.* at 423.

⁸³ *Id.* at 448 (Alito, J., dissenting).

which the Court held that adult rape is not a death-eligible offense.⁸⁴ Moreover, the dissent maintained that the fact that five states specifically established child rape as a death-eligible offense only a few years prior to *Kennedy* might be evidence of a national trend moving toward making child rape a capital offense.⁸⁵ The dissent concluded that state legislatures were constrained from expressing their own understanding of societal standards of decency due to the *Coker* holding and became even more hesitant to make child rape a death-eligible offense in the months following the grant of certiorari for the *Kennedy* case.⁸⁶ Thus, in the eyes of the dissent, the fact that state legislatures and juries declined to impose the death penalty on defendants convicted of child rape reflected the states' reaction to the Supreme Court, rather than a national consensus regarding the acceptability of imposing the death penalty for child rape.⁸⁷

As demonstrated above, the Supreme Court's determination of whether a particular punishment comports with evolving standards of decency depends on: the manner in which the Court *chooses* to count the states that favor or oppose a particular punishment; how the Court *chooses* to interpret jury sentencing data, by either concluding that it demonstrates national consensus or deciding that it reflects factors unrelated to national consensus; and whether the Court *chooses* to consider alternative sources of objective indicia, such as public opinion polls, in addition to state legislature and jury sentencing data.⁸⁸ Thus, it would be relatively simple for a court to dismiss the argument that the federal death penalty fails the evolving standards of decency test when applied to Puerto Rican defendants by merely construing the relevant objective indicia in a manner that fails to demonstrate that the national consensus is opposed to the application of the federal death penalty in Puerto Rico.⁸⁹

D. *How to Correctly Apply the "Evolving Standards of Decency" Test in Puerto Rico*

As shown in the previous section, the manipulability of the evolving standards of decency test is an unpredictable double-edged sword that can either help or condemn defendants depending on how courts choose

⁸⁴ *Id.* at 448–49 (citing *Coker v. Georgia*, 433 U.S. 584 (1977)).

⁸⁵ *Id.* at 461.

⁸⁶ *Id.* at 460–61.

⁸⁷ *See id.*

⁸⁸ For additional examples demonstrating this point, see *Coker v. Georgia*, 433 U.S. 584, 603 (1977) and *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

⁸⁹ For example, a court could find that the national consensus supports the application of the federal death penalty in Puerto Rico for a particular offense by making the argument that the majority of *states* allow the death penalty to be imposed against defendants and that these states also allow the death penalty to be imposed for the same federal capital offense.

to construe the available objective indicia. To ensure that the test can be correctly applied to federal capital defendants in Puerto Rico, it is necessary to first establish exactly how data gathered from objective indicia should be interpreted when the evolving standards of decency analysis is specifically applied to Puerto Rican capital defendants. Since the Supreme Court's Eighth Amendment precedent controls, the correct method for interpreting objective indicia data would need to comport with the Court's previous applications of the evolving standards of decency test. The most accurate method for interpreting objective indicia would be derived from the manner in which the Supreme Court has used objective indicia to determine evolving standards of decency in the past.

Although members of the Court have considered data from Washington D.C. when conducting their evolving standards of decency analyses,⁹⁰ no member of the Court has ever included objective indicia from Puerto Rico despite the fact that Congress and the American courts treat Puerto Rico as a state when it is convenient.⁹¹ Thus, although the Court may consider non-states in its evolving standards of decency analysis, it does not automatically consider the objective indicia from *all* non-states and territories.⁹² It is surprising that no member of the Court has ever used Puerto Rican legislative and jury sentencing data when considering the constitutionality of the federal death penalty.⁹³ It could be argued

⁹⁰ See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 824 n.16 (1988) (“Henceforth, the opinion will refer to the 50 States and the District of Columbia as ‘States,’ for sake of simplicity.”).

⁹¹ See Organic Act of 1900, ch. 191, § 14, 31 Stat. 77, 80 (1900) (codified as amended in scattered sections of 48 U.S.C.) (the laws of the United States apply in Puerto Rico when they are not “locally inapplicable”); *infra* Part II.C (explaining how the First Circuit Court of Appeals reasoned that the federal death penalty can be imposed on residents of Puerto Rico).

⁹² Controversy also surrounds the imposition of the federal death penalty against Native Americans who commit federal capital offenses against other Native Americans on Native American land. See *United States v. Mitchell*, 502 F.3d 931 (9th Cir. 2007) (holding that the federal death penalty is applicable in Native American territories, even when the crimes are against other Native Americans on Native American territory). The imposition of the federal death penalty against Native Americans who commit federal capital offenses against other Native Americans on Native American soil can be distinguished from the current situation in Puerto Rico by the fact that Native Americans are granted more federal rights. For example, they are permitted to vote in the presidential elections. However, it is important to note that in *Mitchell*, the Native American defendant claimed that the federal death penalty failed to meet evolving standards of decency because he committed the capital crimes when he was twenty years old. *Id.* at 981. Had the defendant argued that Native American territories cannot be compared to other state and federal jurisdictions and that the federal death penalty fails to meet evolving standards of decency within the context of Native American societal standards, the Court would have had to consider whether or not Native American territories should be compared and contrasted with state and federal jurisdictions for the purposes of determining evolving standards of decency.

⁹³ Since residents of Puerto Rico oppose the death penalty, it would make sense for justices who disfavor the death penalty to look to Puerto Rican legislative and jury sentencing data to further their arguments.

that Puerto Rico is implicitly represented in the Court's analysis whenever the Court refers to the federal system's approval or disapproval of the imposition death penalty for certain crimes. However, it cannot be reasonably argued that federal statutes represent the consensus of the Puerto Rican people because Puerto Rico residents are barred from voting in presidential elections and are unable to elect congressional representatives who have voting power.⁹⁴ Moreover, the fact that the Supreme Court always looks to the legislature and jury sentencing data of individual states when ascertaining national consensus indicates that the public opinion of each individual state is an essential element of the evolving standards of decency test.⁹⁵

The omission of Puerto Rico's objective indicia from the application of the Supreme Court's evolving standards of decency test implies that Puerto Rico is so fundamentally different from the states that its objective indicia cannot be used to determine the American national consensus. Therefore, objective indicia gathered from the states cannot be used to determine a national consensus that reflects a Puerto Rican consensus because a Puerto Rican consensus can *only* be derived from residents of Puerto Rico.

⁹⁴ See 48 U.S.C. §891 (2006) (allowing Puerto Ricans to elect a resident commissioner, not a senator or representative); *Iguartua de la Rosa v. United States*, 32 F.3d 8, 9 (1st Cir. 1994) (holding that Puerto Rico residents have no right under Article II of the U.S. Constitution to vote in presidential elections because the President is chosen by electors chosen by each state).

