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THE UNITED STATES RESERVATION TO THE BAN ON THE DEATH PENALTY FOR JUVENILE OFFENDERS: AN APPRAISAL UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ved P. Nanda*

INTRODUCTION

After the U.S. Senate gave its advice and consent to the ratification of the International Covenant on Civil and Political Rights (Covenant),1 the United States deposited its instrument of ratification on June 8, 1992,2 subject to several reservations.3 One of the reservations, on which I will comment here, relates to the ban on sentencing criminal offenders under eighteen years of age to death. The pertinent provision in the Covenant reads: “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”4 Under the said reservation, the United States reserves “the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.”5

In its latest pronouncement on the subject, the consolidated decisions of Stanford v. Kentucky and Wilkins v. Missouri,6 the U.S.

* Evans University Professor and Thompson G. Marsh Professor of Law, University of Denver. I gratefully acknowledge the research assistance of Gary Young, J.D. 1992, University of Denver College of Law.


4. ICCPR, supra note 1, art. 6(5), 999 U.N.T.S. at 175.

5. Senate Comm. on Foreign Relations. supra note 2, at 11, reprinted in 31 I.L.M. at 653.

Supreme Court by a majority of five-to-four affirmed the lower court's imposition of capital punishment on two individuals for crimes they committed under the age of eighteen on the ground that such imposition does not violate the Eighth Amendment to the U.S. Constitution. At present, seventeen states authorize capital punishment for criminal offenders under eighteen years of age, and eight do not specify a minimum age for the imposition of capital punishment. However, I will argue that the United States should join an overwhelming majority of nations by withdrawing its reservation on imposing capital punishment committed by persons below eighteen years of age. Alternatively, I will argue that the U.S. Supreme Court should decide that imposition of the death penalty on criminal offenders under eighteen years of age is violative of the Eighth Amendment. The Court should be informed in its deliberations toward reaching such a conclusion by evolving international norms.

The next section examines the pertinent U.S. practice. This is followed by a study of emerging international standards covering the death penalty for juveniles. This includes a review of pertinent international agreements, state practice of nations (especially those that share the Anglo-American heritage), and the views of respected professional organizations. The concluding section contains my recommendations.

I. Pertinent United States Practice

A. In General

At the end of 1991, the number of persons sentenced to death in the United States reached 2,482. Of those, ninety-three were eighteen or nineteen years old when sentenced, and eight were less than seventeen years old when sentenced. Since 1973 — when states began adopting new statutes for death penalties following the Supreme Court's 1972 decision effectively striking down the then-ex-

7. Id. at 380. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. Under the Due Process Clause of the Fourteenth Amendment, Eighth Amendment protections are incorporated and made applicable to the states: Robinson v. California, 370 U.S. 660, 667 (1962).
9. Id.
10. Id. at 10.
isting death penalty statutes\textsuperscript{11} — through the end of 1992, 114 death sentences have been imposed on juveniles.\textsuperscript{18}

Thirty-six states have capital punishment statutes.\textsuperscript{13} Eleven states and the federal government require a person to be at least eighteen years of age at the time the offense was committed to be eligible for the death penalty.\textsuperscript{14} In Georgia, New Hampshire, North Carolina, and Texas, the offender must have been seventeen years old when the crime occurred, although in North Carolina, if the individual was incarcerated for murder when the subsequent murder occurred, the age may be fourteen. Death penalty statutes in Alabama, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, and Wyoming apply to offenders who are sixteen years old.\textsuperscript{15} In Virginia, the age is fifteen; in Arkansas and Utah it is fourteen; and in South Dakota, a ten-year-old offender may be eligible for capital punishment, but only after a transfer hearing whereby the juvenile is tried as an adult.\textsuperscript{16} Eight states — Arizona, Delaware, Florida, Idaho, Montana, Pennsylvania, South Carolina, and Washington — do not specify an age for death penalty eligibility.\textsuperscript{17}

\section*{B. Case Law}

\subsection*{1. Historical Context — Application of Common Law Principles}

It was not until 1962 that the U.S. Supreme Court ruled the Cruel and Unusual Punishments Clause of the Eighth Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment.\textsuperscript{18} Until then, most challenges to the death penalty were heard by state courts applying common law principles.

To place this discussion in an historical context, the American colonies relied upon several treatises which contained interpretations of the common law as it had been developed and practiced in England. Among the more popular works in the new colonies was

\begin{itemize}
\item \textsuperscript{11} See infra notes 49-55 and accompanying text.
\item \textsuperscript{12} See Victor L. Streib, The Juvenile Death Penalty Today 4 (Feb. 1, 1993) (unpublished manuscript, on file with author).
\item \textsuperscript{13} NAACP LEGAL DEFENSE AND EDUC. FUND, DEATH ROW, U.S.A. 7 (1992) [hereinafter DEATH ROW].
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Robinson v. California, 370 U.S. 660, 667 (1962); see supra note 7.
\end{itemize}
Blackstone's Commentaries, published in 1768. On the topic of juvenile culpability for criminal acts, Blackstone wrote, "Infants under the age of discretion ought not to be punished by any criminal prosecution whatever. What the age of discretion is, in various nations, is [a] matter of some variety." In England, Blackstone reported, a child under the age of seven could not be found guilty of a felony, "for then a felonious discretion is almost an impossibility in nature." Under the age of fourteen, a child was prima facie innocent, but this presumption could be overcome by evidence that the juvenile was "doli incapax" and "could discern between good and evil."

Applying these common law principles, English courts condemned to death a thirteen-year-old girl and two boys, ages ten and eight. The girl was reportedly burned to death. The two boys were hanged.

