Recent Developments in the United States and Internationally Regarding Capital Punishment--An Appraisal

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RECENT DEVELOPMENTS IN THE UNITED STATES AND INTERNATIONALLY REGARDING CAPITAL PUNISHMENT—AN APPRAISAL

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We are told by my friend, "Oh, the killer does it; why shouldn't the State?" I would hate to live in a State that I didn't think was better than a murderer.

—Clarence Darrow, September 23, 19241

INTRODUCTION

Although there has been a significant international movement to abolish the death penalty for many years,2 recent trends reveal a still-divergent body of law.3 While most western and industrialized nations have abolished capital punishment—at least for common crimes,4 the United States continues to support the practice. This article discusses the status of the death penalty in

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2 See, e.g., Thailand: Police Wrong to Suggest Widening Death Penalty, BANGKOK POST, Reuter Textline, Feb. 19, 1993, available in LEXIS, World Library, Textline File. According to Amnesty International, 40% of countries in the world had by the end of 1988 abolished the death penalty in law and in practice. Thirty-five other countries had abolished the death penalty for all offenses and 18 for all but exceptional offenses such as murder of a policeman while he was on duty.


4 See Group Wants Death Penalty Abolished, UPI, Mar. 2, 1993, available in LEXIS, News Library (“United States is the only western industrialized nation that still has a death penalty.”). A notable exception to the industrialized countries that have abolished the death penalty is Japan. Although the death penalty is reserved for violent crimes such as “multiple murders, murders involving armed robbery, explosions, rape and terrorist attacks,” executions are performed in a secretive way. “[N]o public announcement is made, and the families of many of the condemned do not know they are dead until they receive a letter asking them to pick up the prisoner's possessions.” Ben Hills, Footsteps of Fear in a Japanese Prison, THE AGE (Melbourne), May 12, 1993, available in LEXIS, World Library, Textline File.

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the United States compared with pertinent international developments. In the concluding section, I recommend that the United States join the other western industrial states in abolishing the death penalty.

I. CAPITAL PUNISHMENT IN THE UNITED STATES—RECENT DEVELOPMENTS

A. General

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."5 Under the Due Process Clause of the Fourteenth Amendment, Eighth Amendment protections are incorporated and made applicable to the states.6

In interpreting the Cruel and Unusual Punishment Clause,7 the Supreme Court has sought guidance from the sparse legislative history of the Eighth Amendment and the tenor of the time of its enactment.8 In 1972, the Supreme Court, in Furman v. Georgia, effectively invalidated the then-existing state capital punishment statutes based on a lack of procedural safeguards for defendants.9 After many states corrected these procedural defects to satisfy Furman, the Court in 1976 affirmed a new generation of death penalty statutes, holding that the Constitution does not prohibit the death penalty itself.10

As a result of the Court's holding, executions resumed in the United States in 1977. From this time through March 5, 1993, the

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5 U.S. CONST. amend. VIII.
7 See generally Ved Nanda, The U.S. Reservation to the Ban on the Death Penalty for Juvenile Offenders Under the International Covenant on Civil and Political Rights—An Appraisal, De Paul L. Rev. — (forthcoming) (I have borrowed from this article in the discussion below).
8 See, e.g., Weems v. United States, 217 U.S. 349, 368-69 (1910).
9 408 U.S. 238 (1972). "[T]he discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied . . . ." Id. at 255. "[D]iscretionary statutes are unconstitutional in their operation." Id. at 256-57. See infra notes 38-43 and accompanying text (discussing Furman more extensively).
10 See Gregg v. Georgia, 428 U.S. 153 (1976). The sentencing procedures in Gregg diminished the arbitrary nature of the guidelines that had troubled the Furman Court. Id. at 206-07. The Court noted specifically that "in no longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." Id.; see also infra notes 47-56 and accompanying text (discussing Gregg).
The total number of executions in the country stood at 194. While twenty-one states have carried out executions, six of them account for nearly seventy-five percent of the total: Texas (54), Florida (29), Louisiana (21), Virginia (18), Georgia (15) and Alabama (10). Twenty-three persons were executed during 1990, fourteen in 1991, thirty-one in 1992, and six in 1993.

