

## The Juvenile Death Penalty: is the United States in Contravention of International Law?

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## THE JUVENILE DEATH PENALTY: IS THE UNITED STATES IN CONTRAVENTION OF INTERNATIONAL LAW?

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### I. INTRODUCTION

In 1989, Amnesty International<sup>1</sup> filed a brief of *amicus curiae*<sup>2</sup> with the Supreme Court of the United States<sup>3</sup> urging the Court to find

1. Amnesty International is an organization devoted to mobilizing worldwide observance and protection of human rights. It "oppose[s] the death penalty unconditionally in all cases, believing it to be the ultimate cruel, inhuman and degrading punishment and a violation of the right to life, as proclaimed in the Universal Declaration of Human Rights and other international human rights instruments." AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY AND JUVENILE OFFENDERS 1 (1991) [hereinafter AMNESTY].

2. *Amicus curiae*

[m]eans, literally friend of the court. A person with a strong interest in or views on the subject matter of an action, but not a party to the action, may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.

BLACK'S LAW DICTIONARY 82 (6th ed. 1990).

3. Brief of Amicus Curiae in support of Petitioners, *Stanford v. Kentucky*, 492 U.S. 361 (1989) (Nos. 87-5765 and 87-6026).

that the imposition of the death penalty on a sixteen or seventeen year-old offender was prohibited by the Constitution's Eighth Amendment ban on cruel and unusual punishment.<sup>4</sup> As evidence, Amnesty cited the capital punishment practices of other countries, a majority of which have either abolished the death penalty, or have restricted it to persons eighteen years of age and above.<sup>5</sup> The Court held that the juvenile death penalty was constitutionally permissible and rejected the relevance of the sentencing practices of other countries.<sup>6</sup>

While "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in our concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.<sup>7</sup>

Two years later, Amnesty issued a highly critical report that condemned the United States for being "in clear contravention of international human rights standards."<sup>8</sup> Intrigue with the forcefulness of Amnesty's rhetoric served as the impetus behind this Comment. Research into this allegation reveals, however, that the U.S. position, domestically and internationally, is anything but clear. Domestically, for example, execution practices among the states vary wildly. In fact, perhaps the only definitive domestic position is the one adopted by the Supreme Court—that the execution of defendants aged sixteen or seventeen is not per se violative of the Constitution.<sup>9</sup> Internationally, meanwhile, the U.S. position is arguably hampered by constitutional constraints, such as separation of powers. The U.S. position can even be viewed as consistent with international law, because, for example, the U.S. has never ratified treaties that prohibit the execution of juveniles. These issues and others, will be explained in detail.

It is worth noting at the start that this author has not set out to argue definitively that the United States is or is not in contravention of international law, but rather to suggest that Amnesty's allegations are

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4. U.S. CONST. amend. XVIII.

5. AMNESTY, *supra* note 1, at 1.

6. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (Scalia, J.).

7. *Id.* (alteration in original) (citations omitted).

8. AMNESTY, *supra* note 1, at Summary.

9. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

problematic and its evidence inconclusive. Nor has this author attempted to venture down the "slippery morality slope" of evaluating the social aspects of the U.S. position, choosing instead to examine the issues from a strictly legal standpoint. Though the moral implications may be far-reaching, they have little bearing on a determination of whether the United States has violated international law.

To appreciate fully the implications of the international argument, it is useful to have first an understanding of the domestic perspective on the issue. Thus this Comment will begin with a brief overview of the history of the death penalty in the United States and a discussion of the recent case law. The focus will then shift to an examination of U.S. domestic policy in light of international treaties and the ambiguous realm of customary international law, followed by a discussion of the issues underlying the U.S. position.

## II. THE JUVENILE DEATH PENALTY IN THE UNITED STATES

### A. *Historical Context*

The drafters of the Bill of Rights provided future generations of Americans little guidance toward achieving an understanding of the meaning and implications of the Eighth Amendment's ban on "cruel and unusual punishment."<sup>10</sup> The topic has been the subject of much scholarly debate and though interpretations vary, it is almost universally acknowledged that whatever forms of punishment the drafters intended to prohibit by including the clause, capital punishment was not among them.<sup>11</sup> As early as 1642, capital punishment was imposed in this country against offenders below the age of eighteen,<sup>12</sup> and executions continued long after the Eighth Amendment was adopted in 1791.<sup>13</sup> Thus, if Eighth Amendment analysis were rooted only in that which was impermissible in 1791, the Court would not be required to delve into the complexities of constitutional analysis, for at the time of the Eighth Amendment's drafting, capital punishment was imposed against offenders as young as eight years of age.<sup>14</sup>

To be sure, American culture has vastly changed from the society

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10. U.S. CONST. amend. VIII.

11. See *Stanford*, 492 U.S. at 367.

12. Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 619 (1983).

13. *Id.* at 630.

14. See 4 WILLIAM BLACKSTONE, COMMENTARIES \*23-4; see also Streib, *supra* note 12, at 614-15.

that existed during the lives of the Framers. As our geographical boundaries metamorphosed, likewise did American values and morality in response to the challenges of an ever-changing world. In order for constitutional principles and tenets to transcend the perpetual evolution of American culture and have modern-day application, our understanding and approach to these principles must also evolve. Justice McKenna articulated this point in *Weems v. United States*:<sup>15</sup>

Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it."<sup>16</sup>

Though historical context has a place in modern day Eighth Amendment jurisprudence,<sup>17</sup> the cruel and unusual punishment clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes more enlightened."<sup>18</sup> Chief Justice Earl Warren, in a now famous passage from *Trop v. Dulles*,<sup>19</sup> affirmed the dependency of Eighth Amendment analysis on the American public's values and perceptions when he instructed that the definition of cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>20</sup>

Despite their respective contributions to Eighth Amendment analysis, neither *Weems* nor *Trop* involved the death penalty and thus did not address the issue of whether capital punishment constitutes cruel and unusual punishment.

It was not until 1972, in *Furman v. Georgia*,<sup>21</sup> that the Supreme Court was presented with the issue. Petitioner Furman had been convicted of murder and sentenced to death.<sup>22</sup> All nine Justices filed sepa-

15. 217 U.S. 349 (1910).

16. *Id.* at 373.

17. See *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Weems v. United States*, 217 U.S. 349 (1910).

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

19. 356 U.S. 86 (1958).

20. *Id.* at 101; see also *Furman v. Georgia*, 408 U.S. 238 (1972) (Burger, C.J., joined by Blackmun, Powell, and Rehnquist, JJ., dissenting) (quoting *Weems*).

21. 408 U.S. 238 (1972).

22. *Id.* at 239.

rate opinions and *per curiam*,<sup>23</sup> the Court reversed Furman's death sentence, holding not that capital punishment is *per se* unconstitutional, but rather that the Georgia death penalty statute was unconstitutional in its failure to provide guidelines for imposing the death penalty. This deficiency in guidelines consequently left the judge or jury with "practically untrammelled discretion to let an accused live or insist that he die."<sup>24</sup> Such discretionary statutes yield discriminatory results and "discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual punishment.'"<sup>25</sup>

In several cases that proceeded *Furman*, the Court refined its Eighth Amendment analysis,<sup>26</sup> but it remained clear that a majority of the Court was unwilling to find capital punishment *per se* unconstitutional.<sup>27</sup> The controversy, however, was far from settled. In 1987, the Court granted *certiorari* to consider whether the execution of a fifteen year-old offender violated the ban on cruel and unusual punishment.<sup>28</sup> William Wayne Thompson had allegedly participated in the vicious murder of his former brother-in-law, who was shot twice in the head, cut in the throat and abdomen and thrown into a river with blocks chained to his body.<sup>29</sup> The trial court granted the State's motion to try Thompson as an adult<sup>30</sup> and he subsequently was convicted and sen-

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23. Justices Douglas, Brennan, Stewart, White and Marshall each filed separate opinions concurring in the judgment. Justices Brennan and Marshall found that the Eighth Amendment bars capital punishment in all cases while Justices Douglas, Brennan, Stewart and White concluded that discretionary sentencing statutes, without guidance, violated the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972).

24. *Furman*, 408 U.S. at 248.

25. *Id.* at 257 (Douglas, J., concurring).