As they considered cases involving juvenile felons, Colonial and state courts relied upon the rules developed by English courts. Not surprisingly, their results mirrored those of their counterparts in England. Between 1642 and 1986, 281 persons who committed

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20. 4 WILLIAM BLACKSTONE, COMMENTARIES *22.
21. 4 id. at *23.
22. 4 id.; see also 1 LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND 136 n.(f) (J.H. Thomas ed., Alexander Towar, Philadelphia 1836):
   In criminal cases, an infant of the age of fourteen years, may be capitally punished for any capital offence; but under the age of seven he cannot. The period between the age of seven and fourteen is subject to much uncertainty, for the infant shall, generally speaking, be judged prima facie innocent; yet if he was doli incapax and could discern between good and evil at the time of the offence committed, he may be convicted, and undergo judgment and execution of death, though he was not attained to years of puberty or discretion; for in such case the maxim of the law is, that "malitia supplet aelatem."
1 id.
23. 4 id. supra note 20, at *23-24. "But by the law, as it now stands and has stood at least since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by the years and days, as by the strength of the delinquent's [sic] understanding and judgment." 4 id. at *23.
24. See, e.g., State v. Bostick, 4 Harr. 563 (Del. 1845) (holding that a girl between twelve and thirteen was presumptively not incapable of arson); Angelo v. People, 96 Ill. 209 (1880) (stating that proof that an eleven-year-old was capable of committing a felony must be clear and strong); State v. Doherty, 1 Tenn. (2 Overt.) 79, 88 (1806) (stating that the law presumed a fourteen-year-old is doli incapax and one between seven and fourteen years of age was not and that this presumption could be overcome by proof of consciousness of wrong.); Wusnig v. State, 33 Tex. 651 (1871) (stating that under Texas statutes, a person between the ages of nine and thirteen could be convicted of any offense, unless it was proved that the person understood the illegality of
crimes while under the age of eighteen were executed in the United States.\(^5\) Of this group, as many as 126 were less than seventeen years old.\(^6\)

Although only a few reported cases exist of juveniles whose death sentence appeals were heard in state courts prior to 1962, the reported decisions share some similarities. First, most of the defendants were black. Second, the opinions reflected a restatement of the common law principle of juvenile criminal incapacity expressed by Blackstone and others. In particular, the decisions noted that the presumption of incapacity for persons between seven and fourteen years of age was rebuttable.\(^7\)

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\(^26\) Id. at 57.

\(^27\) See State v. Aaron, 4 N.J.L. 269, 276-77 (N.J. 1818). The court in Aaron stated:

It is perfectly settled that an infant within the age of seven years cannot be punished for any capital offence, whatever circumstances of mischievous intention may be proved against him, for by the presumption of the law, he cannot have discretion to discern between good and evil and against this presumption no averment can be admitted. It is perfectly settled, also, that between the age of seven and the age of fourteen years, the infant shall be presumed to be incapable of committing crime upon the same principle, the presumption being very strong at seven, and decreasing with the progress of his years; but then this presumption, in this case, may be encountered by proof; and if it shall appear by strong and irresistible evidence that he had sufficient discernment to distinguish good from evil, to comprehend the nature and consequences of his acts, he may be convicted and have judgment of death.

Id.; see also State v. Guild, 10 N.J.L. 163, 174 (N.J. 1828). The court in Guild stated:

With respect to the ability of persons of his age, to commit crimes of this nature, the law is, that under the age of seven, they are deemed incapable of it. Between seven and fourteen, if there be no proof of capacity, arising out of the case, or by the testimony of witnesses, the presumption is in their favour; a presumption however growing weaker and more easily overcome, the nearer they approach to fourteen. And at the age of this defendant [twelve], sufficient capacity is generally possessed in our state of society, by children of ordinary understanding, and having the usual advantages of moral and religious instruction.

Id.; see also Godfrey v. State, 31 Ala. 323, 327-28 (1858). The court in Godfrey stated:

An infant above seven, but under fourteen years of age, is presumed not to have such knowledge and discretion, as would make him accountable for a felony committed during that period. But, if the presumption is met by evidence clearly proving the existence of that knowledge and discretion deemed requisite to a legal accountability, the reason for allowing an immunity from punishment ceases, and, with it, the rule which grants such immunity ceases.

Id.; see also Martin v. State, 90 Ala. 602, 608 (1890). The court in Martin stated:

[(I)n the case of a minor between seven and fourteen years of age, the presumption is, that he or she had not the requisite guilty knowledge of wrongfulness or wickedness of the act charged, to authorize a conviction of felony. But the presumption is only \textit{prima facie} and may be rebutted by clear evidence of a mischievous discretion, or by
Under the common law, proof of capacity in a capital case was a pivotal question that could mean the difference between life and death for a defendant. State courts were careful to ensure that when capacity was challenged, the prosecutor produced substantial rebuttal evidence.28

2. Mitigation

State courts were also cognizant of the individual characteristics of young defendants, though the first use of such evidence could scarcely be called mitigating. Among the evidence the jury was asked to consider in the 1858 Alabama murder trial of an eleven-year-old named Godfrey, for example, was “his condition as a negro and a slave.”29 This evidence did not help young Godfrey avoid proof of knowledge of good and evil, which knowledge must be distinctly made to appear from the evidence.

Id.; see also Ridge v. State, 229 P. 649, 650 (Okla. Crim. App. 1924). The court in Ridge stated:

In this state children between the ages of 7 and 16 years are presumed to be incapable of committing crime, but that presumption may be overcome by a showing made in a juvenile court that the child has sufficient understanding and intelligence to know right from wrong.

Id.; see also Clay v. State, 196 So. 462, 463 (Fla. 1940). The court in Clay stated:

It is well established at common law that a child under the age of 7 years is conclusively presumed to be incapable of committing a crime; the common law rule raises a presumption of incapacity of an infant between the ages of 7 and 14; and the presumption is that the incapacity after 7 years of age decreases with the progress of his years.

Id.


28. See, e.g., Aaron, 4 N.J.L. at 285 (“And so ought the jury and the court here to be satisfied, and satisfied beyond the possibility of question.”); Martin, 90 Ala. at 606 (stating that the jury must be satisfied “beyond all reasonable doubt”). One form of evidence prosecutors often produced was a defendant’s confession. These were sometimes obtained under dubious circumstances. The court in Aaron was suspicious of the child’s confession. “The infant is not to be convict of his own confession,” the court wrote. 4 N.J.L. at 278. Ten years later, however, the same court reached a different result when the confessions of a twelve-year-old murder suspect were challenged on appeal. Young Guild, while jailed for five months, was apparently told he would soon die anyway, so he might as well confess. Guild, 10 N.J.L. at 182. He did confess and the court ruled that since he had nothing to gain by confessing, all hope being lost, he must have told the truth. Id. at 183. Guild had actually confessed and recanted several times to different people. According to one witness, the boy confessed after “I told him I was going to make him put his hand on her [the victim]; that I heard, if a person had murdered another, make him put his hand on her, and she will bleed afresh.” 10 N.J.L. at 167. The Alabama Supreme Court ruled that the confession, standing alone, of someone under the age of fourteen was sufficient for conviction. Martin, 90 Ala. at 609. And in Clay, the Florida Supreme Court ruled that the confessions of three sixteen-year-old boys, who testified they confessed after being beaten by police, were admissible. Clay, 126 So. at 464-65.

execution.