⁹⁵ The Supreme Court has not heard any federal death penalty cases in which the defendant raised an Eighth Amendment claim requiring an evolving standards of decency analysis. This is probably due, in part, to the fact that the claim would need to be properly raised by a defendant to be considered by the Court. Thus, no federal death penalty case to date specifically goes through the evolving standards of decency analysis typically undertaken by the Supreme Court. See, e.g., *United States v. Quinones*, 313 F.3d 49, 61 (2d Cir. 2002) (holding that the defendant must present an Eighth Amendment claim for evolving standards of decency to be considered). Some courts have dismissed Eighth Amendment evolving standards of decency claims filed by federal capital defendants by concluding that "to the extent our standards of decency have evolved since the enactment of the Constitution, they still permit punishment by death for certain heinous crimes such as murder." *United States v. Hammer*, No. 4:96-CR-239, 2011 WL 6020577, at *6 (M.D. Pa. Dec. 1, 2011) (quoting *Quinones*, 313 F.3d at 61-62); see also *United States v. Frank*, 8 F. Supp. 2d 253, 273-74 (S.D.N.Y. 1998) (holding that the death penalty, under previous evolving standards of decency analyses, does not violate the Eighth Amendment per se). Since this type of broad and sweeping conclusion is unlike the type of analysis typically employed by the Supreme Court to ascertain evolving standards of decency, it cannot be presumed that the Supreme Court will necessarily use this same type of generalization if it ever presides over a case involving a federal capital defendant's Eighth Amendment claim requiring the application of the evolving standards of decency test.

II. THE FEDERAL DEATH PENALTY AND ITS APPLICATION IN PUERTO RICO

A. *General Overview of the Federal Death Penalty*

The First American Congress introduced the death penalty in 1790, reserving the punishment for crimes against the United States, such as treason, murder, piracy, and forgery.⁹⁶ The Fifth Amendment, which requires the “presentment or indictment of a grand jury” before charging defendants with “capital” crimes, also implies acceptance of the death penalty by its drafters.⁹⁷

Congress reformed the federal death penalty in 1897 by reducing the number of death-eligible federal offenses to five and allowing juries to choose between a death or life sentence for convicted defendants.⁹⁸ The punishment remained in full effect until 1967, when pressure from death penalty abolitionists caused a moratorium on executions.⁹⁹ Subsequently, the Supreme Court’s 1972 decision in *Furman v. Georgia* invalidated all American death penalty schemes for failing to comply with the Eighth and Fourteenth Amendments’ prohibition against cruel and unusual punishments.¹⁰⁰

Congress enacted the first set of constitutionally sufficient federal death penalty procedures since *Furman* under the National Narcotics Leadership Act of 1998.¹⁰¹ Under the Act, a capital sentence may be imposed against defendants convicted of “intentionally kill[ing] or . . . caus[ing] the intentional killing of an individual” in furtherance of a “continuing criminal enterprise.”¹⁰² In 1994, Congress passed the FDPA, which created general federal procedures for the imposition of the death penalty and extended these procedures to over forty offenses.¹⁰³

Federal capital crimes are currently tried in a bifurcated system. Jurors first decide whether the defendant is guilty and, if so, determine the defendant’s punishment in a second proceeding known as the sentencing

⁹⁶ Rory K. Little, *The Future of the Death Penalty*, 26 OHIO N.U. L. REV. 513, 538 (2000).

⁹⁷ See U.S. CONST. amend. V.

⁹⁸ Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 367 (1999).

⁹⁹ Nicci Lovre-Laughlin, *Lethal Decisions: Examining the Role of Prosecutorial Discretion in Capital Cases in South Dakota and the Federal Justice System*, 50 S.D. L. REV. 550, 554 (2005). The last execution to take place before the moratorium was that of Luis Monge, a Puerto Rican native living in Denver, Colorado. Michael L. Radelet, *Capital Punishment in Colorado: 1859–1972*, 74 U. COLO. L. REV. 885, 922, 1008 (2003).

¹⁰⁰ 408 U.S. 238 (1972) (per curiam).

¹⁰¹ See Pub. L. No. 100–690, 102 Stat. 4181, 4387–95 (codified as amended at 21 U.S.C. § 848 (2006)); Little, *supra* note 96, at 531.

¹⁰² 21 U.S.C. § 848(e) (2006).

¹⁰³ See 18 U.S.C. §§ 3591–3598 (2006); Little, *supra* note 98, at 349–50.

phase.¹⁰⁴ The FDPA applies to federal defendants tried in states whose laws do not allow the death penalty,¹⁰⁵ a provision courts have upheld against Eighth¹⁰⁶ and Tenth Amendment¹⁰⁷ challenges.

B. *Statutes Governing the Application of the Federal Death Penalty in Puerto Rico*

The United States officially acquired Puerto Rico from Spain in 1898 with the signing of the Treaty of Paris following the conclusion of the Spanish–American War.¹⁰⁸ With the ratification of the Foraker Act in 1900, the island officially became subject to all United States laws “not locally inapplicable.”¹⁰⁹ As in non-death penalty states, the federal death penalty is applicable to Puerto Rican defendants through the FDPA.¹¹⁰

Puerto Rico has its own federal district court, presided over by presidentially appointed Article III judges.¹¹¹ The First Circuit Court of Appeals in Boston, Massachusetts, hears appeals from the Puerto Rico district court.¹¹² Since Puerto Rico lacks the facilities to carry out an execution, Puerto Rican capital defendants who receive the death penalty would need to be transferred to a facility in the contiguous United States to await execution.¹¹³

C. *United States v. Acosta-Martinez*

In *United States v. Acosta-Martinez*, defendants Hector Oscar Acosta-Martinez and Joel Rivera-Alejandro were accused of kidnapping

¹⁰⁴ See 18 U.S.C. § 3593.

¹⁰⁵ 18 U.S.C. § 3596(a).

¹⁰⁶ See *United States v. Jacques*, No. 2:08–CR–117, 2011 WL 3881033, at *3, *6 (D. Vt. 2011) (rejecting defendant’s argument that, because Vermont state law did not authorize capital punishment, federal capital prosecution was illegal and therefore “unusual” under the Eighth Amendment); see also *United States v. Johnson*, No. CR 01–3046–MWB, 2012 WL 5275491, at *9, *11 (N.D. Iowa 2012) (agreeing with the *Jacques* court’s reasoning in rejecting a similar Eighth Amendment challenge to the application of the federal death penalty where state law does not permit capital punishment).

¹⁰⁷ See *United States v. Tuck Chong*, 123 F. Supp. 2d 563, 566 & n.17, 567–68 (D. Haw. 1999) (determining that the Tenth Amendment is not implicated in cases where the United States tries a defendant for a federal capital offense in a state that does not allow the death penalty because federal crimes affect federal interests, and the Constitution delegates to the federal government the power to determine punishment for offenses against the United States).