Currently, the number of executions performed is disproportionate to the number of persons under sentence of death. To illustrate, by the end of 1991, 2,481 inmates under sentence of death were imprisoned in thirty-four of thirty-six states that have statutes authorizing the death penalty. By January 15, 1993, the number in state prisons had risen to 2,676. In 1991, there were fourteen executions as 266 prisoners, 265 state and one federal, were added to the death row.

Another disturbing characteristic of the death penalty is the long period of time typically spent by the condemned awaiting execution. For example, the fourteen prisoners put to death during 1991 had served an average of nine years and eight months before execution, with the median time on death row for the 2,482 prisoners being five years. The length of detention prior to execution, combined with the conditions on death row, raise a serious question which the European Commission of Human Rights characterized as the “death row phenomenon.” In Soering v. United Kingdom, the court held that the “death row phenomenon” constituted a violation of Article 3 of the European Convention on Human Rights, which prohibits tortuous, inhuman, or degrading treatment or punishment.

12 Id.
14 Greenfeld, supra note 13, at 8.
15 DEATH ROW, supra note 11, at 1.
16 Greenfeld, supra note 13, at 1. In addition, there were five males held under armed forces jurisdiction with military death sentences for murder. Id. at 8, tbl. 4, note c.
17 Greenfeld, supra note 13, at 1.
19 Id.
B. Historical Background

James Madison introduced the Eighth Amendment in the United States House of Representatives in June 1789. It had been written into Virginia’s Declaration of Rights of 1776 by George Mason, who adopted the language from the English Bill of Rights of 1689, which read, “Excessive Bail ought not be required, nor Excessive Fines imposed, nor cruel and unusual Punishments inflicted.”

As to which punishments were cruel and unusual, seventeenth century England left little to the imagination. In 1878, the United States Supreme Court noted such examples as “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.” Earlier, in 1863, the New York criminal court provided a vivid description of the various ways in which punishments were inflicted in England:

Under the direction of the military courts [the convict] was shot. When condemned by ecclesiastical tribunals, he was not unfrequently [sic] 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

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21 See Larry Charles Berkson, The Concept of Cruel and Unusual Punishment 7 (1975). It should be noted that Madison substituted “shall not” for “ought not.” Id. “The substitution of the imperative ‘shall’ for the flaccid ‘ought’ implies that the prohibition was considered so fundamental that even stronger wording was required than that of previous documents.” Id.


23 Watson, supra note 22, at 1505.

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.  

Punishments in the colonies were no less cruel and unusual; capital punishment by hanging, burning and breaking on the wheel were common. For the Quakers arriving in North America in the 1650s, punishments included being “whipped, pilloried, stocked, caged, imprisoned, . . . branded and maimed” by New England Christians. Also, four Quakers were hanged.  

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 women to a chair and plunging her under the water “as often as the sentence directs in order to cool her immoderate heat.”  

Reviewing this history, the difficulty experienced by the Court when it began to distinguish constitutionally prohibited punishments from those sanctioned by society is understandable. Nevertheless, 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 . . . may well be held forbidden by it as cruel and unusual.”  

The Court’s own approach was to view the Clause as prohibiting excessive punishments out of proportion to the offense, and those that were inhuman, barbarous, or involved torture. In
Wilkerson v. Utah, for example, the Court did not debate the propriety of the death penalty, only whether the method—shooting instead of hanging—was cruel and unusual. The Court held it was not. A decade 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. [The word] implies there [is] something inhuman and barbarous, something more than the mere extinguishment of life."

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.), overruled by Harmelin v. Michigan, 115 L. Ed. 2d 836; Trop, 356 U.S. at 100 ("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."); Weems, 217 U.S. at 368 ("It has been said that ordinarily the terms imply something inhuman and barbarous, torture and the like."); In re Kemmler, 136 U.S. 436, 447 (1889) ("Punishments are cruel [and unusual] when they involve torture or a lingering death . . . ."), overruled by Gregg v. Georgia, 428 U.S. 153 (1976); Wilkerson v. Utah, 99 U.S. 130, 136 (1879) ("It 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 unnecessary cruelty, are forbidden by that amendment to the Constitution."); overruled by Gregg v. Georgia, 428 U.S. 153 (1976). 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 22, at 859 (footnote omitted).

The Cruel and Unusual Punishment 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 (Va. 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 limitations 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 inhuman 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. at 134-35.