Subsequently, the "principles" of Godfrey were "fully approved" by the Alabama Supreme Court in the 1890 murder trial of a fourteen-year-old black named Martin. 30

In 1924, Elias Ridge, a fourteen-year-old black, was charged with murder. In Ridge v. State, 31 the Oklahoma Court of Criminal Appeals expanded the list of factors that should guide a jury's consideration in passing sentence on a youthful offender. "This crime was reprehensible in the highest degree," a unanimous three-judge panel wrote, "but the record shows that the perpetrator, by reason of his youth, his lack of home training, and unfavorable environment, probably had no adequate comprehension of the enormity of the offense or of his criminal responsibility." 32 The court modified his death sentence to hard labor for life. 33

In 1959, the Supreme Court of Pennsylvania decided Commonwealth v. Green, 34 vacating the death sentence of a fifteen-year-old boy. The justices were persuaded by the importance of the defendant's age in sentencing:

Of itself, Green's chronological age of 15 years would not justify the imposition of the lesser penalty, but his age is an important factor in determining the appropriateness of the penalty and should impose upon the sentencing court the duty to be ultra vigilant in its inquiry into the makeup of the convicted murderer. 35

3. Abuse of Discretion

By failing to consider the defendant's age and other circumstances, the jury was ruled by the court in Ridge to have abused its discretion in sentencing Ridge to death. 36 On similar grounds, the sentence was overturned in Green: "The imposition of the death penalty by a judicial tribunal should be made only when it is the sole penalty justified by the criminal act and the criminal himself and then only after a full and exhaustive inquiry into both the criminal act and the criminal himself." 37 It was the duty of the sentenc-

30. Martin, 90 Ala. at 609.
32. Id. at 650.
33. Id. at 651.
35. Id. at 246.
37. Green, 151 A.2d at 247.
ing court "to inquire and exhaust every avenue of information that would inform it of the type of individual represented by that boy." Instead, the trial judges were unfairly moved by "the manner of the murder and the placation of . . . the public plaint."

4. Cruel and Unusual Punishment: The Supreme Court Cases

In his plurality opinion for Stanford v. Kentucky and Wilkins v. Missouri, affirming the death penalties for two offenders who committed their crimes at the ages of sixteen and seventeen, Justice Scalia said that, under the Eighth Amendment to the U.S. Constitution, "[t]he punishment is either 'cruel and unusual' (i.e., society has set its face against it), or it is not." The Stanford Court ruled that society had not set its face against the execution of a person who committed murder at age sixteen. Justice Scalia concluded: "We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."

Justice Scalia noted that the offenders' punishment was not contrary to the "evolving standards of decency that mark the progress of a maturing society," the standard the Court had previously enunciated in 1958 to interpret the Eighth Amendment in Trop v. Dulles. A year before Stanford, in Thompson v. Oklahoma, the Court had decided that "it would offend civilized standards of decency to execute a person who was less than 16 years old at the time

38. Id.
39. Id. Justice Bell, in a mocking dissent, wrote:

I believe the majority's opinion would have been clearer and stronger if it had said something like this: We are opposed to the death penalty, especially for young persons. Notwithstanding all the authorities to the contrary, henceforth it shall be unlawful for a trial Court to impose the death penalty on any murderer who is under [sic] years of age.

Id. at 251 n.4.
41. Id. at 378.
42. Id. at 380.
43. Id. at 379 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).
45. 487 U.S. 815 (1988). As stated by Justice Stevens in his prefatory section, the Thompson decision hinged on the conclusion that a fifteen-year-old could not have the culpability requisite to mandate execution. Id. at 822-23.
In fact, between 1964 and 1985, the United States did not execute any person for crimes committed while under eighteen years of age. Thus, such executions had ceased eight years prior to the U.S. Supreme Court’s landmark decision in Furman v. Georgia. Furman had effectively invalidated capital punishment statutes on the ground that the imposition of the penalty under existing laws constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

While all nine justices in Furman wrote separate opinions, reflecting the difficulty the Court encountered in applying the Eighth Amendment to the state statutes on the death penalty, according to a majority of the Court, the existing sentencing procedures lacked guidelines or standards and, as Justice Stewart said in concurrence, were being “wantonly” imposed. Similarly, Justice White said that there was “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” Although several Justices were concerned that the death penalty failed to serve the penological purposes of retribution and deterrence, only Justices Brennan and Marshall held that it was unconstitutional per se. Thus, several states reenacted death penalty laws in the years following Furman, and in 1976 the Supreme Court held, in Gregg v. Georgia, that “the punishment of death does not invariably violate the Constitution.”

In applying the Eighth Amendment, the Gregg Court combined the “evolving standards of decency” test of Trop with its own test of whether the punishment accords with “the dignity of man.” The Court said that, while an “assessment of contemporary values concerning the infliction of a challenged sanction is relevant” in determining the application of the Eighth Amendment, the penalty “also must accord with ‘the dignity of man,’ which is the basic concept

46. Id. at 830.
47. 408 U.S. 238 (1972).
48. Id. at 240-41; see Justice William Brennan, Constitutional Adjudication and the Death Penalty: A View from the Court, 100 HARV. L. REV. 313 (1986).
49. Furman, 408 U.S. at 310 (Stewart, J., concurring).
50. Id. at 313 (White, J., concurring).
51. See, e.g., id. at 310 (Stewart, J., concurring); id. at 313 (White, J., concurring).
52. Id. at 279-80, 305-06 (Brennan, J., concurring); id. at 342-59 (Marshall, J., concurring); id. at 307 (Stewart, J., concurring); id. at 311-12 (White, J., concurring).
54. Id. at 169.
underlying the Eighth Amendment."

For the moment, the Court has drawn the death penalty line at age sixteen. This result is a product of casting the cruel and unusual punishments clause not in light of those punishments and common law rules of punishment which existed at the time the clause was written, but in the context of contemporary societal norms. However, the Stanford plurality considered only "American conceptions of decency" as dispositive, rejecting the relevance of "the sentencing practices of other countries," which the defendants and their amici had submitted to show that international norms prohibit such punishment. It also rejected the proportionality analysis, that is, whether "there is a disproportion 'between the punishment imposed and the defendant's blameworthiness,'" and whether a punishment makes any "reasonable contribution to acceptable goals of punishment," saying that "we have never invalidated a punishment on this basis alone."