¹⁰⁸ See Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.–Spain, art. II, Dec. 10, 1898, 30 Stat. 1754.

¹⁰⁹ Organic Act of 1900, ch. 191, § 14, 31 Stat. 77, 80 (1900) (codified as amended in scattered sections of 48 U.S.C.).

¹¹⁰ *United States v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001); see also *infra* Part II.C.

¹¹¹ Act of September 12, 1966, Pub. L. 89-571, 80 Stat. 764 (codified as amended at 28 U.S.C. § 134 (2006)).

¹¹² See 28 U.S.C. § 41 (2006).

¹¹³ See Alfonso, *supra* note 6, at 1102.

grocer Jorge Hernández Díaz, demanding a \$1 million ransom from his son, and warning Hernández Díaz's family not to contact the police.¹¹⁴ When Hernández Díaz's family contacted the police, the defendants shot Hernández Díaz to death, dismembered his body with an ax, and disposed of the remains in bags dumped alongside the road.¹¹⁵ In addition to other non-capital crimes, the defendants were charged with "using or carrying a firearm in the commission of a crime of violence which results in death under circumstances constituting first degree murder," in violation of 18 U.S.C. § 924(j), and "killing a person to retaliate against his family for providing information to law enforcement officers about the commission of a federal offense," in violation of 18 U.S.C. § 1513(a)(1)(B).¹¹⁶ Following the indictment, the U.S. government filed notice of its intent to seek the death penalty in the event of conviction.¹¹⁷ In response, Acosta-Martinez and Rivera-Alejandro raised a substantive due process challenge to the imposition of the federal death penalty in Puerto Rico in the Puerto Rico District Court.¹¹⁸

Although the defendants won in district court, on appeal, the First Circuit Court of Appeals held that the death penalty applies to Puerto Rico capital defendants because the Constitution of Puerto Rico operates solely to organize local government and, thus, federal statutes are as applicable in Puerto Rico as they are in the states.¹¹⁹ In reversing the District Court's holding that the FDPA is "locally inapplicable" in Puerto Rico under the PRFRA, the Court of Appeals concluded:

The death penalty is intended to apply to Puerto Rico federal criminal defendants just as it applies to such defendants in the various states. This choice by Congress does not contravene Puerto Rico's decision to bar the death penalty in prosecutions for violations of crimes under the Puerto Rican criminal laws in the Commonwealth courts.¹²⁰

¹¹⁴ 252 F.3d 13, 15 n.1 (1st Cir. 2001).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 15. One of the defense lawyers representing Rivera-Alejandro, Rafael Castro Lang, argued that the defendants should not have been prosecuted in the federal legal system, in part, because one of the U.S. government's arguments for jurisdiction, that the victim was a grocer and thus engaged in interstate commerce, was contrived. John-Thor Dahlburg, *Acquittals Quash a U.S. Bid for Death Penalties in Puerto Rico*, L.A. TIMES (Aug. 2, 2003), <http://articles.latimes.com/2003/aug/02/nation/na-acquit2>.

¹¹⁷ *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 312 (D.P.R. 2000), *rev'd* 252 F.3d 13 (1st Cir. 2001).

¹¹⁸ *Id.* at 311–12. Note that the defendants raised a Fifth Amendment claim rather than an Eighth Amendment claim.

¹¹⁹ *Acosta-Martinez*, 252 F.3d at 18, 20.

¹²⁰ *Id.* at 20.

The *Acosta-Martinez* court applied the Supreme Court's "shocking to the conscience" test to conclude that the death penalty is applicable in Puerto Rico for capital offenses because federal law has routinely been applied in Puerto Rico.¹²¹ The court concluded: "It cannot shock the conscience of the court to apply to Puerto Rico, as intended by Congress, a federal penalty for a federal crime which Congress has applied to *the fifty states*."¹²² The court also noted that granting jurors the opportunity to consider the death penalty for federal capital defendants does not actually require them to impose it.¹²³ Thus, according to the court's rationale, under the FDPA the question of whether the death penalty will be imposed on a defendant is always directly in the hands of a local Puerto Rican jury, which for all effects and purposes embodies the will of the Puerto Rican people. Following the First Circuit's ruling, *Acosta-Martinez* petitioned the Supreme Court for certiorari, which the Court denied.¹²⁴

As in the rest of the United States, the U.S. Constitution protects and enforces the fundamental rights of Puerto Ricans living in Puerto Rico.¹²⁵ However, the First Circuit's narrow decision failed to explore whether the Eighth Amendment's Cruel and Unusual Punishments Clause shields Puerto Rico defendants from being subject to the death penalty. Specifically, the court failed to consider whether the Supreme Court's evolving standards of decency test forbids the federal government from seeking the death penalty against Puerto Rican defendants. The court's failure to consider the evolving standards of decency test in *Acosta-Martinez* and the defense's failure to raise an Eighth Amendment argument governed by that test might be attributed to the fact that many of death penalty cases that shaped the Supreme Court's evolving standards of decency test into what it is today had not yet been decided.¹²⁶ However, a more concerning implication is that the First Circuit's mechanical application of federal statutes in *Acosta-Martinez* could be attributed to the court's ignorance of the relevance of Puerto Rico's cultural and societal values and the importance of taking them into consideration to reach its verdict.¹²⁷

¹²¹ *Id.* at 21.

¹²² *Id.* (emphasis added).

¹²³ *Id.* at 19.

¹²⁴ *Acosta-Martinez v. United States*, 535 U.S. 906 (2002).

¹²⁵ *Balzac v. Porto Rico*, 258 U.S. 298, 304, 312–13 (1922).

¹²⁶ For some examples of cases that helped shape the evolving standards of decency test into its modern form, see *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (child rapists); *Roper v. Simmons*, 543 U.S. 551, 615, 578 (2005) (offenders who were younger than eighteen when they committed their crimes); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (criminals with intellectual disabilities).