136 U.S. 436 (1889), overruled by Gregg v. Georgia, 428 U.S. 153 (1976). In an opinion by Chief Justice Fuller, the Court denied petitioner's application for a writ of error, holding that the enactment of the statute authorizing death by electrocution was within the legitimate power of the New York State Legislature. Id. at 448.

Id. at 447.
Tracing the history of the legal developments which resulted in the adoption of the English Bill of Rights, one commentator concluded that England had developed a common-law prohibition against excessive punishment in any form, and considered it "a paradox that the American colonists omitted a prohibition on excessive punishments and adopted instead the prohibition of cruel methods of punishment, which had never existed in English law."\(^{37}\)

C. Selected Supreme Court Cases Since 1972

When the Supreme Court invalidated Georgia's capital punishment statute in *Furman* in 1972, it did so on the ground that the absence of proper sentencing procedures or guidelines rendered the imposition of the death penalty so arbitrary that it constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments.\(^{38}\) The Court, however, did not decide whether the death penalty was per se unconstitutional.\(^{39}\) Rather, in separate concurrences, Justice Stewart noted that the existing

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\(^{37}\) Granucci, *supra* note 22, at 847. Following events of the "Bloody Assize," English Parliament was summoned and a committee was appointed to draft what was to be the Bill of Rights. *Id.* at 854. Granucci disagreed with the historical view that the Cruel and Unusual Punishment Clause was a response to the Bloody Assize. *Id.* He contended that the random interchange of terms during the original drafts of the Bill indicated that "[t]he final phraseology, especially the use of the word 'unusual,' must be laid simply to chance and sloppy draftsmanship," for none of the "cruel" punishments "employed in the Bloody Assize ceased" after the passage of the Bill of Rights. *Id.* at 855. He added:

The English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties. *Id.* at 860. Granucci also cited examples of how seventeenth century England attached a "less onerous" meaning to the word "cruel," in that it meant "severe or hard"; and on the topic of punishments, the word "cruel" was used as a synonym for "severe or excessive." *Id.*

\(^{38}\) See *Furman*, 408 U.S. at 239-40. *Furman* was one of three companion cases which were granted certiorari limited to addressing the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" *Id.* at 239. See generally Justice William Brennan, *Constitutional Adjudication and the Death Penalty: A View From the Bench*, 100 Harv. L. Rev. 313 (1986) (recounting Court's voluminous discussion of "cruel and unusual" interpretation).

\(^{39}\) See *Furman*, 408 U.S. at 240 (holding imposition of death penalty under applicable state statutes violated Eighth and Fourteenth Amendments); see also *id.* at 310-11 (White, J., concurring) ("I do not at all intimate that the death penalty is unconstitutional per se . . . .").
procedures were “wantonly” imposed, Justice White stated that there was “no meaningful basis for distinguishing the few cases in which [the death penalty was] imposed from the many cases in which it [was] not,” and Justice Douglas observed that guidelines were necessary for the fair application of the death penalty. Only Justices Brennan and Marshall asserted that the death penalty was per se unconstitutional.

Following Furman, several states re-enacted more detailed death penalty laws. In Georgia, a bifurcated approach was used, under which a determination of guilt and at least one aggravating circumstance would allow the state to call for the death penalty. Then the jury was required to consider any mitigating factors which could relieve the defendant of the death penalty. In 1976 this approach was challenged in Gregg v. Georgia, giving the Supreme Court an opportunity to rule on the constitutionality of capital punishment itself. A plurality of the Court held that “the

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40 408 U.S. at 310 (Stewart, J., concurring).
41 Id. at 313 (White, J., concurring).
42 See id. at 253 (Douglas, J., concurring).
43 See id. at 305-06 (Brennan, J., concurring); id. at 342-59 (Marshall, J., concurring).
punishment of death does not invariably violate the Constitution.\textsuperscript{46} The Court noted that the “death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.”\textsuperscript{49} The Supreme Court also upheld death penalty statutes in \textit{Proffitt v. Florida}\textsuperscript{50} and \textit{Jurek v. Texas},\textsuperscript{51} since those state statutes provided guidelines for the admission of evidence of mitigating circumstances.\textsuperscript{52}

In analyzing the Eighth Amendment, the \textit{Gregg} Court articulated several notions which should guide application of the Cruel and Unusual Punishment Clause. The Court acknowledged its earlier analysis of the Eighth Amendment in \textit{Trop v. Dulles},\textsuperscript{53} in which the Court observed that the “evolving standards of decency that mark the progress of a maturing society” must be considered.\textsuperscript{54} Revisiting the issue in \textit{Gregg}, the Court further stated 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 underlying the Eighth Amendment.”\textsuperscript{55}