When faced with the task of applying the clause, the Court, from the earliest cases, turned to the sparse legislative history of the Eighth Amendment and the tenor of the time for guidance. It may be recalled that the Eighth Amendment was introduced by James Madison in the U.S. House of Representatives in June of 1789. It had previously been written into Virginia's Declaration of Rights of 1776 by fellow Virginian George Mason, who adopted the language from the English Declaration of Rights of 1688. In 1688, James II, last of the Stuart kings, abdicated. Among the rights demanded of the new monarchs, William and Mary, by their disgruntled subjects, was that "Excessive Bail ought not be required nor Excessive Fines imposed, nor cruel and unusual punishments inflicted." It is worth noting that Madison changed the wording from "ought not" to "shall not."

But which punishments were cruel and unusual? When it came to inflicting punishment, seventeenth-century England left little to the

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55. Id. at 173.
57. Id. at 369 n.1.
58. Id. at 379, 393.
60. See Larry C. Berkson, The Concept of Cruel and Unusual Punishment 7 (1975).
61. Id. at 5; 2 David K. Watson, The Constitution of the United States 1505 (1910); Granucci, supra note 21, at 840-41.
62. See 2 Watson, supra note 61, at 1505.
63. See Berkson, supra note 60, at 7.
imagination. The U.S. Supreme Court in *Wilkerson v. Utah*\(^4\) noted examples "where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female."\(^5\)

American colonists of the period had a rough go as well. Death by hanging, burning, and breaking on the wheel were common.\(^6\) When the Quakers arrived in North America in the 1650s, they were "whipped, pilloried, stocked, caged, imprisoned, laid neck and heels, branded and maimed" by New England's Christians.\(^7\) Four Quakers were hanged.\(^8\)

In colonial Virginia, James Madison's home state, the ducking stool was a favorite form of punishment, particularly for women. It consisted of tying a woman to a chair and plunging her under the water "as often as the sentence directs in order to cool her immoderate heat."\(^9\)

Reviewing this history, it was understandably difficult for the Court to begin drawing lines, bright or otherwise, that would distinguish constitutionally prohibited punishments from those sanctioned by society.\(^10\)

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\(^4\) 99 U.S. 130 (1878).
\(^5\) Id. at 135; see also *Done v. People*, 5 Park. Cr. Cas. 364, 382-83 (N.Y. Crim. Ct. 1863).
\(^6\) The court in *Done* stated:
The punishments in England . . . were inflicted in various ways. Under the directions of military courts he [the convict] was shot. When condemned by ecclesiastical tribunals, he was not unfrequently burnt at the stake, as if his priestly judges designed that the heretic, on the going out of this world, should have a foretaste of the punishment to which they also consigned him in the next. For treason against the state the great sword of justice was to fall. The condemned man was sentenced to be hung, taken down while still alive, beheaded, disemboweled and quartered; with few exceptions, however, the axe of the executioner only was used, and the criminal was simply beheaded. If however, in case of high crimes, especially treason, the prisoner stood mute and refused to plead, he might be sentenced to be pressed to death, a punishment inflicted by placing the prisoner on his back, naked, in a cold dungeon, with his arms and legs extended by cords to the four corners, and with iron or stone laid on his breast, and left till death from cold, or pressure, or exhaustion, came to his relief. Lastly, for the crime of murder and numerous other felonies, the criminal was sentenced to be hung by the neck till he was dead.

\(^7\) Id.

\(^9\) Id. at 39.
\(^10\) Id. at 40.

The Court considered the word "unusual" as it is used in the Eighth Amendment and proposed that an ordinary meaning should be applied to its interpretation. *See Trop v. Dulles*, 356
However, Thomas Cooley, a respected publicist who was often cited by the Court, concluded that "those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual."

The Court's own approach was to view the clause as prohibiting punishments that were inhuman, barbarous, or involved torture and excessive punishments out of proportion to the offense. Except for a period of four years during the 1970s, the death penalty was never


71. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 694 (Walter Carrington ed., 8th ed. 1927). See also 2 WATSON, supra note 61, at 1511 ("Usually the term means punishment which would shock the human mind and feeling, like burning, or cutting off the members of the body, or throwing the victim into boiling water.").

72. Wilkerson v. Utah, 99 U.S. 130, 136 (1878) ("[I]t is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of cruelty, are forbidden by that amendment to the Constitution."); In re Kemmler, 136 U.S. 436, 447 (1889) ("Punishments are cruel when they involve torture or a lingering death."); Weems v. United States, 217 U.S. 349, 368 (1910) ("It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like."); Trop v. Dulles, 356 U.S. 86, 100 (1958) ("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."); Solem v. Helm, 463 U.S. 277, 286 (1983) ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection — including the right to be free from excessive punishments."); Ford v. Wainwright, 477 U.S. 399, 405 (1986) ("There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the bill of Rights was adopted.").

Granucci argues that England's cruel and unusual punishments clause was designed to prohibit "severe punishment, unauthorized by statute and not within the jurisdiction of the court to impose." Granucci, supra note 21, at 859. To that extent, he says, the Supreme Court's focus on excessiveness and proportionality completely misses the mark. Id. at 860.

The cruel and unusual punishments clause of Virginia's Bill of Rights of 1776 was interpreted by Virginia's Supreme Court in Hart v. Commonwealth, 109 S.E. 582, 586-87 (1921). Justice Sims wrote:

It has been uniformly held by this court that the provisions in question in the Virginia Constitution, which have remained the same as they were originally adopted in the Virginia Bill of Rights of 1776, must be construed to impose no limitation upon the legislative right to determine and prescribe by statute the quantum of punishments deemed adequate by the Legislature; that the only limitation so imposed is upon the mode of punishments, such punishments only being prohibited by such constitutional provision as were regarded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involve torture or lingering death — such as are inhumane and barbarous — as, for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like.

Id.
held to violate the Eighth Amendment. For example, in the 1878 case of Wilkerson v. Utah, the Court did not debate the propriety of the death penalty itself, but whether the method — shooting rather than hanging — was cruel and unusual. The Court held it was not. Twelve years later in In re Kemmler, the Court stated that "the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life."

The issue of executing a juvenile offender did not come before the Court until Eddings v. Oklahoma. In Eddings, a sixteen-year-old murdered a highway patrol officer. The Court was asked to address the issue of whether the infliction of the death penalty on a child who was sixteen at the time of the offense constituted cruel and unusual punishment. The trial court was required by Oklahoma statute to consider mitigating evidence during sentencing. Yet the trial court failed to consider evidence of what the Court called "Eddings' unhappy upbringing and emotional disturbance." This violated the Court's own rule, announced in Lockett v. Ohio, that "any aspect of a defendant's character or record" must be considered in mitigation at the sentencing stage of a capital trial to avoid violating the Eighth Amendment.