¹²⁷ For example, because the presiding judge in *Acosta-Martinez*, Judge Sandra Lynch, is not a Puerto Rico native, it is unlikely that she would have been aware of Puerto Rico's unique

The Puerto Rico District Court's decision, written by Judge Salvador E. Casellas, provides a stark contrast with the First Circuit's decision. In his decision, Judge Casellas concluded:

In summary, (1) the purpose of establishing Commonwealth status in Puerto Rico was to develop and enhance self-government by the people of Puerto Rico and create an autonomous political entity; (2) in voting to accept Public Law 600—adopted by Congress as a compact with the people of Puerto Rico—the people of Puerto Rico accepted section 9 of the PRFRA, which provides for the applicability to the Commonwealth of all Federal law *if not locally inapplicable*; (3) the Commonwealth Constitution, which was adopted by the Puerto Rican people and approved by Congress, expressly prohibits capital punishment in Puerto Rico; (4) *Puerto Rico's culture, traditions and values are repugnant to the death penalty*; and (5) the FDPA was not specifically made extensive to Puerto Rico. Under these circumstances, the Court concludes that the FDPA *is locally inapplicable within the meaning of section 9 of the PRFRA*.¹²⁸

Interestingly, Judge Casellas employed a test similar to the evolving standards of decency test by incorporating Puerto Rican culture, traditions, and values into his decision even though the defendants did not raise Eighth Amendment claims.¹²⁹ The contrast between the Puerto Rico District Court's and the First Circuit's *Acosta-Martinez* decisions demonstrates how a judge's personal knowledge or bias can affect whether or not evolving standards of decency will be considered in any particular case. This raises another problem with imposing the federal death penalty in Puerto Rico: convicted federal capital defendants in Puerto Rico may only appeal to the First Circuit in Boston. The question then becomes whether a court so removed from Puerto Rico's culture can properly apply the evolving standards of decency test to Puerto Rican defendants.

cultural and political history and its relevance to the federal death penalty. *See generally Biographical Directory of Federal Judges*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1447> (last visited April 8, 2013) (Judge Lynch was born in Oak Park, Illinois). In addition, the First Circuit Court of Appeals is in Boston. *Court Location*, U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov/court-info/court-location> (last visited May 23, 2013).

¹²⁸ United States v. *Acosta Martinez*, 106 F. Supp. 2d 311, 321 (D.P.R. 2000), *rev'd*, 252 F.3d 13 (1st Cir. 2001).

¹²⁹ *See id.*

III. APPLYING THE “EVOLVING STANDARDS OF DECENCY” TEST TO PUERTO RICAN DEFENDANTS

A. *Puerto Rico’s “Evolving Standards of Decency” Are Not Comparable to Those of the States*

Under the evolving standards of decency test, the FDPA should not be imposed in Puerto Rico because it treats Puerto Rico as one of the states, to which *all* federal laws automatically apply. Treating Puerto Rico as a state ignores the following important distinctions between Puerto Rico and the American states: Puerto Rico residents are prohibited from voting for president and lack congressional representatives who can vote either for or against federal death penalty statutes;¹³⁰ Puerto Rico is an unincorporated territory that Congress never intended to make a state;¹³¹ and not all federal laws automatically apply in Puerto Rico.¹³² Although the Supreme Court sometimes includes federal jurisdictions when applying the evolving standards of decency test, because Puerto Rico residents lack congressional representation and cannot vote in presidential elections, federal legislation does not represent the will of the Puerto Rican people. In addition, the Court’s evolving standards of decency precedents always include objective indicia *from the states* and

¹³⁰ U.S. CONST. art. II § 1 cl. 2; 48 U.S.C. § 891 (2006).

¹³¹ *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922). Although the United States granted Puerto Ricans citizenship within fifteen years of taking over the island, the purpose of granting citizenship was to dissipate the Puerto Rican desire for independence that had grown strong during the Spanish colonial regime. See RONALD FERNANDEZ, *THE DISENCHANTED ISLAND* 33 (2nd ed. 1996). Today, there is an ongoing debate as to whether Puerto Rico should become a state. However, although 61.2% of Puerto Rican voters who participated in most recent plebiscite held on the island on November 4, 2012 chose statehood over independence, marking the first plebiscite in which the majority of voters chose statehood, the results of the plebiscite may not accurately reflect the majority opinion. Ed Morales, *Analysis: The Puerto Rico Plebiscite That Wasn’t*, ABC NEWS (Nov. 8, 2012), http://abcnews.go.com/ABC_Univision/Opinion/puerto-rico-status-plebiscite/story?id=17674719. These results are not conclusive because 466,337 blank votes were cast, which means that statehood may have only garnered 45.1% of the vote. *Id.* Moreover, even if the plebiscite results were correct, the results do not bind Congress to take any action. See Roque Planas, *Puerto Rico Status: White House Gives Mixed Signals on Statehood*, HUFFINGTON POST (Dec. 4, 2012), http://www.huffingtonpost.com/2012/12/04/puerto-rico-status-white-_n_2237757.html (discussing how the vote could prompt Congress to “consider” Puerto Rican statehood).

¹³² For example, Puerto Rico residents are exempt from paying federal taxes. 48 U.S.C. § 734 (2006). It seems contradictory for Congress to provide this exemption while Puerto Rico remains under the exclusive control of the federal government, since federal statutes that are not “locally inapplicable” still apply to Puerto Rico. This is even more surprising considering that Washington D.C. residents pay federal taxes despite their lack of congressional representation. This anomaly can be explained by Congress’s political incentives: Congress allows these types of exceptions to prevent the Puerto Rican people from attempting to secede. See generally FERNANDEZ, *supra* note 131. Thus, like the Supreme Court, Congress *chooses* to manipulate federal laws to reach its preferred outcome, regardless of whether their choices will lead to inconsistent results.

Puerto Rico is never treated as a state under the Court's test.¹³³ Thus, because the Court's framework separates Puerto Rico from the states, the states' consensus regarding the death penalty cannot control the constitutionality of the application of the death penalty in Puerto Rico. *Only* Puerto Rico can demonstrate a consensus regarding the application of the death penalty in Puerto Rico.¹³⁴

B. Puerto Rico's Legislative Record Shows a Consensus Against the Death Penalty

The Supreme Court emphasizes historical context when analyzing the meaning of the Eighth Amendment's bar on cruel and unusual punishments.¹³⁵ For example, in *Trop v. Dulles*, the Court stated, "[T]he death penalty has been employed throughout our history, and, in a day when it is *still* widely accepted, it cannot be said to violate the constitutional concept of cruelty."¹³⁶ Thus, to determine the true meaning of the Constitution of Puerto Rico's proscription of the death penalty, it is necessary to examine the historical background of the death penalty in Puerto Rico to verify whether the punishment was ever truly accepted by the Puerto Rican people.

Puerto Rico was a Spanish colony from 1493 to 1898.¹³⁷ Spain not only utilized summary executions to conquer the island,¹³⁸ but also regularly imposed the death penalty to: control the island's rapidly growing slave population,¹³⁹ establish Catholicism as the sole religion,¹⁴⁰ punish soldiers for desertion,¹⁴¹ and deter any other acts that threatened the stability of the colony or Spain's pecuniary interests.¹⁴² Only the native Spanish elite enjoyed the special privileges of appealing their death

¹³³ See *supra* Part I.D.

¹³⁴ *Id.*

¹³⁵ See, e.g., *Furman v. Georgia*, 408 U.S. 238, 241–45 (1972) (Douglas, J., concurring) (discussing the Eighth Amendment's historical context).