It should be noted that the \textit{Gregg} Court upheld the constitutionality of capital punishment only in cases in which the offender had deliberately taken the life of the victim. The Court did not address whether a sentence of death was appropriate for other crimes.\textsuperscript{56} Subsequently, in 1977, the Supreme Court held the

\begin{itemize}
\item \textsuperscript{46} \textit{Id.} at 169.
\item \textsuperscript{49} \textit{Id.} at 187.
\item \textsuperscript{50} 428 U.S. 242 (1976). Petitioner had stabbed and murdered the decedent while burglarizing the decedent’s home. \textit{Id.} at 245.
\item \textsuperscript{51} 428 U.S. 262 (1976). Petitioner had kidnapped and attempted to rape a ten-year-old girl before strangling and drowning her in a river. \textit{Id.} at 264-67.
\item \textsuperscript{52} See FLA. STAT. ANN. § 921.141(2)(b), (c) (West Supp. 1976-77) (directing jury to consider whether mitigating factors exist which outweigh aggravating circumstances); TEX. CODE CRIM. PROC. ANN., art. 37.071(b)(1)-(3) (West Supp. 1975-76) (setting forth special jury questions).
\item \textsuperscript{53} 356 U.S. 86, 101 (1958). Petitioner was convicted of wartime desertion by a general court martial and his citizenship was revoked under the Nationality Act of 1940. \textit{Id.} at 87-88.
\item \textsuperscript{54} \textit{Id.} at 101.
\item \textsuperscript{55} 428 U.S. at 173 (applying \textit{Trop} “dignity of man” standard to penalty restrictions).
\item \textsuperscript{56} \textit{Id.} at 187 n.35. “We do not address here the question whether the taking of the criminal’s life is a proportionate sanction where no victim has been deprived of life—
death penalty unconstitutional for the crime of raping an adult woman in Coker v. Georgia, determining that the sentence is excessive when the victim is not killed. The Supreme Court also invalidated death sentences that same year for kidnapping and rape, in Eberheart v. Georgia, and for robbery, in Hooks v. Georgia, and in 1982 for complicity to murder, in Enmund v. Florida. In Enmund, Justice O'Connor explicitly stated in her dissent that "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness."

On the other hand, in the 1987 case of Tison v. Arizona, the Court held that the imposition of the death penalty on a defendant who participated in a felony with reckless indifference for human life was constitutional. The Court stated, "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." It found that the execution of felony murderers was consistent with the goals of retribution and deterrence. However, in the 1991 decision of Harmelin v. Michigan, which was not a death penalty case, Justice Scalia suggested that the Cruel and Unusual Punishments Clause of the Eighth Amendment does not prohibit disproportionate sentences, but rather it prohibits certain methods of punishment.

The Supreme Court has also addressed the issue of the age of the defendant at the time of commission of the crime as a factor in

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57 433 U.S. 584 (1977). The petitioner, while serving various sentences for murder, rape, kidnapping, and aggravated assault, escaped from prison and committed armed robbery, rape, and kidnapping. Id. at 587.
58 Id. at 598 (concluding that death "is an excessive penalty for the rapist who, as such, does not take human life").
59 433 U.S. 917 (1977) (per curiam).
62 Id. at 825 (O'Connor, J., dissenting). Here, "proportionality" referred to the Eighth Amendment requirement of proportionality between the crime and the punishment such that the punishment does not violate the Cruel and Unusual Punishment Clause. Id.
64 Id. at 158.
65 Id. at 149.
66 See id. at 151-54.
68 See id. at 2691-92, 2696, 2701 (Scalia, J., with Rehnquist, C.J.).
assessing the appropriateness of the death penalty. In *Eddings v. Oklahoma*, the trial court was required by the Oklahoma capital punishment statute to consider mitigating evidence during sentencing. It had, however, failed to consider evidence of what the Supreme Court called "Eddings' unhappy upbringing and emotional disturbance." This violated the Court's 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. The Court therefore vacated Eddings' death sentence under the *Lockett* rule; however, it did not determine whether the death penalty was per se cruel and unusual punishment, and hence unconstitutional, when imposed on a sixteen-year-old person.