26. *Gregg v. Georgia*, 428 U.S. 153 (1976) (Stewart, J., plurality opinion) (holding that capital punishment is not *per se* invalid); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (Stewart, J., plurality opinion) (holding that mandatory death sentences are prohibited by the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584 (1977) (White, J., plurality opinion) (the imposition of the death penalty in a rape case was grossly disproportionate and excessive punishment and therefore constituted cruel and unusual punishment); *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that all aspects of defendant's character, record and crime are to be considered as mitigating factors, including age).

27. *See supra* note 26.

28. *Thompson v. Oklahoma*, 474 U.S. 1084 (1987).

29. The alleged motive was, in part, the victim's physical abuse of Thompson's sister. *Id.* at 860 (Scalia, J., dissenting).

30. The judge ruled that "there are virtually no *reasonable* prospects for rehabilitation of William Wayne Thompson within the juvenile system and that William Wayne Thompson should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult." *Thompson*, 487 U.S. at 819-20 (quoting

tenced to death.<sup>31</sup> The Court of Criminal Appeals of Oklahoma affirmed.<sup>32</sup> The Supreme Court granted *certiorari* to determine whether the sentence of death was cruel and unusual punishment when imposed upon a fifteen year-old.<sup>33</sup> As in *Furman*, the Court was once again divided, with Justices Stevens, Brennan, Marshall and Blackmun concluding that the Eighth and Fourteenth Amendments prohibit the imposition of capital punishment upon offenders under the age of sixteen.<sup>34</sup> Justice O'Connor concurred in the result<sup>35</sup> and Justices Scalia, White and the Chief Justice dissented.<sup>36</sup>

The following year the Court again granted *certiorari* on the issue of the juvenile death penalty; this time the offender was seventeen.<sup>37</sup> Petitioner, Kevin Stanford, and an accomplice had allegedly robbed a gas station and then repeatedly raped and sodomized the station attendant.<sup>38</sup> They then allegedly shot her point-blank in the face and in the back of her head.<sup>39</sup> The Kentucky juvenile court certified Stanford for trial as an adult,<sup>40</sup> and a trial court then convicted and sentenced him to death.<sup>41</sup> Though the Court was once more divided, it was Justice Scalia who announced the judgment of the Court, joined by the Chief Justice and Justices White and Kennedy with Justice O'Connor as the swing vote.<sup>42</sup> The *Thompson* dissenters now formed the majority and held that the execution of a seventeen year-old offender did *not* consti-

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trial court). Under Oklahoma law, a litigant may file a statutory petition seeking an order to certify a juvenile defendant to stand trial as an adult. OKLA. STAT. tit. 10, § 1112(b) (1981).

31. *Thompson*, 487 U.S. at 820.

32. *Thompson v. Oklahoma*, 724 P.2d 780 (1986).

33. *Thompson v. Oklahoma*, 479 U.S. 1084 (1987).

34. *Thompson*, 487 U.S. at 818.

35. *Id.* at 848.

36. *Id.* at 859.

37. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

38. *Stanford*, 492 U.S. at 365.

39. *Id.*

40. The Kentucky statute provided that a juvenile could be waived into the adult system if he was either charged with a Class A felony or capital crime, or was over 16 years of age and charged with a felony. KY. REV. STAT. ANN. § 208.170 (Michie 1982). In certifying Stanford, the juvenile court focused on petitioner's extensive history within the juvenile system and the gravity of the crimes and concluded that it would be in the best interest of petitioner and the community if Stanford were tried as an adult. *See Stanford*, 492 U.S. at 365. Subsequent to *Stanford*, the Kentucky statute was repealed. KY. REV. STAT. ANN. § 635.020 (Baldwin 1990).

41. *Stanford*, 492 U.S. at 366.

42. *Id.* at 364.

tute "cruel and unusual punishment."<sup>43</sup>

There was no dispute in *Thompson* or in *Stanford* that the execution of a fifteen or sixteen year-old would not have been prohibited as cruel and unusual punishment at the time the Framers drafted the Eighth Amendment.<sup>44</sup> The divergence between the plurality and dissent in both cases focused on the question of whether in fact a current demonstrable societal consensus condemns capital punishment of offenders at these ages.<sup>45</sup> The two sides also diverged on what factors are relevant to making this determination.

### B. Societal Consensus

#### 1. State Legislative Enactments

Consistent with *Furman*,<sup>46</sup> the Justices in both *Thompson* and *Stanford* looked for objective indicators of contemporary standards in determining whether "evolving standards of decency" prohibited the imposition of the death penalty against a fifteen or seventeen year-old.<sup>47</sup> The first of these indicators was the actions of state legislatures with regard to the death penalty.<sup>48</sup>

Writing for the plurality in *Thompson*, Justice Stevens restricted his analysis to the eighteen states that set a minimum age at which the death penalty could be imposed—all at sixteen years of age at the time of the offense,<sup>49</sup> and concluded that those states that had addressed the

43. *Id.* at 380.

44. *Thompson*, 487 U.S. at 864 (Scalia, J., dissent); *Stanford*, 492 U.S. at 368 (Scalia, J., plurality).

45. *Stanford*, 492 U.S. at 370-80, 394-405; *Thompson*, 487 U.S. at 821-38, 863-78.

46. *Furman v. Georgia*, 408 U.S. 238, 277-79 (1972).

47. *Thompson*, 487 U.S. 815, 822 (1988); *Stanford*, 492 U.S. at 370.

48. "In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Gregg v. Georgia*, 428 U.S. 153, 175-76 (1976) (Burger, C.J., dissenting) (quoting *Furman*, 408 U.S. at 383).

49. *Thompson*, 487 U.S. at 829 n.30. The following states set 16 as the minimum age: CAL. PENAL CODE § 190.5 (West 1993) (age 18); COLO. REV. STAT. § 16-11-103(1)(a) (1986) (age 18); CONN. GEN. STAT. § 53a-46a(g)(1) (1989) (age 18); GA. CODE ANN. § 17-9-3 (Michie 1990) (age 17); ILL. REV. STAT. ch. 38, para. 9-1(b) (1992) (age 18); IND. CODE §§ 35-50-3(b), 35-50-2-9 (Supp. 1991) (age 16); KY. REV. STAT. ANN. § 640.040(1) (1987) (age 16); MD. CODE ANN., art. 27 § 412(f) (1992) (age 18); NEB. REV. STAT. § 28-105.01 (1985) (age 18); N.H. REV. STAT. ANN. § 630:5(XIII) (Supp. 1988) (age 18); N.J. REV. STAT. §§ 2A:4A-22(a) (West 1987), 2C:11-3(g) (West Supp. 1992) (age 18); N.M. STAT. ANN. §§ 28-6-1(A), 31-18-14(A) (Michie 1990) (age 18); N.C. GEN. STAT. § 14-17 (Supp. 1992) (age 17); OHIO REV. CODE ANN. § 2929.02(A) (Anderson 1987) (age 18); ORE. REV. STAT.



issue did not permit the execution of a fifteen year-old.<sup>50</sup> However, in 1988, when *Thompson* was decided, nineteen additional states permitted capital punishment but declined to set a minimum age at which it could be imposed.<sup>51</sup> Stevens disposed of these nineteen states by concluding that, because there must be a chronological age at which it is unconstitutional to impose the death penalty, any state that did not provide for a minimum age had simply not focused on the issue and thus was not relevant to the discussion.<sup>52</sup>

In her *Thompson* concurrence, Justice O'Connor also dismissed the significance of these nineteen states, charging them with legislative oversight.<sup>53</sup> She reasoned that the absence of a minimum death penalty age is no indication that those state legislatures "have deliberately concluded that it would be appropriate to impose capital punishment on fifteen year-olds."<sup>54</sup> Without such deliberation from these nineteen

§§ 161.620, 419.476(1) (1991) (age 18); TENN. CODE ANN. §§ 37-1-102(b)(3), 37-1-102(b)(4), 37-1-103, 37-1-134(a)(1) (1991 & Supp. 1992) (age 18); TEX. PENAL CODE ANN. § 8.07(d) (West Supp. 1993) (age 17).

At the time *Thompson* was decided, Nevada had set a minimum age of 16. *Thompson*, 487 U.S. at 829 n.26. Presently, there is no minimum age provided for in Nevada's death penalty statute. NEV. REV. STAT. ANN. § 200.035(6) (Michie 1992).

Both Missouri and Wyoming changed their death penalty statutes to a minimum age of 16 subsequent to the *Thompson* decision. MO. ANN. STAT. §§ 565.020, 565.030 - 565.040 (Vernon Supp. 1992); WYO. STAT. §§ 6-2-101 to 6-2-103 (1988).