¹³⁶ 356 U.S. 86, 99 (1958) (emphasis added).

¹³⁷ See JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 5–20 (1997).

¹³⁸ JALIL SUED-BADILLO, *LA PENA DE MUERTE EN PUERTO RICO: RETROSPECTIVA HISTÓRICA PARA UNA REFLEXIÓN CONTEMPORÁNEA* 18 (2000). During the initial conquest, the Spanish declined to take prisoners of war because they regarded the native Taíno Indians as subjects who had committed treason by rebelling. *Id.*; see also TRÍAS MONGE, *supra* note 137, at 5.

¹³⁹ See SUED-BADILLO, *supra* note 138, at 20.

¹⁴⁰ See *id.* at 22.

¹⁴¹ See *id.* at 30.

¹⁴² See *id.* at 24. For a more detailed history of the Puerto Rican judicial system under Spanish rule, see TRÍAS MONGE, *supra* note 137.

sentences or escaping prosecution altogether.¹⁴³ Thus, Puerto Ricans were divided along socioeconomic lines into two distinct groups:

[There was the Puerto Rican] from the town, heterodox, smuggler, mestizo, impulsive, impatient, consumer of cassava bread and rum and [there was] the Puerto Rico represented by the Capital, with their military officers and ecclesiastics, their consumption of white bread and wine made from imported grapes, for the native elite in clear growth, corrupt and also engaged in smuggling.¹⁴⁴

Since Puerto Rico had no penal code until 1879,¹⁴⁵ personal interests and political conveniences, rather than the nature of the alleged crime, determined whether the accused would receive a death sentence.¹⁴⁶

Although executions were a common practice during the Spanish Regime, native Puerto Ricans, who remained outside the circle of the Spanish native elite, categorically rejected the imposition of the punishment.¹⁴⁷ Puerto Rican opposition to the death penalty continued after the United States annexed Puerto Rico from Spain in 1898, at the close of the Spanish-American War, and continued imposing the death penalty on the island.¹⁴⁸ In 1902, the United States replaced Puerto Rico's Spanish-derived Penal and Criminal Procedure Codes with a new code copied from the amended Penal Code of California of 1873.¹⁴⁹ Of the twenty-eight executions that took place on the island in the twentieth century, many of the condemned were young, black or mestizo farmworkers convicted of murder.¹⁵⁰

¹⁴³ See SUED-BADILLO, *supra* note 138, at 28–30. For example, when five brothers from a prominent family were accused of attempting to assassinate the governor and sentenced to death, the governor commuted their sentence on the day of their execution after they had already been brought out for execution in the main square. *Id.* at 30. To get a sense of the division between the native elite and the Puerto Rican poor, it may be helpful to note that a 1530 census conducted on the island showed that 327 white families owned 2,292 black slaves and 473 native islanders. TRIÁS MONGE, *supra* note 137, at 5.

¹⁴⁴ SUED-BADILLO, *supra* note 138, at 28 (translated from Spanish).

¹⁴⁵ *Id.* at 57.

¹⁴⁶ See *id.* at 49, 126. For example, in 1541, there were fifteen murders in San Juan, but only one of the alleged murderers was executed for his crime because the Spanish did not see the need to aggressively prosecute crimes that only primarily affected the local population. See *id.* at 24.

¹⁴⁷ See *id.* at 26.

¹⁴⁸ See CÉSAR J. AYALA & RAFAEL BERNABE, *PUERTO RICO IN THE AMERICAN CENTURY: A HISTORY SINCE 1898* 314–15 (2007).

¹⁴⁹ Eulalio A. Torres, *The Puerto Rico Penal Code of 1902–1975: A Case Study of American Legal Imperialism*, 45 REV. JUR. U.P.R. 1, 18–20 (1976).

¹⁵⁰ See Juan Alberto Soto González & Juan Carlos Rivera Rodríguez, *La Pena de Muerte, Una Batalla Entre una Ley Federal y la Constitución de Puerto Rico*, 41 REV. DER. P.R. 253, 257 (2002); SUED-BADILLO, *supra* note 138, at 87–89. The use of the death penalty in Puerto Rico at the beginning of the American Regime can be compared to the use of the death penalty in the Old South, which was primarily aimed at subduing the black population rather than to

The Puerto Rico Legislature attempted to abolish the death penalty in 1917,¹⁵¹ but did not succeed until 1929,¹⁵² two years after the last execution on the island.¹⁵³ The consensus against the death penalty among Puerto Rico's native population was so strong that the penalty's prohibition continued even after presidentially appointed Puerto Rico Governor Blanton Winship attempted to reinstate the death penalty beginning in 1936, following series of deadly clashes between Puerto Rican nationalists and police that made him fear the growing sense of nationalism among the Puerto Rican people.¹⁵⁴

Today, the application of Puerto Rican criminal statutes continues to reflect the anti-death penalty sentiments embodied in the Constitution of Puerto Rico. For example, former Governor Luis Fortuño granted federal authorities jurisdiction over certain types of violent crimes, such as carjackings and drive-by shootings, in 2012 in an effort to reduce the

serve legitimate goals of deterrence and communal retribution. See Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439–42 (1995). The similarity between the imposition of the death penalty against blacks in the Old South and poor Puerto Ricans living on the island is even more evident after considering that, during the early portion of the American regime, Puerto Ricans were considered to be black by their colonizers. FERNANDEZ, *supra* note 131, at 13; see, e.g., Cartoon of Uncle Sam Teaching Puerto Rico, the Philippines, Hawaii, and Cuba, in Louis Dalrymple, *School Begins* (1899), available at <http://www.loc.gov/pictures/item/2012647459> (depicting Puerto Rico as a black child receiving a civilizations lesson from his teacher, Uncle Sam).

¹⁵¹ SUED-BADILLO, *supra* note 138, at 58.

¹⁵² *Id.*

¹⁵³ Abby Goodnough, *Acquittal in Puerto Rico Averts Fight Over Government's Right to Seek Death Penalty*, N.Y. TIMES, Aug. 1, 2003, at A14, available at <http://www.nytimes.com/2003/08/01/us/acquittal-puerto-rico-averts-fight-over-government-s-right-seek-death-penalty.html>.