Six years after *Eddings*, a plurality of the Court in *Thompson v. Oklahoma* ruled that executing the defendant, who committed a capital crime at age fifteen, would indeed violate the Cruel and Unusual Punishment Clause. Writing for four of the Justices, Justice Stevens looked to the "evolving standards of decency that mark the progress of a maturing society" to hold such executions as violative of the Cruel and Unusual Punishment Clause of the Constitution. In an exhaustive review of state legislation regarding age requirements for civic participation, Justice Stevens

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69 See generally Nanda, supra note 7.  
70 455 U.S. 104 (1982).  
71 OKLA. STAT. tit. 21, § 701.10 (1980).  
72 *Eddings*, 455 U.S. at 109. The trial judge stated: "[T]he Court cannot be persuaded entirely by the... fact that the youth was sixteen years old when this heinous crime was committed. Nor can the Court in following the law, in my opinion, consider the fact of this young man's violent background." *Id.*  
74 *Id.* at 604.  
75 *Eddings*, 455 U.S. at 105.  
76 *Id.* at 110 n.5.  
78 *Id.* at 838.  
79 *Id.* at 821 (quoting *Trop*, 356 U.S. at 101). In discerning such "evolving standards," Justice Stevens reviewed the determinations of state legislatures and sentencing juries to confirm the Court's judgment that youths under 16 years of age are not capable of acting with the degree of culpability that justifies the death penalty. *Id.* at 821-23; see also *id.* at 839-48 (tabulating states' laws regarding minimum ages for certain activities).  
80 *Id.* at 838; see *Weems*, 217 U.S. at 378 ("The [Cruel and Unusual Punishment] 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.").
concluded that most states conferred these adult obligations, privileges, and responsibilities on persons sixteen years of age and older. He also examined state death penalty laws and noted that of the eighteen states which established a minimum statutory age, all required the defendants to have been at least 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 observed that many other nations had rejected the death penalty or declined to apply it to juveniles.

Despite the plurality's strong language that "it would offend civilized standards of decency to execute a person who was less than sixteen years old at the time of his or her offense," Thompson was not a majority decision on this point, and thus, the issue arguably remains undecided.

In the 1989 consolidated decisions of Stanford v. Kentucky and Wilkins v. Missouri, a bare majority of the Court affirmed the lower court's imposition of capital punishment on two individuals for crimes which they committed before reaching the age of eighteen—the defendants were sixteen and seventeen years old, holding that such punishment does not violate the Eighth Amendment.

Writing for the Court, Justice Scalia noted that under the Eighth Amendment, "[t]he punishment is either 'cruel and unusual' (i.e., society has set its face against it) or it is not." Justice Scalia considered society's "evolving standards" to determine if a consensus existed that such executions constitute cruel and unusual punishment and concluded that no such consensus existed. "In 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.\textsuperscript{90} The most persuasive expressions of the public attitude, he wrote, "are statutes passed by society's elected representatives."\textsuperscript{91} "We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at sixteen or seventeen years of age. Accordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment."\textsuperscript{92} In other words, the will of the public currently governs the Court's consideration of the constitutionality of punishments imposed by governments upon juveniles.\textsuperscript{93}

Justice Scalia also rejected evidence and arguments that characterized the death penalty for Stanford and Wilkins as disproportionate, and that it failed to serve the "legitimate goals of penology,"\textsuperscript{94} namely retribution and deterrence, as required under \textit{Coker}\textsuperscript{95} and \textit{Enmund}.\textsuperscript{96} The defense had argued that "juveniles, possessing less developed cognitive skills than adults, are less

\textsuperscript{90} Id. at 369.
\textsuperscript{91} Id. at 370. The existence of statutes declining to impose capital punishment on criminals under the age of 18 "does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." \textit{Id.} at 370-71.
\textsuperscript{92} Id. at 380.
\textsuperscript{93} \textit{But see} \textit{Trop}, 356 U.S. at 104 (Warren, C.J.) (plurality opinion) ("We cannot push back the limits of the Constitution merely to accommodate challenged legislation. . . . [T]he ordeal of judgment cannot be shirked.").
\textsuperscript{94} 492 U.S. at 377. The Court further stated:
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.\textit{Id.} at 379-80 (citations omitted). Justice O'Connor replied:
In my view, this Court does have a constitutional obligation to conduct proportionality analysis. In \textit{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.\textit{Id.} at 382 (O'Connor, J., concurring in part and concurring in judgment) (citations omitted).
\textsuperscript{95} 433 U.S. 584 (1977); \textit{see supra} note 57 and accompanying text.
\textsuperscript{96} 458 U.S. 782 (1982); \textit{see supra} text accompanying note 61.
likely to fear death,” and “being less mature and responsible, are also less morally blameworthy.”