50. *Thompson*, 487 U.S. at 826-29.

51. *Id.* at 829 n.26. The following states permit capital punishment but set no minimum age: ALA. CODE §§ 13A-5-39 to -59, 13A-6-2 (1982 & Supp. 1991); ARIZ. REV. STAT. ANN. §§ 13-703 to -706, 13-1105 (1989 & Supp. 1992); ARK. CODE ANN. §§ 5-4-104(b), 5-4-601 to -617, 5-51-201 (Michie 1987 & Supp. 1989); DEL. CODE ANN. tit. 11, §§ 636, 4209 (1987 & Supp. 1992); FLA. STAT. ANN. §§ 775.082, 782.04(1) (West Supp. 1992); HAW. REV. STAT. § 921.141 (1985 & Supp. 1992); IDAHO CODE §§ 18-4001 to -4004, 19-2515 (1987 & Supp. 1992); LA. REV. STAT. ANN. § 14:30(C), 14:113 (West 1986 & Supp. 1992); MISS. CODE ANN. §§ 97-3-21, 97-7-67, 99-19-101 to -107 (Supp. 1992); MONT. CODE ANN. § 46-18-301-305; OKLA. STAT. tit. 21, §§ 701.10 to 701.15 (1981 & Supp. 1993); 18 PA. CONS. STAT. ANN. § 1102(a), 42 PA. CONS. STAT. ANN. § 9711 (1982 & Supp. 1987); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1985 & Supp. 1991); S.D. CODIFIED LAWS ANN. §§ 23A-27A-1 to -41 (1988 & Supp. 1992); UTAH CODE ANN. §§ 76-3-206, 76-3-207 (1990 & Supp. 1992); VT. STAT. ANN. tit. 13, §§ 2303(b), 7101-7107 (1974 & Supp. 1990); VA. CODE ANN. §§ 18.2-31 (Michie Supp. 1992), 19.2-264.2 to .5 (Michie 1990 & Supp. 1992); WASH. REV. CODE ANN. §§ 10.95.010 to 10.95.900 (West 1990 & Supp. 1992).

52. *Thompson*, 487 U.S. at 829.

53. *Id.* at 850 (O'Connor, J., concurring).

54. *Id.* at 850 (O'Connor, J., concurring). Justice O'Connor asserted that there are other reasons unrelated to capital punishment that would justify a state waiving a 16 or 17 year-old into the adult system, e.g., the length or conditions of confinement

states, Justice O'Connor relied heavily on those states that had set a minimum age: "[T]he most salient statistic that bears on this case is that every single American legislature that has expressly set a minimum age for capital punishment has set that age at 16 or above."<sup>55</sup> By combining the eighteen states that set the minimum age at sixteen or above with the fourteen states that had abolished capital punishment in all cases,<sup>56</sup> she concluded that a majority of states prohibited capital punishment below the age of sixteen.<sup>57</sup> Justice O'Connor's opinion, however, was limited to a narrow set of circumstances. Where the juvenile offender was subject to the penalty solely by virtue of the state's adult waiver statute,<sup>58</sup> the penalty would be unconstitutional if there were 1) no national consensus forbidding capital punishment against the age of the offender, and 2) no statute setting forth a minimum age at which the death penalty may be imposed (thus evidencing a conscious legislative determination).

These circumstances were not present in *Stanford*. Applying her *Thompson* analysis, Justice O'Connor concurred with Justice Scalia in finding that the death penalty against a seventeen-year-old offender did not violate the cruel and unusual punishment clause.<sup>59</sup> She concluded that there was no national consensus against the imposition of capital punishment on a seventeen-year-old offender; those states that had set a minimum age for capital punishment had set it at sixteen or above.<sup>60</sup> Without a contrary national consensus, it was not necessary that a state specify a minimum age at which capital punishment could be imposed.<sup>61</sup>

Writing for the dissent in *Thompson*, Justice Scalia considered the

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and the safety of other juvenile offenders. *Id.*

55. *Id.* at 849. See *supra* note 49 for cites.

56. See *supra* note 49; ALASKA STAT. §§ 12.55.015, 12.55.125 (1990); D.C. CODE ANN. § 22-2404 (1981); HAW. REV. STAT. § 706-656 (1988 & Supp. 1992); IOWA CODE ANN. § 902.1 (West 1979 & Supp. 1992); ME. REV. STAT. ANN. tit. 17-A, §§ 1251, 1152 (West 1983 & Supp. 1992); MICH. COMP. LAWS ANN. § 750.316 (West 1991); MINN. STAT. ANN. § 609.185 (West 1987 & Supp. 1993); N.D. CENT. CODE § 12-50 (1985); R.I. GEN. LAWS § 11-23-2 (Supp. 1992); W.VA. CODE § 61-11-2 (1992); WIS. STAT. §§ 939.50(3)(a), 940.01 (1982).

At the time the case was decided, Kansas, Massachusetts and New York did not permit the death penalty. Presently, all three states do. KAN. STAT. ANN. §§ 22-4001 to -4014 (1988 & Supp. 1992); MASS. GEN. LAWS ANN. ch. 279, §§ 57-71 (West Supp. 1992); N.Y. PENAL LAW § 60.06 (McKinney Supp. 1993).

57. See *supra* note 56.

58. *Thompson*, 487 U.S. at 850.

59. *Stanford*, 492 U.S. at 380-81 (O'Connor, J., concurring).

60. *Id.* at 381 (citing *Thompson*, 487 U.S. at 849).

61. *Id.*

same statutes as did the plurality, yet reached a far different result. By contrast, he found that those states that permitted the death penalty but did not set a minimum age had neither declined to address the issue nor inadvertently permitted the death penalty for juvenile offenders.<sup>62</sup> To the contrary, in these states the minimum age at which an offender could be sentenced to death was a function of the state adult waiver statutes.<sup>63</sup>

A survey of state laws shows, in other words, that a majority of the States for which the issue exists (the rest do not have capital punishment) are of the view that death is not different insofar as the age of juvenile criminal responsibility is concerned. And the latter age, while presumed to be 16 in all the States . . . can, in virtually all the States, be less than 16 when individualized consideration of the particular case warrants it.<sup>64</sup>

Based on this reasoning, the Scalia voting bloc found that a majority of the states which permit capital punishment theoretically permit it at age fifteen.<sup>65</sup> In *Stanford*, Justice Scalia noted that of the thirty-seven states that permit capital punishment,<sup>66</sup> only twelve have set a minimum age of eighteen.<sup>67</sup> The remaining twenty-nine states permit the execution of a sixteen or seventeen year-old by virtue of either their death penalty statutes or by their adult waiver statutes.<sup>68</sup> These statis-

62. *Thompson*, 487 U.S. at 867-68 (Scalia, J., dissenting).

63. *Id.*

64. *Id.* at 868.

65. When *Thompson* was decided, 19 of 37 states that permitted capital punishment, arguably permitted it against 15 year-old offenders. *Id.* at 867-68. See *supra* note 51.

Further, when *Thompson* was decided, Nevada had set a minimum age of 16. Presently, there is no minimum death penalty age provided for in Nevada's death penalty statute. NEV. REV. STAT. ANN. § 200.035(6) (Michie 1992).

66. *Stanford*, 492 U.S. at 370 (Scalia, J., plurality).

67. *Id.* at 370 n.2. The following 12 states set 18 as the minimum age: CAL. PENAL CODE § 190.5 (West 1989 & Supp. 1993); COLO. REV. STAT. § 16-11-103(1)(a) (1986); CONN. GEN. STAT. § 53a-46a(g)(1) (West 1989); ILL. REV. STAT. ch. 38, para. 9-1(b) (1979 & Supp. 1992); MD. CODE ANN. art. 27, § 412(f) (1992); NEB. REV. STAT. § 28-105.01 (1989); N.H. REV. STAT. ANN. § 630:5(VI)(2) (Supp. 1992); N.J. STAT. ANN. § 2A:4A-22(a) (West 1987) and 2C:11-3(g) (West Supp. 1992); N.M. STAT. ANN. §§ 28-6-1(A) (Michie 1991), 31-18-14(A) (Michie 1990); OHIO REV. CODE ANN. § 2929.02(A) (Anderson 1993); OR. REV. STAT. §§ 161.620 (1990), 419.476(1) (1987); TENN. CODE ANN. §§ 37-1-102(b)(3), 37-1-102(b)(4), 37-1-103, 37-1-134(a)(1) (1991).