Thus, the Court vacated Eddings' death sentence, but it did not rule on whether the death penalty was per se cruel and unusual punishment and hence unconstitutional when imposed on a sixteen-year-old person. Writing for a five-to-four majority, Justice Powell said, "Because we decide this case on the basis of Lockett v. Ohio, we do not reach the conclusion of whether — in light of contemporary standards — the Eighth Amendment forbids the execution of a de-

73. See supra notes 49-55 and accompanying text.
74. 99 U.S. 130 (1878).
75. Id. at 134-35.
76. 136 U.S. 436 (1889).
77. Id. at 447.
78. 455 U.S. 104 (1982).
79. Id. at 106.
80. Id.
82. 445 U.S. at 109.
84. Id. at 604.
defendant who was 16 at the time of the offense."

Six years after *Eddings*, a plurality of the Court, in *Thompson v. Oklahoma*, ruled that executing a person who committed a crime at age fifteen would violate the Cruel and Unusual Punishments Clause. The petitioner, Thompson, had been sentenced to death in Oklahoma for the murder of his former brother-in-law. The Court did not examine the issue of whether or not executing fifteen-year-old criminals was common at the time the clause was written, but in a five-to-three decision it did vacate Thompson's death sentence. Writing for four of the Justices, Justice Stevens looked to the "evolving standards of decency that mark the progress of a maturing society" and held that such executions were prohibited under the Cruel and Unusual Punishments Clause of the Constitution. In an exhaustive review of state legislation regarding age requirements for voting, jury service, driving, marriage, the purchase of pornography, and gambling, Justice Stevens concluded that most states conferred these adult obligations, privileges or responsibilities on persons sixteen years of age and above. He also examined state death penalty laws and found that of the eighteen states which established a minimum statutory age, all required the defendants to have been sixteen years of age at the time of their offense.

Aside from domestic legislation, Justice Stevens noted that the practice of other nations could be informative on the issue of "evolving standards," and he observed that many other nations had rejected the death penalty altogether or refused to allow juveniles to be executed. Finally, according to the Court, only five persons who were under the age of sixteen at the time of their crimes were sentenced to death between 1982 and 1986. The harsh punishment of these five juveniles, said Justice Stevens, was "cruel and unusual in

87. *Id.* at 838.
88. *Id.* at 821 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)).
89. *Id.* at 821-38; see also *Weems v. United States*, 217 U.S. 349, 378 (1910) (noting that "[t]he [cruel and unusual punishments] clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." (emphasis added)).
91. *Id.* at 829.
92. *Id.* at 830-31.
93. *Id.* at 832-33.
the same way that being struck by lightning is cruel and unusual."

Justice O'Connor concurred on the narrow grounds that the Oklahoma statute, which set no minimum age at which capital punishment could be imposed and at the same time separately provided that juvenile defendants may be treated as adults under some circumstances, failed to meet the standard of "careful consideration that we have required for other kinds of decisions leading to the death penalty." Under this law, Oklahoma could not execute a fifteen-year-old. Justice Scalia, joined by Chief Justice Rehnquist and Justice White, dissented.

Since the Court in Thompson did not reach a majority decision on whether capital punishment for all offenders under sixteen violates the Constitution, the issue remains undecided.

In Stanford v. Kentucky, the Court considered the death sentence appeals of two defendants, ages sixteen and seventeen, and held by five votes to four that the execution of these offenders was permissible under the Constitution. Writing for the majority, Justice Scalia began his analysis by examining the English common law, just as the state courts had done when confronted with sentencing a child to death. When the Eighth Amendment was written, he noted, the common law "theoretically permitted capital punishment to be imposed on anyone over the age of 7." Finding no prohibition in the common law of 1789, he then considered society's "evolving standards" to determine if a consensus existed that such executions constitute cruel and unusual punishment. He concluded that no such consensus exists. He noted 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."

Justice Scalia opposed the notion that the practices of other nations were germane to Eighth Amendment analysis. He also rejected "public opinion polls, the views of interest groups, and the

94. Id. at 833 (Stewart, J., concurring) (citations omitted).
95. Id. at 858 (O'Connor, J., concurring in part and concurring in result).
96. Id. at 859-87 (Scalia, J., dissenting).
98. Id. at 368.
99. Id.
100. Id. at 369.
101. Id.
102. Id. at 369 n.1.
positions adopted by various professional associations” which the defendant introduced as evidence supporting the contention of an existing national consensus in opposition to the death penalty for a sixteen-year-old defendant.103 He characterized these submissions as “socioscientific” or “ethicoscientific.”104 The most persuasive expressions of the public attitude, he wrote, “are statutes passed by society’s elected representatives.”105 In other words, Justice Scalia argued that the will of the majority should govern the Court’s consideration of the constitutionality of punishments imposed by governments upon juveniles.106

Justice Scalia rejected evidence and arguments characterizing the death penalty for Stanford and Wilkins as disproportionate and failing to serve the “legitimate goals of penology,” namely retribution and deterrence.107 This inquiry is called for, in addition to that concerning evolving standards of decency, under prior Supreme Court cases, Coker v. Georgia108 and Enmund v. Florida.109 While Coker held that a penalty is “excessive” if it involves unnecessary infliction of pain or when it is grossly disproportionate to the severity of the crime,110 Enmund held that if punishment fails to further the penological goals of retribution or deterrence, it amounts to unnecessary

103. Id. at 377.
104. Id. at 378. Scalia noted that “[t]he 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.” Id.
105. Id. at 370.
107. Stanford, 492 U.S. at 379. Scalia noted:

All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty. . . . In fact, 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 379-80.

Justice O’Connor replied:

In my view, this Court does have a constitutional obligation to conduct proportionality analysis. In Thompson I specifically identified age-based statutory classifications as ‘relevant to Eighth Amendment proportionality analysis.’ . . . Thus, although I do not believe that these particular cases can be resolved through proportionality analysis, . . . I reject the suggestion that the use of such analysis is improper as a matter of Eighth Amendment jurisprudence.