Similarly, as to mentally retarded offenders whose competency might be an issue, the Supreme Court remarked in 1989 in Penry v. Lynaugh,98 that “in the absence of better evidence of a national consensus against execution of the retarded, mental age should not be adopted as a line-drawing principle in our Eighth Amendment jurisprudence.”99 Thus, the Court declined to hold that “the Eighth Amendment precludes the execution of any mentally retarded person of Penry’s ability [with the reasoning capacity of a seven-year-old] convicted of a capital offense simply by virtue of his or her mental retardation alone.”100

Finally, in McCleskey v. Kemp101 in 1987, the Court held that statistical evidence of racial disproportion in death sentences does not demonstrate arbitrary, capricious, or discriminatory application of the death penalty.102 The Court has implicitly supported capital punishment in several recent rulings noting that potential jurors who oppose the death penalty will be excluded when their views would “prevent or substantially impair” the proper performance of their duties;103 that under the Eighth Amendment there is no per se prohibition against admission of “victim input” evidence

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97 492 U.S. at 377; see Michael J. Spillane, Comment, The Execution of Juvenile Offenders: Constitutional and International Law Objections, 60 UMKC L. Rev. 113 (1991) (reviewing history of juvenile executions and asserting such executions are banned by Eighth Amendment as cruel and unusual). See generally Edward Miller, Note, Executing Minors and the Mentally Retarded: The Retribution and Deterrence Rationales, 48 Rutgers L. Rev. 15 (1990) (examining Penry and Stanford decisions and concluding that capital punishment of such offenders violates Eighth Amendment). The petitioners had the assistance of amicus briefs from, inter alia, the American Society for Adolescent Psychiatry, the American Orthopsychiatric Association, and the Child Welfare League, joined in its brief by other organizations such as the National Parent and Teachers Association and the National Council on Crime and Delinquency. 492 U.S. at 388 n.4 (Brennan, J., dissenting).


99 Id. at 340.

100 Id.

101 481 U.S. 279 (1987). In McCleskey, a black man convicted of armed robbery and murdering a white police officer, id. at 283, offered a statistical study to show that blacks who murder whites are 20% more likely to receive capital punishment than blacks who murder blacks. Id. at 286.

102 See id. at 292-93. The Court held that the statistical study did not demonstrate a risk of racial bias in violation of the Eighth Amendment. Id. at 313; see also id. at 297-99 (rejecting Fourteenth Amendment claim for failure to show intentional discrimination).

in a sentencing hearing;\textsuperscript{104} and that the practice of bringing repeated substantive constitutional challenges based on claims not raised in earlier state court proceedings is disfavored in federal courts.\textsuperscript{105}

D. Procedural Fairness Issues Before the Supreme Court in Recent Cases

1. Sentencing Procedures

Several recent decisions have examined constitutional infirmities in state death penalty sentencing. In \textit{Stringer v. Black},\textsuperscript{106} the Court reviewed Mississippi's sentencing law, which requires a jury finding of one of eight aggravating factors before a death sentence can be imposed.\textsuperscript{107} If an aggravating circumstance is found, the jury must weigh it against any mitigating circumstances.\textsuperscript{108}

In \textit{Stringer}, the jury found three aggravating factors, one of which was that "[t]he capital murder was especially heinous, atro- cious or cruel."\textsuperscript{109} Justice Kennedy, writing for a six-to-three majority, noted that states which balance aggravating and mitigating evidence during capital sentencing "[require] that aggravating factors be defined with some degree of precision."\textsuperscript{110} Vague and imprecise sentencing instructions violate the Eighth Amendment because they may lead to "arbitrary and capricious application of the death penalty."\textsuperscript{111} The use of a vague aggravating factor permits the sentencer to rely upon the existence of an illusory circumstance, creating a risk that the jury will treat the defendant as more deserving of the death penalty than the defendant might otherwise be.\textsuperscript{112}

The Florida death sentencing statute, which requires both the jury and the judge to weigh aggravating and mitigating circum-


\textsuperscript{106} Id. 112 S. Ct. 1130 (1992).