68. See *supra* notes 49, 51.

tics, he concluded, did "not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."<sup>69</sup>

## 2. Federal Legislative Enactments

In addition to state enactments, the *Thompson* and *Stanford* Courts also considered the federal position on the death penalty for juvenile offenders. The *Thompson* dissent pointed to the Comprehensive Crime Control Act of 1984<sup>70</sup> as further evidence that there was no societal consensus against the execution of a fifteen year-old.<sup>71</sup> Construed with federal death penalty statutes,<sup>72</sup> the Act theoretically could result in the execution of a fifteen year-old offender.<sup>73</sup>

Justice O'Connor refuted the significance of the Act in much the same way that she refuted the relevance of the states that had not expressly set a minimum age in their death penalty statutes. Just as the states failed to provide evidence by way of legislation and/or legislative history that they had considered the minimum age at which capital punishment could be imposed, Justice O'Connor pointed to the dissent's

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69. *Stanford*, 492 U.S. at 371 (Scalia, J., plurality).

70. Comprehensive Crime Control Act of 1984, 18 U.S.C. § 5032 (1982 & Supp. IV) (lowering the federal waiver age from 16 to 15).

71. *Thompson*, 487 U.S. at 865-66 (Scalia, J., dissenting) The Act lowered the age at which a juvenile can be tried as an adult in Federal District Court from 16 years of age to 15.

72. The *Thompson* Court cited the following statutes:

10 U.S.C. § 906a (1988) (peacetime espionage); 10 U.S.C. § 918 (murder while member of Armed Forces) (1988); 18 U.S.C. §§ 32, 33, 34 (1982 & Supp. IV) (destruction of aircraft, motor vehicles or related facilities resulting in death); 18 U.S.C. § 115(b)(3) (1982 & Supp. IV) (murder of member of immediate family of law enforcement officials) (by cross reference to 18 U.S.C. § 1111); 18 U.S.C. § 351 (1982 & Supp. IV) (murder of member of Congress, important Executive official, or Supreme Court Justice) (by cross reference to 18 U.S.C. § 1111); 18 U.S.C. § 794 (1988) (espionage); 18 U.S.C. § 844(f) (1982 & Supp. IV) (destruction of government property resulting in death); 18 U.S.C. § 1111 (1982 & Supp. IV) (first-degree murder within federal jurisdiction); 18 U.S.C. § 1716 (1988) (mailing of injurious articles with intent to kill resulting in death); 18 U.S.C. § 1751 (1988) (assassination or kidnapping resulting in death of President or Vice President) (by cross reference to 18 U.S.C. § 1111); 18 U.S.C. § 1992 (1988) (willful wrecking of train resulting in death); 18 U.S.C. § 2113 (1988) (bank robbery-related murder or kidnapping); 18 U.S.C. § 2381 (1988) (treason); 49 U.S.C. app. §§ 1472, 1473 (1988) (death resulting from aircraft hijacking).

73. *Thompson*, 487 U.S. at 866.

failure to produce legislative history indicating that Congress expressly intended to permit the execution of fifteen year-olds by enacting the Act.<sup>74</sup> Further, O'Connor cited the Anti-Drug Abuse Act of 1988<sup>75</sup> as evidence that the federal government did not intend to execute fifteen year-olds.<sup>76</sup> The Act authorized the death penalty in certain drug related killings but restricted its imposition to offenders eighteen years of age or older.

Justice Scalia refuted the significance of The Anti-Drug Abuse Act of 1988 referred to by O'Connor and held that the Act "does not embody a judgment by the Federal Legislature that *no* murder is heinous enough to warrant the execution of such a youthful offender, but merely that the narrow class of offense it defines is not."<sup>77</sup> Furthermore, because a substantial number of state legislatures permit the execution of offenders below the age of eighteen, he believed the absence of a federal statute permitting the same "would not remotely establish . . . a national consensus that such punishment is inhumane."<sup>78</sup>

### 3. Jury Sentencing Patterns

In addition to the determinations of legislatures, the Court has looked to jury responses in capital cases as a manifestation of American attitudes with respect to the death penalty.<sup>79</sup> In *Thompson*, Justice Stevens relied on statistics of capital executions when he concluded that juries have rejected the death penalty for juvenile offenders.<sup>80</sup> According to the statistics, only eighteen to twenty offenders under the age of sixteen have been executed during the 20th century—all prior to 1949.<sup>81</sup>

Justice Scalia harshly criticized the plurality's narrow use of the statistics in *Thompson*. Noting the plurality's failure to consider the number of capital sentences in addition to capital executions, Justice

74. *Id.* at 851 (O'Connor, J. concurring).

75. The Anti-Drug Abuse Act, 21 U.S.C. § 848(1) (1988). Note that the Act had not yet been enacted when the *Thompson* opinion was announced.

76. *Thompson*, 487 U.S. at 852.

77. *Stanford*, 492 U.S. at 372-73 (Scalia, J., plurality).

78. *Id.* at 373.

79. Interestingly, as Justice Stevens noted in *Thompson*, it was the arbitrary and capricious imposition of capital punishment by sentencing juries that was the determinative factor in finding the death penalty unconstitutional in *Furman*. *Thompson*, 487 U.S. at 831 (Stevens, J., plurality).

80. *Thompson*, 487 U.S. at 832-33 (Stevens, J., plurality).

81. *Id.* at 832 (citing VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* 197 (1987)).

Scalia reasoned that capital executions are "of course substantially lower than those for capital sentences because of various factors, most notably the exercise of executive clemency."<sup>82</sup> He further suggested that focusing on the trend of the past forty years is not sufficient to "justify calling a constitutional halt to what may well be a pendulum swing in social attitudes."<sup>83</sup> Though he conceded that the decline in the number of capital executions and/or sentences may indeed be evidence that few circumstances justify executing a fifteen or sixteen year-old, Justice Scalia was unwilling to interpret this decline as conclusive evidence that such executions have been categorically rejected by the American public.<sup>84</sup>

#### 4. Socioscientific Evidence

For Justice Scalia, cruel and unusual death penalty determinations stop after an analysis of state statutes. In his opinion, evolving standards of decency must be ascertained from societal standards as reflected "in the operative acts (laws and the application of laws) that the people have approved."<sup>85</sup> He dismissed the relevance of so-called "socioscientific" evidence employed by the *Thompson* plurality.<sup>86</sup> Such evidence focuses on the reduced moral capability of children, and the penological failure of the death penalty to deter juvenile offenders. None of these considerations, Justice Scalia argued, is representative of every sixteen year-old or every seventeen year-old, and individuated consideration is a fundamental requirement of Eighth Amendment analysis.<sup>87</sup>

In arriving at their decision, Justice Scalia wrote that the Justices had "looked not to [their] own conceptions of decency, but to those of modern American society as a whole."<sup>88</sup> In the footnote that followed

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82. *Thompson*, 487 U.S. at 869 (Scalia, J. dissenting).

83. *Id.* at 869.

84. *Id.* at 869; accord *Stanford v. Kentucky*, 492 U.S. 361, 374 (1989) (Scalia, J., plurality).

85. *Stanford*, 492 U.S. at 377 (Scalia, J., plurality).

86. *Thompson*, 487 U.S. at 823-24 (Steven, J., plurality). See also *id.* at 853-54 (O'Connor, J., concurring). But see Joan F. Hartman, "Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty, 52 U. CIN. L. REV. 655, 696 (1983) (cautioning that setting a constitutional minimum death penalty age "requires a considerable analytical step beyond these precedents toward the identification of classes of persons exempted from capital punishment by reason of their status-age rather than of the quality of their acts.").

87. *Stanford*, 492 U.S. at 375 ("In the realm of capital punishment in particular, 'individualized consideration [is] a constitutional requirement.'") (citing *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

88. *Stanford*, 492 U.S. at 369 (Scalia, J., plurality).

this passage, he noted that "it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant."<sup>89</sup>

### C. Juvenile Justice System

The argument has been made that executing juvenile offenders is cruel and unusual punishment because of their reduced moral responsibility.<sup>90</sup> Advocates of this view cite the various ways our society recognizes this diminished ability: a minimum driving age, a minimum drinking age, and a minimum age to vote and be drafted.<sup>91</sup> Therefore, they contend that criminal accountability should also be adjusted for juveniles and the death penalty abolished for persons below the age of eighteen.<sup>92</sup> In response, this author points to the juvenile justice system, a mechanism established separate and apart from the adult system, which is intended to meet these very concerns.<sup>93</sup>

Though the focus of the juvenile justice system is on rehabilitation and treatment, there are juveniles whom the system recognizes are simply not amenable to treatment, either because of the heinous and despicable nature of the crime, or the frequency of past offenses.<sup>94</sup> These

89. *Id.* at 369 n.1.