¹⁵⁴ See AYALA & BERNABE, *supra* note 148, at 136 (2007); TRÍAS MONGE, *supra* note 137, at 93–94. The bloodiest of these clashes was the Ponce Massacre, which occurred on March 21, 1937, Palm Sunday. STEPHEN HUNTER & JOHN BAINBRIDGE, JR., *AMERICAN GUNFIGHT: THE PLOT TO KILL TRUMAN—AND THE SHOOT-OUT THAT STOPPED IT* 174–79 (2005). Puerto Rican nationalists received a permit from the mayor of Ponce to hold a parade commemorating the abolition of slavery in Puerto Rico and protesting the imprisonment of Nationalist Party leader, Pedro Albizu Campos, who was accused of attempting to overthrow the U.S. government. See TRÍAS MONGE, *supra* note 137, at 94. Prior to the start of the parade, Governor Winship instructed the police chief to revoke the nationalists' permit and to send 150 heavily armed police officers to the scene to maintain order. HUNTER & BAINBRIDGE, JR., *supra*, at 175. Not to be deterred, the unarmed nationalists chose to march without the permit. *Id.* at 175–76. Soon thereafter, a shot rang out and, once the sound of the submachine guns subsided, nineteen people, including women and children, lay dead in the street and over a hundred more were wounded. *Id.* at 175–79. Governor Winship was blamed as being responsible for the attack. TRÍAS MONGE, *supra* note 137, at 94. In his report for the American Civil Liberties Union, Arthur Garfield Hays stated that “facts show that the affair of March 21st in Ponce was a massacre” and was caused by Governor Winship's refusal to allow Puerto Ricans to exercise their civil liberties to parade and assemble. FERNANDEZ, *supra* note 131, at 131. Although he was eventually removed from office, neither Governor Winship nor any of the police officers involved in the attack were ever prosecuted. HUNTER & BAINBRIDGE, JR., *supra*, at 179.

prevalence of violent crime on the island.¹⁵⁵ However, he also made it clear that he remained opposed to the use of capital punishment in the prosecution of those crimes.¹⁵⁶ Likewise, many other politicians and government officials also remain opposed to the imposition of the death penalty in Puerto Rico despite the island's role as a major illegal drug transshipment point between South America and the United States.¹⁵⁷ Thus, the application of the death penalty against Puerto Rican defendants cannot be justified through the Puerto Rico Legislature's grant of jurisdiction to the U.S. federal government because applying the death penalty in Puerto Rico directly contravenes Puerto Rico's legislative intent—to reduce crime without imposing the death penalty.

As demonstrated above, the prohibition of the death penalty in the Constitution of Puerto Rico embodies a categorical communal rejection of the death penalty that is still felt by the Puerto Rican people today. Puerto Rico residents reject the death penalty, in large part, due to the historical implications of the punishment.¹⁵⁸ Unlike the death penalty in the United States, which was collectively and voluntarily established by the settlers and colonists as a means of attaining deterrence and communal retribution,¹⁵⁹ the death penalty in Puerto Rico was solely imposed under the Spanish and American colonial regimes as a means of protecting colonial political and pecuniary interests and with complete disregard for the native population.

The U.S. government continues to impose the death penalty in Puerto Rico in a similar fashion today—as a thinly veiled attempt to further its own agenda in the fight against terrorism and the War on Drugs. For example, on June 21, 2012, Texas Congressman Michael McCaul addressed the Committee of Homeland Security and noted, among other statistics, that 80% of the cocaine trafficked through Puerto Rico is distributed on the East Coast.¹⁶⁰ Although Congressman McCaul addressed

¹⁵⁵ Coto, *supra* note 1; see also Annika McGinnis, *Puerto Rico Governor Urges Federal Help in Drug War*, MIAMI HERALD (June 21, 2012), <http://www.miamiherald.com/2012/06/21/2861652/puerto-rico-governor-urges-federal.html>. The former Puerto Rico governor also enacted a new penal code, providing more severe punishments for violent offenses. *Puerto Rico Governor Luis Fortuño Signs New Penal Code into Effect*, CARIBBEAN J. (July 30, 2012), <http://www.caribjournal.com/2012/07/30/puerto-rico-governor-luis-fortuno-signs-new-penal-code-into-effect>.

¹⁵⁶ *Puerto Rico Jury Rejects Death Penalty in Drug Dealer Case*, REUTERS (Sept. 27, 2012, 6:10 PM), <http://www.reuters.com/article/2012/09/27/us-puertorico-deathpenalty-idUSBRE88Q1UU20120927>.

¹⁵⁷ *Id.*

¹⁵⁸ See Saeed Shabazz, *Activists Fighting Return of Death Penalty in Puerto Rico*, FINAL CALL (Apr. 20, 2005 2:53 PM), http://www.finalcall.com/artman/publish/article_1937.shtml.

¹⁵⁹ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 5–16 (2002).

¹⁶⁰ *U.S.-Caribbean Border: Open Road for Drug Traffickers and Terrorists: Hearing Before the Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Sec.*, 112th Cong. 1–2 (2012) [hereinafter *U.S.-Caribbean Border*], available at <http://>

the fact that millions of Puerto Ricans are currently “under siege” as a result of the escalating violence on the island,¹⁶¹ which has a higher murder rate than any state,¹⁶² his real concerns are summarized in the following quote: “Because Puerto Rico is a US Territory, illegal contraband that makes it to the island is unlikely to be subjected to further US Customs inspections *en route to the continental United States*, meaning it is easily mailed or placed on commercial aircraft without suspicion.”¹⁶³ This remark suggests that Congressman McCaul is far more concerned with drugs entering the continental United States than the effects that the drug trade is having on Puerto Rican residents.¹⁶⁴

Just as the Supreme Court in *Furman v. Georgia* looked to the 1689 English Bill of Rights as the guide to determine the true, current meaning of the Eighth Amendment, the prohibition of the death penalty in the Constitution of Puerto Rico should be examined within the same type of historical framework.¹⁶⁵ Therefore, because Puerto Rico’s capital punishment prohibition was born out of a repressive colonial history and continues to be imposed solely to serve the interest of the U.S. federal government, the death penalty cannot pass constitutional muster under the Supreme Court’s evolving standards of decency test if imposed upon defendants in Puerto Rico.¹⁶⁶

C. *Puerto Rico Jury Sentencing Data Demonstrates a Consensus Opposed to the Death Penalty*

Since the 1988 reinstatement of the federal death penalty, the U.S. government has sought to impose the punishment against six defendants in Puerto Rico, and in each case, the jury declined to impose it.¹⁶⁷ While it can be argued that these six cases provide insufficient jury sentencing

www.gpo.gov/fdsys/pkg/CHRG-112hhrg79507/pdf/CHRG-112hhrg79507.pdf (statement of Rep. Michael McCaul, Chairman).

¹⁶¹ *Id.* at 2.

¹⁶² Gabe Gutierrez, *The ‘Third Border’: Puerto Rico a Backdoor into US Mainland for Drug Cartels*, NBC NEWS (Nov. 23, 2012, 7:20 PM), http://usnews.nbcnews.com/_news/2012/11/23/15392453-the-third-border-puerto-rico-a-backdoor-into-us-mainland-for-drug-cartels.

¹⁶³ *U.S.-Caribbean Border*, *supra* note 160, at 3 (emphasis added).