\textsuperscript{107} Id. at 1134; see Miss. Code Ann. § 97-3-19(2) (Supp. 1991).

\textsuperscript{108} \textit{Stringer}, 112 S. Ct. at 1134.

\textsuperscript{109} Id.

\textsuperscript{110} Id. at 1136.

\textsuperscript{111} Id. at 1135.

\textsuperscript{112} Id. at 1139; see also Richmond v. Lewis, 113 S. Ct. 528, 537 (1992) (finding "especially heinous, cruel, or depraved" aggravating factor "unconstitutionally vague and tainted with Eighth Amendment error").
stances, was challenged in two cases decided in 1992. In Espinosa v. Florida, the jury was instructed that if it found that the murder was "especially wicked, evil, atrocious or cruel," the circumstances would establish an aggravating factor. The Court held the instruction invalid for vagueness. The Court rejected Florida's argument that the jury was not the actual sentencer under the Florida system, noting that Florida case law required trial judges to give "great weight" to the jury's recommendation.

In Sochor v. Florida, the Court vacated a death penalty judgment and remanded the case because the trial judge had considered an aggravating factor—"coldness"—which the Florida Supreme Court had ruled was not supported by the evidence. This, the Court found, made the factor invalid, and therefore, weighing it violated the Eighth Amendment.

2. Other Death Penalty Challenges

In Gomez v. United States District Court, the Court vacated a stay of execution and declined to rule on the appellant's fourth federal habeas corpus petition which argued that execution by lethal gas was cruel and unusual punishment in violation of the Eighth Amendment. The Court stated that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and [the appellant's] obvious attempt at manipulation."

In Dawson v. Delaware, the Court held that introducing evidence during sentencing which linked the defendant to membership in the Aryan Brotherhood, "a white racist prison gang that is

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115 Id. at 2927.
116 Id. at 2928.
117 Id.
118 112 S. Ct. 2114 (1992). The defendant was convicted of kidnapping and first degree murder. Id. at 2118.
119 Id. at 2122. The instruction read, in part, "[T]he crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel, and... was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification." Id. at 2118.
120 Id. at 2122.
122 Id. at 1653.
123 Id.
associated with drugs and violent escape attempts at prisons, and that advocates the murder of fellow inmates,\textsuperscript{126} violated the First and Fourteenth Amendments.\textsuperscript{126} Chief Justice Rehnquist, writing for the majority, noted, "[e]ven if the Delaware group to which Dawson allegedly belongs is racist, those beliefs, so far as we can determine, had no relevance to the sentencing proceeding in th[e] case. For example, the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim."\textsuperscript{127}

Justice Thomas, in dissent, responded,

In 	extit{Barclay v. Florida}, the plurality found it relevant that a black gang conspired not merely to commit crimes, but to commit them against white persons out of racial hatred. Even if Dawson's white racist prison gang does not advocate "the murder of fellow inmates," a jury reasonably could infer that its members in one way or another act upon their racial prejudice.\textsuperscript{128}

The issue on appeal in 	extit{Lockhart v. Fretwell}\textsuperscript{129} was a Sixth Amendment claim that defense counsel's failure to raise an objection during the penalty phase prejudiced his client.\textsuperscript{130} The foregone objection would have been based upon an Eighth Circuit decision which held that a death sentence was unconstitutional if the aggravating factor relied upon was also an element of the underlying felony.\textsuperscript{131} Nevertheless, Justice Rehnquist concluded that "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him."\textsuperscript{132}

Another significant case was 	extit{Graham v. Collins}.\textsuperscript{133} In 1981, Gary Graham, age seventeen, engaged in a variety of violent acts, including murder, over the course of one week.\textsuperscript{134} During closing arguments at his trial, defense counsel urged the jury to consider