90. *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)); see also FRANKLIN ZIMRING, TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978); see also *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988).

91. See *Thompson*, 487 U.S. at 824-25.

92. *Thompson*, 487 U.S. at 823-25 (Stevens, J., plurality); Glenn M. Bieler, Note, *Death Be Not Proud: A Note on Juvenile Capital Punishment*, 7 N.Y.L. SCH. J. HUM. RTS. 179 (1990).

93. See STEVEN M. COX & JOHN J. CONRAD, JUVENILE JUSTICE 72 (1978) (noting that juvenile courts are to administer the law "in a general atmosphere of parental concern rather than with punitive overtones"); see also ANTHONY PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977).

94. See *Stanford v. Kentucky*, 492 U.S. 361, 365. (noting that petitioner had been waived into the adult system because of the seriousness of his crime and because of "the unsuccessful attempts of the juvenile justice system to treat him for numerous instances of past delinquency").

Maryland's waiver statute provides for the following considerations before waving a juvenile offender into the adult criminal justice system: (1) Age of the child; (2) Mental and physical condition of the child; (3) The child's amenability to treatment in any institution, facility, or program available to delinquents; (4) The nature of the offense and the child's alleged participation in it; and (5) The public safety. MD. CODE ANN. CTS. & JUD. PROC. § 3.817 (1991).

juveniles are either waived into the adult system *after* a juvenile court has conducted hearings or are statutorily excluded<sup>95</sup> from the jurisdiction of the juvenile court.<sup>96</sup> In short, the juvenile justice system extends many due process rights plus additional safeguards to the juvenile offender.

### III. INTERNATIONAL LAW

#### A. Treaties

Those who share the view that the United States is in contravention of international human rights standards by permitting a juvenile death penalty point to three treaties.<sup>97</sup> Each treaty contains a provision prohibiting the execution of juveniles below eighteen years of age at the time of the offense: the International Covenant on Civil and Political Rights (ICCPR);<sup>98</sup> the American Convention on Human Rights (ACHR);<sup>99</sup> and the United Nations Convention on the Rights of the Child (UNCRC).<sup>100</sup> The ICCPR and the ACHR were signed by Presi-

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95. See, e.g., MD. CODE ANN. CTS. & JUD. PROC. § 3-804(e) (excluding a child 14 years old or older charged with a crime punishable by death or life imprisonment).

96. See Elizabeth W. Browne, *Guidelines for Statutes for Transfer of Juveniles to Criminal Court*, 4 PEPP. L. REV. 479, 480-81 (1977). In addition to waiver hearings and statutory exclusion, a juvenile offender may also be tried in the adult system by prosecutorial discretion. *Id.*

97. AMNESTY, *supra* note 1, at 78-79; Lisa Kline Arnett, Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 251-53 (1988); Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269 (1991) [hereinafter *Judicial Enforcement*]; Donald T. Fox, *Current Development: Inter-American Commission on Human Rights Finds United States in Violation*, 82 AM. J. INT'L L. 601 (1988).

98. The relevant provision is included in Article 6(5) and states that "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." International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368, 370 (entered into force Mar. 23, 1976).

99. The relevant provision is found in Article 4(5), which sets forth: "Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age. . . ." American Convention on Human Rights, Nov. 22, 1969, I.L.M. 673, 676 (entered into force July 18, 1978).

100. The relevant provision is included in Article 37(a) and provides that: "No child shall be subjected to torture or other cruel, inhuman punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age. . . ." United Nations Convention on the Rights of the Child, G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. No. 16 at 19, U.N. Doc. A/4354 (1959).



dent Carter in 1977 but neither has been ratified by the United States Senate at the time of this writing.<sup>101</sup> The U.N. Convention has been neither signed nor ratified.<sup>102</sup>

In the event that any of the above were ratified,<sup>103</sup> the inclusion of provisions which are overtly contrary to the Constitution would render these treaties domestically inoperative.<sup>104</sup> The Supremacy Clause demands that "the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; . . . ."<sup>105</sup> The Court articulated this point in *Reid v. Covert*.<sup>106</sup>

There is nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions.<sup>107</sup>

### B. Customary International Law

Presently, neither U.S. constitutional law nor treaty law supports

101. *See supra* notes 98, 99.

102. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War also prohibits the imposition of capital punishment against juveniles and has been ratified by the United States. However, the provisions of this treaty apply only during wartime. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 68, 6 U.S.T. 3516, 75 U.N.T.S. 287.

103. No treaty can become binding upon the United States without first achieving two-thirds approval of the Senate. U.S. CONST. art. II, § 2, cl. 2.

104. *Reid v. Covert*, 354 U.S. 1, 6 (1957) (Black, J.).

105. U.S. CONST. art. VI.

106. *Reid*, 354 U.S. at 16.

107. *Id.* at 16-17; *see also* Kinsella v. United States *ex rel* Singleton, 361 U.S. 234, 248 (1960); *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1562-63 (1984) (noting that "a treaty inconsistent with the Constitution may be binding internationally but will not be enforced as law in the United States") [hereinafter *International Law*].

the contentions of Amnesty and those who share its perspective that the United States is domestically obligated to abstain from imposing capital punishment upon juvenile offenders. The abstention, it is argued, is mandated by customary international law—an area of law based not on principles which have been studied, debated, clearly articulated and ultimately adopted by member States, but by “the customs and usages of civilized nations.”<sup>108</sup>

The Restatement (Third) on Foreign Relations defines customary international law as “a general and consistent practice of States followed by them from a sense of legal obligation.”<sup>109</sup> The Restatement’s drafters acknowledged the difficulties of the definition by noting that “there is no precise formula to indicate how widespread a practice must be”<sup>110</sup> and “[i]t is often difficult to determine when that transformation [from mere custom] into law has taken place.”<sup>111</sup>

Determining the prevalence and consistency of a state’s practice, in addition to ascertaining the basis of a state’s adherence to a particular norm have been the subjects of much debate. Assuming these queries could be answered with any precision, there remains the task of discerning whether in fact an international norm prohibits juvenile executions<sup>112</sup> and whether the United States has sufficiently “protested” the norm to exempt itself effectively from compliance.<sup>113</sup> Each of these considerations is discussed in further detail below.

### 1. State Practice

Determining the existence of a state practice is difficult for several reasons. First, there is no definitive list of state activities which conclusively establish a state practice. The Restatement considers “diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy”<sup>114</sup> as evidence of state prac-

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108. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

109. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT]; see also STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 38, 59 Stat. 1055, 1060, T.S. 993.

110. RESTATEMENT, *supra* note 109, § 102 cmt. b.

111. *Id.* § 102 cmt. c; see also Henkin, *International Law*, *supra* note 107, at 1566 (describing the development of customary international law as a process that “is hardly certain and remains somewhat mysterious”).

112. Hartman, *supra* note 86, at 669.

113. The RESTATEMENT explains that a state that “indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.” RESTATEMENT, *supra* note 109, § 102 cmt. d. See discussion *infra* part III.B.3.

114. RESTATEMENT, *supra* note 109, § 102 cmt. b.

tice, while the leading cases in this area suggest "the usage of nations, judicial opinions and the works of jurists" would indicate state practice.<sup>115</sup> One commentator has gone so far as to assert that only the physical actions of a state are probative.<sup>116</sup> Second, there appears to be little, if any, indication from either the Restatement or the case law regarding the appropriate weight to be given to these various state actions. Theoretically then, the works of jurists could play a significant role in evidencing a state practice and would thus bind States to a rule of international law predicated on the subjective, albeit scholarly, interpretations of those writers asserting an opinion on the issue.<sup>117</sup>

Turning now to the death penalty, and assuming that general philosophical consensus cannot substitute for empirical data, a global study of sentencing decisions and penal codes is required to determine whether a widespread state practice exists against the execution of juvenile offenders.<sup>118</sup> Such an empirical study presents its own set of problems. Not only is a global analysis a tremendous and time-laden undertaking, but it is not always possible to obtain complete, much less accurate, information.<sup>119</sup> Assuming a complete study could be accomplished, the ascertainment of state practice is stymied by yet another obstacle: that of the number of States which must adhere to a practice

115. Hartman, *supra* note 86, at 667 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)); see also *Judicial Enforcement*, *supra* note 97, at 1273; *The Paquete Habana*, 175 U.S. 677 (1900); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

116. ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 88-89 (1971); see also *Anglo-Norwegian Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 119 (dissent of Judge Read).