¹⁶⁴ *See id.*; *see generally* Gutierrez, *supra* note 162 (discussing the effect of the high incidences of murder in Puerto Rico on the families of victims).

¹⁶⁵ *See* 408 U.S. 238, 243–44 (1972) (Douglas, J., concurring).

¹⁶⁶ *See* Adam Liptak, *Puerto Ricans Angry That U.S. Overrode Death Penalty Ban*, N.Y. TIMES, July 17, 2003, at A1, available at <http://www.nytimes.com/2003/07/17/us/puerto-ricans-angry-that-us-overrode-death-penalty-ban.html>.

¹⁶⁷ *See* Coto, *supra* note 1; *Jury Declines to Impose Death Penalty in Puerto Rico Murders*, REUTERS (Mar. 23, 2013), <http://www.reuters.com/article/2013/03/24/us-usa-deathpenalty-puertorico-idUSBRE92N02020130324> [hereinafter *Candelario Santana Verdict*]; *Puerto Rico Jury Deliberating Rare Death Penalty Case*, REUTERS (Sept. 27, 2012, 10:32 AM), <http://www.reuters.com/article/2012/09/27/us-puertorico-deathpenalty-idUSBRE88Q11620120927>; Reuters, *Puerto Rican Jury Rejects Death Sentence in Police Killing*, CHI. TRIB. (Apr. 13, 2013), <http://articles.chicagotribune.com/2013-04-12/news/sns-rt-us-usa>

data to determine whether or not the Puerto Rico consensus is opposed to the death penalty, a stronger argument can be made that the data indicates a community consensus against the death penalty because these cases constitute 100% of modern death penalty cases decided in Puerto Rico and the juries in those cases refused to impose the death penalty despite the objectively severe nature of the defendants' crimes. To date, Puerto Rican juries have refused to impose the death penalty against defendants convicted of murdering a guard during the robbery of an armored truck,¹⁶⁸ acting as an accomplice to the murder of a Veteran's Administration Hospital guard during the course of a robbery,¹⁶⁹ murdering an ex-girlfriend who was a DEA informant,¹⁷⁰ orchestrating and participating in a shooting that killed eight people,¹⁷¹ and murdering an undercover police officer during a drug deal.¹⁷² These verdicts represent the will of the Puerto Rican people because the jurors at those trials served as the "link between community values and the penal system."¹⁷³

verdict-puertoricobre93b0o5-20130412_1_death-sentence-death-penalty-puerto-ricans [herein after *Casey Verdict*].

¹⁶⁸ Defendant Hernaldo Medina Villegas received a life sentence, despite the fact that he was convicted of shooting the guard in the head while he was laying defenseless on the ground. Fed. Death Penalty Res. Counsel, *Federal Capital Prosecutions Resulting in a Sentence Less Than Death*, CAPDEFNET.ORG (June 17, 2011), http://www.capdefnet.org/FDPRC/uploadedFiles/Public/Case_Descriptions/Case_Descriptions_by_Category/Federal%20Capital%20Prosecutions%20Resulting%20in%20a%20Sentence%20Less%20than%20Death%20-%206-17-11.pdf. His accomplice, Lorenzo Catalan Roman, also received a life sentence. *Id.*

¹⁶⁹ Carlos L. Ayala-Lopez received a life sentence. *Id.*

¹⁷⁰ Burgos Montes received a life sentence. Coto, *supra* note 1.

¹⁷¹ Alexis Candelario Santana received a life sentence. *Candelario Santana Verdict*, *supra* note 167.

¹⁷² Lashaun Casey received a life sentence. *Casey Verdict*, *supra* note 167.

¹⁷³ See *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1957)). Although not every jury delivered a unanimous life verdict, this fact has no impact on the evolving standards of decency analysis. For example, the Burgos Montes jury did not reach a unanimous verdict. Burns, *supra* note 20. Rather, during the preliminary vote, seven jurors favored the death penalty and five opposed it; in the final vote, eleven jurors favored death and a single juror remained opposed. Melissa Correa Velázquez, *Mayoría Quería Ejecutar a Edison Burgos*, VOCERO (Sept. 28, 2012), <http://www.vocero.com/once-a-favor-de-pena-de-muerte-en-caso-edison-burgos>. However, the fact that the jury did not deliver a unanimous life sentence should have no bearing on how the evolving standards of decency analysis should be applied to Puerto Rico capital defendants because the Supreme Court has only considered final jury verdicts when applying the evolving standards of decency test. See generally *supra* Part I.B–C (detailing the objective indicia used by the Supreme Court when conducting the evolving standards of decency analysis, such as jury verdicts). In addition, jury deliberation data should not be used while conducting an evolving standards of decency analysis because it is unavailable in the majority of cases and, thus, cannot be consistently used. See Thomas L. Brunell et al., *Factors Affecting the Length of Time a Jury Deliberates: Case Characteristics and Jury Composition*, 5 REV. LAW & ECON. 555, 559 (2009) ("A recurring challenge in jury deliberation analysis is the difficulty in obtaining data. Most of the data on juries comes from experimental situations which by their very nature constrain the length of time deliberations may take place."). Moreover, a lack of unanimous jury agreement does not necessarily demonstrate that the national consensus is moving toward accepting the death penalty because a jury's lack of consensus can be explained by a myriad of alternative

D. Additional Objective Indicia Confirm a Puerto Rican Consensus Opposed to the Death Penalty

In addition to Puerto Rico legislative and jury sentencing data, many other objective indicia demonstrate that the Puerto Rico consensus is opposed to the imposition of the death penalty against Puerto Rican defendants.¹⁷⁴ Public opinion polls indicate that Puerto Rico residents have remained opposed to the federal death penalty since before the passage of the FDPA.¹⁷⁵ In addition to the general Puerto Rican population, professional organizations, such as the Puerto Rico Bar Association¹⁷⁶ and the Puerto Rico ACLU,¹⁷⁷ also reject the death penalty. For example, when asked about his opinion regarding the death penalty in Puerto Rico, Arturo Luis Dávila Toro, the president of the Puerto Rico Bar Association, stated, “Although we are talking about some facts that are very gruesome, the people of Puerto Rico do not approve in any way of capital punishment.”¹⁷⁸ In addition, although the Supreme Court does not always consider international opinion when determining whether a punishment is cruel and unusual,¹⁷⁹ many Latin American countries have either banned capital punishment altogether¹⁸⁰ or severely limited its application.¹⁸¹

factors. *See, e.g.*, Joshua S. Press, *Untruthful Jurors in the Federal Courts: Have We Become Comfortably Numb?*, 21 ST. THOMAS L. REV. 253 (2009) (discussing how the voir dire process currently used in the federal courts does not guarantee juror impartiality). Therefore, in light of these considerations, courts should not give weight to jury deliberation data while conducting the evolving standards of decency analysis because doing so would only increase the likelihood of inconsistent and prejudicial results. *See supra* Part I.C–D.