Id. at 382 (O’Connor, J., concurring in part and concurring in the result).
110. Coker, 433 U.S. at 592.
and wanton infliction of pain.\textsuperscript{111}

In \textit{Stanford v. Kentucky}, the defense argued that "juveniles, possessing less developed cognitive skills than adults, are less likely to fear death" and, "being less mature and responsible, are also less morally blameworthy."\textsuperscript{112} But, Justice Scalia stated that the juvenile death penalty would fail under equal protection arguments, rather than the Eighth Amendment, if such arguments could be conclusively proven.\textsuperscript{113}

Consequently, under the \textit{Stanford} plurality's ruling, the fate of juvenile offenders is to be decided solely by the voters of the fifty states. The Court should not be so willing to defer to the preferences of legislatures in analyzing cases under the Eighth Amendment. As Chief Justice Warren wrote:

> We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously . . . . But the ordeal of judgment cannot be shirked.\textsuperscript{114}

\textsuperscript{111} \textit{Enmund}, 458 U.S. at 798.
\textsuperscript{113} \textit{Stanford}, 492 U.S. at 378.
\textsuperscript{114} \textit{Trop v. Dulles}, 356 U.S. 86, 104 (1958); \textit{see also Weems v. United States}, 217 U.S. 349, 378-79 (1910). The Court in \textit{Weems} stated:

> In [several cases] prominence is given to the power of the legislature to define crimes and their punishment. We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant.

\textit{Id.}
II. EMERGING INTERNATIONAL STANDARDS WITH RESPECT TO CAPITAL PUNISHMENT OF JUVENILES

A. In General

If the prohibition on the juvenile death penalty has almost acquired the status of *jus cogens*, a nonderogable principle of international law binding upon all nations, as some have argued, the U.S. reservation to those provisions of the International Covenant will have no effect. Assuming, however, that very few norms of international law meet the *jus cogens* standard and these norms do not encompass the juvenile death penalty prohibition, it is nevertheless fair to argue that under evolving international standards, there is an emerging customary international law under which capital punishment of juveniles is prohibited. Pertinent international agreements, state practice, and views of respected professional organizations provide strong evidence of such an emerging norm.

B. International Agreements

In the recent past, several human rights instruments containing prohibitions on either the death penalty itself or as applied against juvenile offenders have been adopted by the international community. Four major treaties of concern to the United States contain language explicitly prohibiting the death penalty for juveniles.

The International Covenant on Civil and Political Rights, which came into force in 1976, states in Article 6, paragraph 5, that a “sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . .” During the period of negotiations and drafting of the Covenant, neither the United States nor any other country objected to the juvenile capital punishment language as contrary to human rights principles. Rather, the *travaux preparatoires* reveal that the contents of Article 6 were already the consensus of nations.

The second pertinent agreement is the American Convention on

116. ICCPR, supra note 1.
117. Id. art. 6, 999 U.N.T.S. at 174.
Human Rights,\textsuperscript{119} which states in Article 4, paragraph 5, "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age . . . ."\textsuperscript{120} Again, during the drafting phase, the United States did not object to the prohibition of the execution of juvenile offenders in the American Convention, but it argued that setting a specific age limit in the treaty failed to take into account the "already existent trend" toward the abolition of the death penalty altogether.\textsuperscript{121}

The American Convention was signed by nineteen OAS members, ratified by sixteen of those, and pledged to be followed by four.\textsuperscript{122} The United States never ratified the American Convention, in part because the drafting Conference would not remove the proscription of capital punishment for certain age groups. Instead, the United States abstained on Article 4.\textsuperscript{123} After President Carter was unsuccessful in his attempts to gain ratification in 1978,\textsuperscript{124} the Reagan Administration never resubmitted it. Although the United States is not a party to the Convention, it is subject to the recommendations of the Inter-American Commission on Human Rights (Commission), another organ of the OAS. Indeed, the Commission in 1987 found the United States to be in violation of a rule of \textit{jus cogens} by its practice of executing juvenile offenders.\textsuperscript{125}

The case involved the executions of James Terry Roach and Jay Pinkerton, both seventeen at the time of their crimes. Of particular concern to the Commission was the U.S. system under which each state has its own laws on capital punishment and minimum ages therefor. This, it said, results in a "hodge-podge of legislation" and

\begin{itemize}
  \item \textsuperscript{120} Id. art. 4(5).
  \item \textsuperscript{121} Brief of Amicus Curiae Amnesty International in Support of Petitioner, Wilkins v. Missouri, 492 U.S. 361 (1989); see Comment, supra note 112.
  \item \textsuperscript{122} See American Convention on Human Rights, supra note 119.
  \item \textsuperscript{124} Message from the President of the United States Transmitting Four Treaties, 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 3, 1978). The President had suggested that a reservation be entered to Article 4, "subject to the Constitution and other laws of the United States." Id.
\end{itemize}
arbitrary, inconsistent sentencing that reflects the location of the crime more than its nature. The finding of the Commission, however, has been the subject of criticism for its lack of thorough analysis and reasoning.

Signed in 1949, the Fourth Geneva Convention, the Convention Relative to the Protection of Civilian Persons in Time of War, states, "In any case, the death penalty may not be pronounced against a protected person [one held by a party to the conflict or an occupying force of which he/she is not a national] who was under eighteen years of age at the time of the offence." The United States was one of 154 nations to sign the Fourth Geneva Convention.

The 1977 Protocols to the Geneva Conventions explicitly prohibit imposition of the death penalty on those whose crimes were committed while they were under the age of eighteen. The Additional Protocol relating to the Protection of Victims of International Armed Conflicts (Protocol I) states in Article 77, paragraph 5, "The death penalty related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed." And the Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) states in Article 6, paragraph 4, "The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence . . . ."

The most recent of the treaties, the Convention on the Rights of the Child, requires States Parties to ensure that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." The United States has signed but has not ratified the

127. See Note, supra note 123, at nn.177-82.
129. Id. art. 68, 75 U.N.T.S. at 330.
134. Id. art. 37(a).
The United Nations Economic and Social Council (ECOSOC) adopted a resolution at its 1984 Session which embodies a series of safeguards guaranteeing protection of the rights of those facing the death penalty. Safeguard 3 provides: "Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death . . . ." The Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders endorsed the safeguards in 1985; in May 1989, ECOSOC adopted another resolution inviting member States to review their legislation for the death penalty safeguards if they had not yet done so (the United States has not yet conducted such a review); and in December 1989, the U.N. General Assembly adopted the ECOSOC resolution on implementation of the safeguards without a vote.

In December 1989, the U.N. General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights, obligating each State Party to "take all necessary measures to abolish the death penalty within its jurisdiction," and acknowledging a world-wide effort to abolish capital punishment for all purposes. Six years earlier, Protocol 6 to the European Convention on Human Rights abolished the death penalty in time of peace.