117. Indeed, Professor Hartman cautions:

[T]he process of formation of customary international law must be more complex and demanding than these decisions would imply, or binding rules of law would be created simply by the pious expressions of human rights ideals by public international bodies, national officials and scholars. A crucial if ill-defined quantum of evidence of state practice is the first prerequisite for the existence of a customary norm, but it is difficult to determine how much is enough. Moreover, there is uncertainty as to *what* we are looking for, even before we decide how much of it we need.

Hartman, *supra* note 86, at 668-69. See also D'AMATO, *supra* note 116, at 10 n.3 ("Judges have often emphasized that writers record and interpret custom but do not create it . . .").

118. Hartman, *supra* note 86, at 669.

119. *Id.* ("Since 1959, the United Nations has endeavored to compile accurate information concerning the imposition of capital punishment by member nations, [cite omitted] and empirical studies have been undertaken by groups such as Amnesty International, but the available studies have been woefully incomplete.") (citation omitted).

to constitute a sufficiently widespread practice.<sup>120</sup> In the words of one writer, “[t]here is no metaphysically precise (such as ‘seventeen repetitions’) or vague (such as ‘in the Court’s discretion’) answer possible. States do not organize their behavior along absolute lines. There is no international ‘constitution’ specifying when acts become law.”<sup>121</sup> By way of example, there are some judges who require unanimity in state practice before concluding that a rule of customary international law has been created.<sup>122</sup> If this interpretation were correct, the five nations in addition to the United States, as reported by Amnesty International, who permit the execution of persons under the age of eighteen, would be sufficient to strike down state practice.

One writer has suggested that the “number of [s]tates needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule.”<sup>123</sup> Arguably then, with the United States as a world leader in establishing human rights norms,<sup>124</sup> a great number of states would be required in order to refute the U.S., and to establish that eighteen is the minimum age at which an offender may be executed. That the seventy-two States<sup>125</sup> which set eighteen as the minimum age sufficiently outweigh the six States that continue to impose it (even with the United States among them), is undoubtedly true. The point, however, should be reasserted; the task of determining state practice is not at all marked by crystalline standards—but is subject to wide interpretation.

## 2. *Opinio Juris*

State practice is not the end of the analysis of customary international law; a more elusive element remains. The psychological component, *opinio juris*, must be satisfied as well.<sup>126</sup> *Opinio juris*, or “legal duty,” is essentially the motivation behind adherence to the particular

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120. Again, the Restatement uses broad language: “A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.” RESTATEMENT, *supra* note 109, § 102 cmt. b.

121. D’AMATO, *supra* note 116, at 91.

122. Michael Akehurst, *Custom As A Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 17 (1974).

123. *Id.* at 18.

124. See *infra* notes 146-48 and accompanying text.

125. In 1991, Amnesty International released the results of its global study and reported that at least 72 countries set 18 or above as a minimum age at which capital punishment may be imposed. AMNESTY, *supra* note 1, at 78.

126. RESTATEMENT, *supra* note 109, § 102(2).

state practice. If a state engages in a particular practice "which is generally followed but [which] States feel legally free to disregard," then the engagement may not be counted towards establishing a state practice.<sup>127</sup> If, however, a state adheres to a practice with the belief that the state is legally obligated to adhere to it, then the requisite *opinio juris* has been satisfied.<sup>128</sup> As articulated by The International Court of Justice:

The States concerned must feel they are conforming to what amounts to a legal obligation: the frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial [sic] and protocol, which are performed almost invariably, but which are motivated by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.<sup>129</sup>

This requirement raises conceptual difficulties. Essentially, a state must adhere to a particular practice with the belief that it is law, when in fact it is not necessarily so.<sup>130</sup>

If practice alone is not sufficient to verify *opinio juris*, indicators other than state practice must be relied upon. The Restatement does not require "explicit evidence of legal obligation (e.g., by official statements)" but instead permits inferences of *opinio juris* drawn from "acts or omissions."<sup>131</sup> Other writers have looked to States' official statements for evidence of state belief regarding a particular practice,<sup>132</sup> requiring statements that affirmatively indicate a State's belief that a practice is binding as law, rather than an indication that a practice "ought to be law, or that it is required by morality, courtesy, comity, social needs, etc."<sup>133</sup>

In the context of the juvenile death penalty, proving "that a state's treatment of its own citizens in such areas as capital punishment is directed by consciousness that its actions are governed by international legal obligations" is a difficult burden to meet.<sup>134</sup> This is particularly

127. *Id.* § 102 cmt. c.

128. *Id.*

129. North Sea Continental Shelf Case (F.R.G. v. Den.), 1969 I.C.J. 3, 44.

130. Akehurst, *supra* note 122, at 32.

131. RESTATEMENT, *supra* note 109, § 102 cmt. c.

132. See Akehurst, *supra* note 122, at 36-37; see also Hartman, *supra* note 86, at 671; see also D'AMATO, *supra* note 116, at 75.

133. Akehurst, *supra* note 122, at 37.

134. Hartman, *supra* note 86, at 670.

true in light of the fact that neither U.S. legislatures nor courts often articulate an express reliance on international norms in setting a minimum age at which the death penalty may be imposed.<sup>135</sup> Short of obscure theories of natural law and positivism,<sup>136</sup> little evidence has been proffered to demonstrate that the requisite *opinio juris* element has been satisfied.<sup>137</sup>

Some writers have argued that by signing the aforementioned treaties and by supporting the Universal Declaration of Human Rights,<sup>138</sup> the United States has acknowledged an international norm against the execution of juvenile offenders.<sup>139</sup> As to the former, the codification of standards in international treaties is not dispositive evidence of a customary norm,<sup>140</sup> and at least one source has suggested that the failure to ratify a treaty "constitutes a silent rejection of the treaty."<sup>141</sup>

Regarding the latter, declarations are not per se binding instruments evincing legal rights and obligations. If the circumstances, including the intent of the parties, indicate the nonbinding status of the instrument, then no legal obligations are imposed upon the member States.<sup>142</sup> "what [S]tates do is more weighty evidence than their decla-

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135. See *id.* at 671. Furthermore, Justice Scalia has gone so far as to denounce the role of international considerations on domestic policy: "[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." *Thompson v. Oklahoma*, 487 U.S. 815, 868-69 n.4.

136. For a discussion of these theories, see Hartman, *supra* note 86, at 671.

137. At least one writer has collapsed the *opinio juris* requirement into the state practice requirement. See *Judicial Enforcement*, *supra* note 97, at 1273.

138. Universal Declaration of Human Rights, G.A. Res. 217A (III), Pt. 1, U.N. Doc. A/810, at 71-77 (1948), reprinted in MALCOM D. EVANS, BLACKSTONE'S INTERNATIONAL LAW DOCUMENTS 39-42 (1991) [hereinafter cited as LAW DOCUMENTS].

139. See *Judicial Enforcement*, *supra* note 97, at 1273.

140. RESTATEMENT, *supra* note 109, § 102(3) ("International agreements create law for the parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.") (emphasis added). See also Baxter, *Treaties and Custom*, in LOUIS HENKIN ET. AL, INTERNATIONAL LAW: CASES AND MATERIALS 78 (1987) ("Rules found in treaties can never be conclusive evidence of customary international law.") [hereinafter INTERNATIONAL LAW: CASES AND MATERIALS]. This point is particularly important in light of consistent U.S. refusal to adhere to such a norm domestically. For a discussion of the role of protest to an international norm, see discussion *infra* part III.B.3.