¹⁷⁴ Shabazz, *supra* note 158.

¹⁷⁵ *See* Liptak, *supra* note 166.

¹⁷⁶ *See id.*

¹⁷⁷ *Death Penalty*, ACLU OF P.R., <http://www.aclu-pr.org/EN/WhatWeDo/DeathPenalty/DeathPenalty.htm> (last visited Aug. 3, 2013).

¹⁷⁸ Liptak, *supra* note 166.

¹⁷⁹ *But see* *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1976) (“[The] climate of international opinion concerning the acceptability of a particular punishment’ is an additional consideration which is ‘not irrelevant.’”)).

¹⁸⁰ WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 311 (3rd ed. 2002). Although Mexico officially abolished the death penalty in 2005, some Mexican citizens are now calling for its reinstatement to help curb violence. *Mexico: Death Penalty Gaining Support*, HUFFINGTON POST (Feb. 14, 2009, 5:12 AM), http://www.huffingtonpost.com/2009/01/14/mexico-death-penalty-gain_n_157868.html. This type of sentiment is not seen in Puerto Rico despite warnings that the island is becoming a “narco-state.” *See* Elyssa Pachico, *Is Puerto Rico Becoming a Narco-State?*, CHRISTIAN SCI. MONITOR (Dec. 16, 2011, 11:33 AM), <http://www.csmonitor.com/World/Americas/Latin-America-Monitor/2011/1216/Is-Puerto-Rico-becoming-a-narco-state>.

¹⁸¹ SCHABAS, *supra* note 180; *see generally* THOMAS BUERGENTHAL ET AL., *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* (3d ed. 2002) (noting that international law customarily incorporates the basic norms of international law followed by countries due to a sense of legal obligation, regardless of whether they are obligated to do so by treaty or domestic law).

Even the families of victims of capital crimes reject the punishment.¹⁸² In the case of the murder of Madelyn Semidey Morales, Morales's mother agreed with Edison Burgos Montes's life sentence, stating, "I'm satisfied that justice was served."¹⁸³ Morales's father also voiced his approval of the verdict by acknowledging that the jury "did their job" and that "[t]he system worked."¹⁸⁴

CONCLUSION

In response to Edison Burgos Montes's life sentence, U.S. Attorney Rosa Emilia Rodriguez stated, "I think we will soon be ready for the appropriate [death penalty] case."¹⁸⁵ While it is possible that the meaning of the term "we" in her statement refers to the Puerto Rican people, it is far more appropriate to interpret the term "we" as applying to the federal government. The U.S. government will likely continue to pursue Puerto Rico death penalty cases in the hopes that a Puerto Rico jury will finally impose a death sentence by virtue of sheer statistical probability.

In 2013, Puerto Rican juries decided two more death penalty cases. The first case involved defendant Alexis Candelario Santana, a man accused of masterminding a 2009 shooting rampage in a bar that resulted in eight fatalities.¹⁸⁶ This case garnered significant attention because of the brutality of the shootings and the fact that one of the victims was preg-

¹⁸² See Coto, *supra* note 1.

¹⁸³ *Id.*

¹⁸⁴ *Id.* Perhaps another indication that the Puerto Rico national consensus is opposed to the death penalty is the fact that Puerto Ricans have actively started looking for alternative means of deterring violent crime on the island. See Zuania Ramos, *Puerto Rico Murder Sparks Social Media Campaign Seeking Peace: #TodosSomosJoséEnrique*, HUFFINGTON POST (Dec. 5, 2012, 4:38 PM), http://www.huffingtonpost.com/2012/12/05/puerto-rico-murder-social-mediadotossomosjoseenrique_n_2245961.html. The most recent case involved the death of publicist José Enrique Gómez Saladín, who was beaten and burned alive in the town of Cayey on November 30, 2012 during a robbery. *Id.*; Miguel Rivera Puig, *Publicista Suplicó por Su Vida*, VOCERO (Dec. 5, 2012), <http://www.vocero.com/publicista-murio-a-golpes>. Following Gómez Saladín's death, activists launched a movement on Twitter called #TodosSomosJoséEnrique ("We Are All José Enrique"). Ramos, *supra*. The campaign, which consists of photographs of individuals holding up a sign with Gómez Saladín's name on it, gained momentum on social platforms such as Twitter, Facebook and Instagram and raised awareness regarding the growing problem of violence in Puerto Rico. *Id.* The important takeaway from this movement is that, rather than demanding that the alleged perpetrators be put to death, the Puerto Rican people are attempting to deter future violence by essentially saying, *We are all one people and we suffer through every act of violence together*. Despite Puerto Rico's continuing opposition to the death penalty, the U.S. Attorney's Office spokeswoman Lymarie Llovet announced in December 2012 that the suspects accused of Gómez Saladín's murder may be subject to the death penalty. *Feds Take Over Gómez Saladín Case*, CARIBBEAN BUS. (Dec. 4, 2012 3:45PM), <http://www.caribbeanbusinesspr.com/news/feds-take-over-gomez-saladin-case-opening-door-to-capital-punishment-79131.html>.

¹⁸⁵ Coto, *supra* note 1.

¹⁸⁶ *Candelario Santana Verdict*, *supra* note 167.

nant.¹⁸⁷ The second case involved defendant Lashaun Casey, a man accused of killing an undercover police officer during a drug deal.¹⁸⁸ Puerto Rican juries declined to impose the death penalty in both cases and instead sentenced both men to life in prison.¹⁸⁹

No death penalty cases are currently slated to begin in Puerto Rico. However, even if a future Puerto Rican death penalty case were to result in a death sentence verdict, that sentence alone would be insufficient to demonstrate that the Puerto Rican consensus has changed due to the small number of death-certified cases that have been adjudicated in Puerto Rico since the reintroduction of the death penalty and the fact that Puerto Rican legislative data—the Constitution of Puerto Rico—is unequivocally opposed to the imposition of the death penalty in Puerto Rico.

Future Puerto Rican death penalty cases will provide Puerto Rican federal capital defendants with the opportunity to raise Eighth Amendment claims arising under the evolving standards of decency test to argue that the consensus of the Puerto Rican people is unwaveringly opposed to the death penalty. Ultimately, these claims will demonstrate that either the federal death penalty is unconstitutional when applied to Puerto Rican defendants or that the Supreme Court's evolving standards of decency test is invalid and unworkable.

¹⁸⁷ *Id.*

¹⁸⁸ *Casey Verdict*, *supra* note 167.

¹⁸⁹ *Id.*; *Candelario Santana Verdict*, *supra* note 167.