Under international law, a state may make a reservation provided that the treaty permits it and that the reservation is not incompatible with the objects and purposes of the treaty. It is arguable that under the International Covenant on Civil and Political Rights, such a reservation is not allowed. A persuasive argument can also be made that under the Vienna Convention on the Law of Treaties,
such a reservation is incompatible with the objects and purposes of the Covenant.\footnote{42}

It is particularly important to note that at the time of the negotiation, drafting, and opening for signature of the International Covenant, the Geneva Protocols, the American Covenant, and the Security Council Resolutions, the United States had discontinued its use of the death penalty on juvenile offenders.\footnote{43} Therefore, if indeed the prohibition against the juvenile death penalty is customary international law, under any reading of U.S. practice in this area, its reservation in 1992 is ineffective.

C. State Practice

An overwhelming number of countries have abolished the death penalty for offenders under the age of eighteen. The United States, in fact, remains alone among the industrialized nations in applying the death penalty to juveniles between the ages of sixteen and eighteen at the time of their crimes.\footnote{44}

With the assistance of Amnesty International and the International Human Rights Law Group, the petitioners in \textit{Thompson} provided the Supreme Court with extensive authoritative evidence of the current juvenile death penalty practices of the international community. That information was given consideration on the basis of the Court's having "previously recognized the relevance of the view of the international community in determining whether a punishment is cruel and unusual."\footnote{145} As Justice Scalia later rejected this argument in \textit{Stanford}, it was for Justice Brennan to approve it in his dissent, noting: "Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis."\footnote{146} Thus international standards would "inform" the Eighth Amendment analysis.\footnote{147}

\footnote{142. See Gamble, supra note 141, at 393.}
\footnote{143. See I STREIB, supra note 25, at 55.}
\footnote{144. It is debatable whether \textit{Thompson} actually set the minimum age limit for the death penalty at sixteen, since only four of the justices — Stevens, Brennan, Marshall, and Blackmun — stated that conclusion, with Justice O'Connor concurring in the result on separate grounds relating to the age limit in the state statute.}
\footnote{145. 487 U.S. 815, 830 n.31 (1988).}
\footnote{146. 492 U.S. 361 (1989).}
\footnote{147. See Brief of Amicus Curiae Amnesty Int'l in Support of Petitioner, Wilkins v. Missouri, 492 U.S. 361 (1989).}
As of February 1993, forty-nine countries have abolished the death penalty for all crimes, and an additional fifteen have abolished it for all but exceptional crimes. The former include all Western European countries but for Cyprus, Italy, Malta, Spain, and the United Kingdom, which are all included in those retaining only for exceptional crimes. At least seventy-two countries do not allow the death penalty for offenders below eighteen, including notably Russia, South Africa, Syria, Paraguay, and Libya. Twelve more countries have acceded to the International Covenant on Civil and Political Rights without reservations to the relevant provisions of those treaties and may therefore be considered to have also abolished the juvenile death penalty. Of the reported juvenile executions between 1981 and 1991 worldwide, four were carried out in the United States, one in Barbados (which subsequently changed its minimum age for capital punishment to eighteen), one in Nigeria, one in Bangladesh, and three in Pakistan. An unknown number of juvenile offenders have been executed by Iran and Iraq. In 1992, another juvenile was put to death in the United States.

In order for this great majority of opponents to the juvenile death penalty to go beyond a standard of decency to become a basis for customary international law, the element of opinio juris is necessary. That is, the behavior of the country must be motivated by a sense of legal obligation. As pointed out by Professor Joan Hartman, however:

Opinio juris poses the most troubling problem in constructing an intellectually honest and convincing theory for customary human rights norms. Its function is to distinguish between those habitual practices that are regarded as binding legal obligations from those that result simply from courtesy or diplomatic protocol, or from domestic policy considerations, and from which departure can ensue without breach of international law. . . . But, as applied here, the doctrine creates a substantial theoretical barrier to the establishment of customary human rights norms. It is a difficult task to prove that a state’s treatment of its own citizens in such areas as capital punish-

149. Id. at 3. “Exceptional crimes” are such as those under military law or crimes committed in exceptional circumstances such as in wartime. Id.
150. Id.
152. Id.
153. Id. at 79.
154. Johnny Garrett, age 17 at the time of his offense, was executed on February 11, 1992, in Texas. See STREIB, supra note 25, at 2.
ment is directed by consciousness that its actions are governed by international legal obligations.\textsuperscript{156}

Regardless, as she points out, the proof of \textit{opinio juris} is present, for "what is the source of the nations' disinclination to execute juvenile offenders other than a shared sense of the moral reprehensiveness of the practice?"\textsuperscript{156}

Rather than disallowing the development of \textit{opinio juris} for this context, Professor Hartman wisely demonstrates that the sentiments expressed during the preparation of the International Covenant, for one, do indeed evidence the consensus that international law forbade the execution of juvenile offenders:

While efforts to adopt an abolitionist provision were defeated as unrealistic, the view was expressed, without opposition, that the execution of juvenile offenders was contrary to basic principles of respect for human rights and should be prohibited explicitly in a treaty intended to be a comprehensive codification of human rights norms.\textsuperscript{157}

Furthermore, "[t]he drafting discussions regarding these exemptions [from the death penalty for pregnant women and those under eighteen] focused on the appropriate wording of the exemption and never questioned whether the exemption should be granted in the first place."\textsuperscript{158}

\section*{D. Professional Organizations}

\textit{Thompson v. Oklahoma} recognized voluminous evidence of professional organizations' concerns about the juvenile death penalty. Notably, briefs were filed by the American Bar Association, which "oppose[d], in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen,"\textsuperscript{159} and the American Law Institute, whose Model Penal Code states that "civilized societies will not tolerate the spectacle of exe-
The U.S. Senate should take the lead to join an overwhelming majority of nations by withdrawing its reservation of the death sentence on juveniles below eighteen at the time of the crime. Alternatively, the U.S. Supreme Court should declare such punishment violative of the Eighth Amendment. It should be informed by international standards in its constitutional analysis.