141. Baxter, *supra* note 140, at 79.

142. See RESTATEMENT, *supra* note 109, § 301 cmt. e. See also D'AMATO, *supra* note 116, at 6 ("Such resolutions are authority for the content of customary law only if they claim to be declaratory of existing law.").

rations or the resolutions they vote for."<sup>143</sup> As explained by Eleanor Roosevelt, Chairman of the Commission on Human Rights and a U.S. representative in the General Assembly at the time the Declaration was adopted, the Declaration "is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms . . . to serve as a common standard of achievement for all people of all nations."<sup>144</sup> The "statements of those voting for it [indicate further that] the declaration was not intended to be a statement of existing law."<sup>145</sup>

As a final matter, the significant role played by the U.S. Bill of Rights in the development and language of the Universal Declaration should not be misconstrued. As Henkin has observed, "Americans were prominent among the architects and builders of international human rights, and American constitutionalism was a principal inspiration and model for them."<sup>146</sup> It is not surprising then, that "most of the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights (ICCPR), are in their essence American constitutional rights projected around the world."<sup>147</sup> Notwithstanding U.S. recognition and support of human rights, it must be remembered that, from the U.S. perspective, the imposition of the death penalty upon a juvenile offender whose rights have been protected by a carefully constructed juvenile justice system<sup>148</sup> does not violate the offender's human rights. Though the United States is indeed a strong proponent of human rights, support of the Universal Declaration of Human Rights should not be understood to represent U.S. acknowledgment of a binding international norm.

### 3. Protest

Notwithstanding other elements of customary international law, any state that "indicates its dissent from the principle during its development" will not be bound by the principle "even after it matures."<sup>149</sup> For those who claim that the United States violates customary international law by executing juvenile offenders, it is perhaps this aspect of

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143. RESTATEMENT, *supra* note 109, § 103 reporters' note 2.

144. 5 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 243 (1965).

145. INTERNATIONAL LAW: CASES AND MATERIALS, *supra* note 140, at 115.

146. Richard B. Lillich, *Rights—Here and There: The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 852 (1989) (quoting Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 407 (1979)).

147. *Id.*

148. See discussion *supra* part II.C.

149. RESTATEMENT, *supra* note 109, § 102 cmts. c, d.

customary law that is the most difficult to refute convincingly.<sup>150</sup>

The "protest" provision is included within the Restatement because of "an accepted application of the traditional principle that international law essentially depends on the consent of States."<sup>151</sup> The Restatement gives little further guidance as to what will be sufficient to qualify as a declaration of dissent. The generally accepted rule, however, seems to indicate that a protest must be clear and continuous in order to exempt a state from the binding effect of a developing international standard.<sup>152</sup>

U.S. protest to a rule against the execution of juvenile offenders can be seen in the debates surrounding each of the aforementioned treaties. For example, during the Third Committee debates regarding Article Six of the ICCPR's provision prohibiting the imposition of the death penalty against persons below the age of eighteen, the United States abstained from voting on the provision. The U.S. declination was, in part, the result of U.S. opposition to human rights treaties that would subordinate the Constitution to treaty provisions.<sup>153</sup> Though the United States strongly supported human rights, various provisions of the ICCPR did not comply with the Constitution.<sup>154</sup> In an attempt to reconcile the U.S. position, President Carter submitted a letter to the Senate for advice and consent proposing, among other things, a reservation which would permit the United States to impose capital punishment against persons under the age of eighteen.<sup>155</sup> The letter, in part, advised that the "United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment."<sup>156</sup> Furthermore, the Covenants,<sup>157</sup> as noted by the U.S. delegate, "could not authorize or

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150. Many have accused the United States of failing to exempt itself by not persistently objecting to the abolition of the death penalty for persons below 18 at the time of the offense. See authorities cited *supra* note 97.

151. RESTATEMENT, *supra* note 109, § 102 reporters' note 2.

152. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8 (1966).

153. See discussion of U.S. opposition to human rights treaties *infra* part IV.

154. In addition to Article 6, Article 20 of the ICCPR conflicted with the right to free speech as protected by the First Amendment to the U.S. Constitution. U.S. CONST. amend. I, cl. 2; see President's Human Rights Treaty Message to the Senate, 14 WEEKLY COMP. OF PRES. DOC 395 (Feb. 23, 1978), reprinted in *Four Treaties Pertaining to Human Rights: Message from the President of the United States*, 95th Cong., 2d Sess. at X-XII [hereinafter Message].

155. Message, *supra* note 154, at XII.

156. *Id.*

157. Statements that contribute to *opinio juris* may take many forms. They can be made "in the text of a treaty or in the *travaux preparatoires*. The most obvious example of such statements is a statement that some or all of the provisions of the



sanction any measures in the United States which do not conform to the clear provision of the United States Constitution."<sup>158</sup>

The State Department used similar language when it issued the following reservation in response to Article Four (prohibiting capital punishment below the age of eighteen) of the American Convention on Human Rights (ACHR):<sup>159</sup> "United States adherence to Article Four is subject to the Constitution and other law [sic] of the United States."<sup>160</sup>

In addition to express dissent, evidence of U.S. protest to a minimum death penalty age of eighteen can be construed from U.S. reluctance to adopt self-executing human rights treaties.<sup>161</sup> A self-executing treaty needs no domestic implementing legislation. "In general, agreements that can be readily given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest."<sup>162</sup> Self-execution doctrine in the area of human rights is problematic because treaty provisions become effective following passage of the treaty by the Senate and the Executive Branch—the House of Representatives takes no part.<sup>163</sup> Essentially, treaties bypass the legislative lawmaking process. As a result, the United States has treated many of the human rights treaties as non-self-executing.<sup>164</sup>

Although self-execution is not explored in depth here, it is mentioned to illustrate that, through clear rhetoric in the letters of the President and the State Department, persistent U.S. refusal to ratify treaties codifying the rule, and resolute constitutional policy which allows the juvenile death penalty, the United States has made its opposi-

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treaty codify (or are declaratory of) existing customary international law . . . ." Akehurst, *supra* note 122, at 45.

158. COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 15-16 (18th Report 1968).

159. American Convention on Human Rights, *supra* note 99.

160. U.S. DEP'T OF STATE, LETTER OF SUBMITTAL, S. EXEC. DOC. NOS. C-F, 95th Cong., 2d Sess. at XVIII (1978) [hereinafter LETTER OF SUBMITTAL].

161. Message, *supra* note 154, at VIII, XV (requesting the inclusion of a reservation declaring the ICCPR to be non-self-executing); LETTER OF SUBMITTAL, *supra* note 160 (recommending that the United States declare the provisions of the first 32 Articles of the ACHR (including Article 4(5) regarding the death penalty and juvenile offenders) as non-self-executing).

162. RESTATEMENT, *supra* note 109, § 111 reporters' note 5.

163. Charles W. Stotter, Comment, *Self-Executing Treaties and the Human Rights Provisions of the United Nations Charter: A Separation of Powers Problem*, 25 BUFF. L. REV. 773, 774 (1976).

164. R. MACBRIDE, TREATIES VERSUS THE CONSTITUTION (1956); see also Message, *supra* note 154, at VIII, XV; LETTER OF SUBMITTAL, *supra* note 160, at XVIII.

tion to the rule abundantly clear—clear enough to exempt itself from the rule.<sup>166</sup>

#### IV. AN EXPLANATION OF U.S. OPPOSITION

##### A. *Separation of Powers*

Though the Constitution expressly provides that treaties are the law of the land and supreme over state law, it does not address customary international law at all.<sup>166</sup> “[Customary international law] is not patently part of the ‘laws of the United States’; it is not, strictly, federal law made by the federal government but the law of the international community to which the United States contributes only in an uncertain way and to an indeterminate degree . . . .”<sup>167</sup> Customary international law is essentially the infusion of law, binding upon the states,<sup>168</sup> which has neither been proposed, drafted nor approved by the representative branches of our government. In short, customary international law bypasses the legislative processes of the U.S. lawmaking mechanism<sup>169</sup> and poses judges with the dilemma of political question doctrine.<sup>170</sup> For a judge “to enforce the customary international law prohibition against executing juveniles would foist on the American people a law on which they did not vote.”<sup>171</sup>

Additionally, domestic judges are reluctant to enforce customary international standards as a practical matter 1) because of the inherent imprecision in determining what exactly the standard is, and if and when it has become binding law;<sup>172</sup> and 2) because domestic judges do not hear cases on this area of law on a consistent basis and thus do not develop the expertise with the substantive provisions of the law that

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165. *Contra* Brief for Amicus Curiae International Human Rights Law Group in Support of Petitioner at 28-29, *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (No. 86-6169) (“The United States has never affirmatively nor openly opposed the formation of the customary international norm prohibiting the execution of juvenile offenders . . . .”).

166. U.S. CONST. art. VI, § 2. *See also* LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 222 (1972) [hereinafter *FOREIGN AFFAIRS AND THE CONSTITUTION*].

167. *FOREIGN AFFAIRS AND THE CONSTITUTION*, *supra* note 166, at 222.

168. Customary international law is given the same weight as treaty law and thus is imposed upon the states. *See International Law*, *supra* note 107, at 1564.

169. U.S. CONST. art. II, § 2, cl. 2. *See also Judicial Enforcement*, *supra* note 97, at 1285.

170. *See generally* *Baker v. Carr*, 369 U.S. 186, 217 (1962).

171. *Id.*

172. *Id.*

they do with domestic legislation.<sup>173</sup> It has been observed that "the Justices have no matured or clear philosophies; the precedents are flimsy and often reflect the spirit of another day."<sup>174</sup>

In sum, there appears to be a justifiable "uneasiness about legitimating the creation of United States domestic law by foreign governments."<sup>175</sup>

### B. U.S. Opposition to Human Rights Treaties

Though the drafters' insistence on codification of the Bill of Rights clearly indicates that human rights were an early concern of the United States, there has been resistance to ratifying international documents that attempt to codify these rights. In the mid-1950s, opposition to human rights treaties<sup>176</sup> was strong, in part because of the decision in *Missouri v. Holland*,<sup>177</sup> in which the Supreme Court rejected Missouri's argument that "what an act of congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do."<sup>178</sup> There was intense fear of federal encroachment on the states under the guise of federal treaty-making power.<sup>179</sup> The fear was so intense that, in 1955, Ohio Senator John W. Bricker proposed what became known as the "Bricker Amendment"—<sup>180</sup> essentially a constitutional amendment providing that no treaty could become binding domestically without implementing legislation. Though the amendment ultimately failed (by only one vote),<sup>181</sup> its defeat was secured by Secretary of State Allen Dulles' promise that the United States would not become a party to any human rights treaties.<sup>182</sup>

173. See *International Law*, *supra* note 107, at 1561-62.

174. *Id.*

175. *Judicial Enforcement*, *supra* note 97, at 1284-85.

176. The United States refused to ratify both the Universal Declaration of Human Rights, G.A. Res. 217A (III), Pt. 1, U.N. Doc. A/810, at 71-77 (1948), reprinted in *LAW DOCUMENTS*, *supra* note 138, at 39-42; and the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

177. *Missouri v. Holland*, 252 U.S. 416 (1920).

178. *Id.* at 432.

179. See David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35, 66 (1978); see also James C. Kitch, *The American Convention on Human Rights: The Propriety and Implications of United States Ratification*, 12 RUT.-CAM. L.J. 359, 390 (1979).

180. Weissbrodt, *supra* note 179, at 38 n.45; see also Hartman, *supra* note 86, at 686 n.113.

181. 100 CONG. REC. 2262 (1954).

182. See *Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the*

Despite the amendment's failure, the United States generally considers human rights treaties to be non-self-executing.<sup>183</sup> Of the six human rights treaties currently pending before the Senate, all were submitted with the President's recommendation for a declaration indicating that the substantive provisions would not be self-executing.<sup>184</sup> Notwithstanding philosophical reasons for ratifying treaties with reservations, problems with the language in the treaties justifies U.S. reticence to adopt them without reservations.

A look at the treaties themselves reveals several issues that have contributed to U.S. caution in ratifying them. The UNCRC, it has been noted, is significant "not only for its length, fifty-four Articles, but for the lack of satisfaction or enthusiasm with which it has thus far been greeted by most governments."<sup>185</sup> Following the presentation of the final draft of the document, "an unprecedented 737 paragraph explanatory document" accompanied the text, demonstrating the lack of general consensus among the drafters.<sup>186</sup> Another ten years of debate and revision lapsed before the adoption of the UNCRC, and though signed by thirty-six co-sponsors, perhaps its completion was premature.<sup>187</sup> Many of the sponsors stated that no consensus had been reached on some of the Articles while others went so far as to intimate plans to reopen the convention.<sup>188</sup> The ICCPR too is problematic. The original instrument was not intended as a binding resolution; the Preamble requires only a "responsibility to *strive* for the promotion and observance of the rights recognized in the present Covenant."<sup>189</sup> Furthermore, the ACHR raised serious questions with respect to domestic constitutional issues regarding not only capital punishment, but abor-

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*Senate Comm. on the Judiciary*, 83rd Cong., 1st Sess. 10-11 (1953).

183. *International Law*, *supra* note 107, at 1562.

184. MESSAGE OF THE PRESIDENT TRANSMITTING FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOCS. NOS. C-F, 95th Cong., 2d Sess. VIII, XI, XV, XVIII (1978); MESSAGE OF THE PRESIDENT TRANSMITTING THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, S. EXEC. DOC. R, 96th Cong., 2d Sess. IX (1980); Message of the President Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. TREATY DOC. NO. 20, 100th Cong., 2d Sess. 2 (1988).

185. Russel L. Barsh, *The Convention of the Rights of the Child: A Re-Assessment of the Final Text*, 7 J. HUM. RTS. 142, 142 (1989).

186. *Id.*

187. *Id.* at 157.

188. *Id.* at 158 (Article 38, it was contended, had not achieved a consensus and thus could not be signed by the Netherlands. Venezuela and Switzerland suggested the possibility of reopening the convention.).

189. LAW DOCUMENTS *supra* note 138, at 120 (emphasis added).

tion as well.<sup>190</sup>

### V. IS THERE A COMPROMISE?

It has been suggested that international standards and values could play a role in domestic law without treading upon constitutional waters.<sup>191</sup> The role would be one whereby international custom would be considered a factor in Eighth Amendment analysis.<sup>192</sup> "By using international law to inform, or aid in the interpretation of a constitutional right, the right attains greater credence as one that has universal recognition."<sup>193</sup> This concept is not a novel one and in fact has been used frequently by the Court in deciding death penalty cases. In *Coker v. Georgia*,<sup>194</sup> for example, the Court acknowledged that "the climate of international opinion concerning the acceptability of a particular punishment" was relevant in ascertaining the appropriateness of the death penalty in a rape case.<sup>195</sup> Likewise, five years later, in *Enmund v. Florida*,<sup>196</sup> the Court noted that international opinion "is an additional consideration."<sup>197</sup> In *Enmund*, the Court assessed the practices of other nations with respect to ancillary involvement in felony murder as one factor in finding that the death penalty, under the circumstances presented by the case, violated the Eighth Amendment.<sup>198</sup> Similarly, the Court ruled in *Thompson v. Oklahoma*<sup>199</sup> that the execution of anyone below sixteen years of age offended "civilized standards of decency" and that such a perspective was consistent with "the leading members of the Western European community."<sup>200</sup> Finally, however, Justice Scalia in *Stanford v. Kentucky*,<sup>201</sup> rejected the practices of other nations as being *dispositive* of the answer to whether or not execution of juvenile offenders violates evolving standards of decency as defined by the Eighth Amendment.<sup>202</sup>

Although today's Court is unwilling to enforce international stan-

190. See American Convention on Human Rights, *supra* note 99, art 4.

191. See Arnett, *supra* note 97, at 257-60 (1988); see also *Judicial Enforcement*, *supra* note 97, at 1275 n.48.

192. Arnett, *supra* note 97, at 257.

193. *Id.*; see also Lillich, *supra* note 146, at 860-62.

194. *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977).

195. *Id.* (citing *Trop v. Dulles*, 356 U.S. 86, 102 (1958)).

196. *Enmund v. Florida*, 458 U.S. 782 (1982).

197. *Id.* at 796 n.22 (citing *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977)).

198. *Id.* at 797.

199. 487 U.S. 815 (1988).

200. *Id.* at 830.

201. 492 U.S. 361 (1989).

202. *Id.* at 369 n.1.

dards regarding the death penalty, the Court is not blind to their relevance. Perhaps in the coming years, the tide of public opinion will begin to retreat from the position advanced by Justice Scalia. Should that shift occur, the Court's Eighth Amendment analysis likely will shift accordingly and continue to reflect U.S. perspectives of decency and fairness.

## VI. CONCLUSION

As stated at the outset, the purpose of this Comment is neither to condone nor defend the morality of the U.S. position on the issue, but rather to illuminate the complexity of the issue from both international and domestic perspectives. Amnesty International faces continued domestic resistance to its efforts to prompt the United States to abolish the death penalty for juvenile offenders. In light of strong U.S. opposition to the domestic enforceability of human rights treaties and of judicial approval of the juvenile death penalty, it is unlikely that a change will be forthcoming in the near future. Perhaps the efforts of Amnesty and other abolitionist supporters would be better served by focusing on the legislative, rather than judicial, organs of the U.S. government.

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