The Supreme Court had indeed opened the door to the influence

160. Id. at 830 n.33 (quoting Model Penal Code § 210.6 commentary (Official Draft & Revised Comments 1980)).


of international standards of decency on the juvenile death penalty question in \textit{Thompson v. Oklahoma},\textsuperscript{163} but snapped it shut in \textit{Stanford v. Kentucky}.\textsuperscript{164} Nevertheless, there remains a considerable drive to again assert the influence of other nations' practices, and there is good reason and adequate authority for doing so. Perhaps the Supreme Court could decide that executing offenders for crimes committed below the age of eighteen is a violation of a norm of customary international law, binding upon the United States and applicable to the states under the Supremacy Clause of the Constitution. Also, the Court's interpretation of the Eighth Amendment could be informed by the practice of the international community. Additionally, if the Court determines that there is no customary international law norm, it could look to international agreements, state practice, and the "climate of international opinion" to gauge contemporary values.\textsuperscript{165}

First, international law — embodied in either treaties or customary international law — is a part of the "law of the land" and is applicable by U.S. courts under the Supremacy Clause of the Constitution. In the nineteenth-century admiralty case, \textit{The Paquete Habana},\textsuperscript{166} the Supreme Court declared that customary international law, "the customs and usages of civilized nations," is federal law and should be applied "as often as questions of right depending upon it are duly presented for determination."\textsuperscript{167} Thus in \textit{Filartiga v. Pena-Irala},\textsuperscript{168} the Second Circuit found that the right to be free from torture, as stated in the Universal Declaration of Human Rights, "has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights."\textsuperscript{169} And the unreasonably lengthy detention of a Cuban in \textit{Fernandez v. Wilkerson} was found to be not a constitutional violation \textit{per se}, but "judicially remedial as a violation of international law."\textsuperscript{170}

In his effort to discern the standards of decency by which to

\textsuperscript{163} 487 U.S. 815 (1988).
\textsuperscript{164} 492 U.S. 361 (1989).
\textsuperscript{165} See Brief of Amicus Curiae International Human Rights Law Group in support of Petitioner at 17, \textit{Thompson} (citing \textit{Coker v. Georgia}, 433 U.S. 584 (1976)).
\textsuperscript{166} 175 U.S. 677 (1900).
\textsuperscript{167} Id. at 700.
\textsuperscript{168} 630 F.2d 876 (2d Cir. 1980).
\textsuperscript{169} Id. at 882.
\textsuperscript{170} 505 F. Supp. 787, 798 (1980), aff'd, 654 F.2d 1382 (10th Cir. 1981).
gauge the use of the death penalty, Justice Scalia said in *Stanford* that "it is American conceptions of decency that are dispositive, rejecting the contention that the sentencing practices of other countries are relevant . . . [because] they cannot serve to establish the Eighth Amendment prerequisite, that the practice is accepted among our people."\(^{171}\)

Initially it was *Trop v. Dulles* that referred to an "internationally shared principle of civilized treatment."\(^{172}\) While the incentive to look to international human rights procedural law and standards may not yet be an established rule\(^ {173}\) that can dictate the U.S. Supreme Court's deliberations, nevertheless the Court can look to the practices of other countries, the multilateral human rights instruments, and the pronouncements of professional organizations and publicists, as evidence of civilized practices to "inform" the Eighth Amendment debate.\(^ {174}\)

In its plurality decision in *Thompson*, the Court noted that it had "previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."\(^ {175}\) And it bolstered the "conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense"\(^ {176}\) with evidence of the practices of other Anglo-American and leading western European countries.\(^ {177}\)

Then, when the *Stanford* Court refused to do so, Justice Brennan pressed the point in his dissent. Justice Brennan reiterated figures argued for the *Thompson* petitioners, "demonstrating that within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved."\(^ {178}\) On the other hand, Justice Scalia gave no authority for his governing pre-
sumption that the standards for informing the Eighth Amendment are to be limited to those of the United States only.

For the U.S. Supreme Court to give weight to the ramifications of practices throughout the international community is not, however, an automatic or easy next step. Although there has for years been a growing tendency to do so, in the past those references to foreign practices have simply fallen in the midst of and as extra support to extensive reasoning for the ultimate conclusion, often as footnotes.¹⁷⁹

So the contention that the Court should place significant reliance on “non-American” standards has understandably met with great resistance. The fact is that constitutional case law actually begs for the Court to do so. With respect to the death penalty in general, ever since Gregg v. Georgia the Court has sought to discover “evolving standards of decency” which serve the “dignity of man.”¹⁸⁰ Unfortunately, what the Stanford Court reached was not so much a standard as a lowest common denominator of existing usage. Indeed, little effort was given at all to the search for a standard, which implies just the opposite. The use of state laws is certainly an inadequate gauge of evolving standards of decency for the elevated purposes of the U.S. Constitution. As one commentator has stated:

This is not an ideal way to determine the meaning of the Bill of Rights. If legislatures alone were truly capable of protecting unpopular minority interests, then bills of rights would not be necessary. Legislatures, however, are creatures of popular majorities. The courts, as guardians of the rights of minorities should enforce those rights even when the majority does not approve. The analysis of Stanford abdicates the Court’s function as a truly independent judge of societal standards and as a guardian of Eighth Amendment rights based on those standards.¹⁸¹

The United States has been one of the most active participants in the movement toward international respect for human dignity and human rights. Although the Court reasonably seeks to protect an “American” ethic and understanding of the death penalty, doing so defeats its ability to reach a logical “standard of decency,” unless it would posit that the decency and the dignity of Americans are somehow lower than those of the rest of the world. Judging from those nations other than the United States which still allow the

¹⁷⁹. Id.
¹⁸¹. Comment, supra note 112, at 118.
death penalty for juvenile offenders, and, more importantly, those which have actually executed for juvenile offenses within the last ten years, if the U.S. law and practice truly aim at a standard of decency, the Court must certainly incorporate an acknowledgement that almost the entire world's standard of decency is far higher, or else deliberately and explicitly abandon the Trop, Gregg, and Thompson line of Eighth Amendment jurisprudence.

Many different approaches have been put forth for the Court's utilizing international juvenile death penalty standards. It is suggested that the federal common law must acknowledge a customary international law norm disapproving the practice, and that the Court is obligated to employ these principles under the Supremacy Clause.

As it has done in the past, the Court can also consider the practices of other countries to support such a conclusion. But it has not yet undertaken to apply directly the well-evolved global standard of decency and human dignity as the standard for measuring the constitutionality of conduct. Simply put, there is no justification for an "American standard" when the issue is human dignity. Holding out such a standard is an affront to even the terms "decency" and "dignity."

What is called for, therefore, is a definite shift toward an inclusive and expansive view of the applicable standard. There is no reason not to make that shift, though, and all justification for holding onto a separate "American" standard has gone the way of the ducking stool.


183. See, e.g., Hartman, supra note 115.