\textsuperscript{125} Id. at 1097.
\textsuperscript{126} Id. at 1095.
\textsuperscript{127} Id. at 1098.
\textsuperscript{128} Id. at 1102 (Thomas, J., dissenting) (citation omitted) (citing Barclay v. Florida, 463 U.S. 939 (1983)).
\textsuperscript{129} 113 S. Ct. 838 (1993). In 	extit{Lockhart}, the defendant was sentenced to death based on his conviction for felony murder. \textit{Id.} at 841. The Court found the contemporaneous commission of robbery to be an aggravating factor. \textit{Id.}
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}; see Collins v. Lockhart, 754 F.2d 258 (8th Cir.), \textit{cert. denied}, 474 U.S. 1013 (1985).
\textsuperscript{132} \textit{Lockhart}, 113 S. Ct. at 843.
\textsuperscript{133} 113 S. Ct. 892 (1993).
\textsuperscript{134} \textit{Id.} at 895.
Graham’s age when passing sentence. The jury was required to answer three “special issues” during sentencing:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Since these questions were answered in the affirmative by the jury, the trial judge sentenced Graham to death as required by the statute. The Court of Appeals for the Fifth Circuit rejected Graham’s appeal, stating that it would require the creation of a “new rule” of constitutional law, contrary to the principles of Teague v. Lane. Nevertheless, the Supreme Court granted Graham’s petition for certiorari in light of a contemporaneous Supreme Court holding that the Texas special issues did not allow the jury to consider the mitigating effect of a defendant’s evidence of mental retardation and child abuse.

In Herrera v. Collins, the petitioner filed a federal habeas corpus petition ten years after his conviction, arguing that newly discovered evidence established that he was innocent of the murders for which he had been sentenced to death. In rejecting the petition, the Court held that newly-discovered evidence is not a ground for habeas corpus review. The Supreme Court noted

135 Id. at 896.
136 Id. (quoting TEXAS CRIM. PROC. CODE ANN. art. 37.071(b) (West 1981)).
137 Id.
138 113 S. Ct. at 897.
139 Id.; see Teague v. Lane, 489 U.S. 288 (1989). “A holding constitutes a ‘new rule’ within the meaning of Teague if it ‘breaks new ground,’ imposes a new obligation on the States or the Federal Government,’ or was not ‘dictated by precedent existing at the time the defendant’s conviction became final.” Graham, 113 S. Ct. at 897.
142 Id. at 856-57.
143 Id. at 860.
that "[o]nce a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears," particularly since there are other constitutional provisions which ensure against the conviction of an innocent person. Federal habeas corpus review is restricted to an appellant's constitutional claims, and "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."

Justices Blackmun, Stevens, and Souter dissented, stating that they would have reversed the Court of Appeals and remanded on the ground that the Eighth Amendment forbids the execution of an innocent person. "Nothing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent." While agreeing that "the execution of a legally and factually innocent person would be a constitutionally intolerable event," Justice O'Connor, joined by Justice Kennedy, rejected Herrera's claims of innocence, finding that "[t]he record overwhelmingly demonstrates that petitioner deliberately shot and killed Officers Rucker and Carrisalez the night of September 29, 1981; petitioner's new evidence is bereft of credibility."

It seems that despite the Supreme Court's desire to distance itself from executions and death penalty policy, it is not likely that it will be able to do so in the 1990s.

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144 Id.
145 Id. at 859-60 (discussing rights to confront adverse witnesses, compulsory process, effective assistance of counsel, jury trial, and prosecutorial disclosure of exculpatory evidence).
146 Herrera, 113 S. Ct. at 860.
147 Id. at 862.
148 Id. at 876.
149 Id. (Blackmun, J., dissenting) (citations omitted) (suggesting that "[i]t also may violate the Eighth Amendment to imprison someone who is actually innocent").
150 Id. at 870 (O'Connor, J., concurring).
151 Id. at 871.
E. Legislation in the United States

1. Federal Legislation

Since Furman, the United States Congress has enacted four death penalty statutes, prescribing the death penalty for espionage by a member of the armed forces;\textsuperscript{153} death resulting from aircraft hijacking;\textsuperscript{154} witness tampering resulting in death;\textsuperscript{155} and intentional killing or counseling, commanding, inducing, procuring, or causing the intentional killing of an individual or a federal, state, or local law enforcement official, under specified circumstances.\textsuperscript{156} Several pre-Furman death penalty statutes also remain in force.\textsuperscript{157}

Although a federal death sentence may be imposed for a broad range of activities, it is noteworthy that only one person is presently incarcerated under sentence of death.\textsuperscript{158}

2. State Legislation

Thirty-six states have capital punishment statutes,\textsuperscript{159} which leaves fourteen: Alaska, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, Vermont, West Virginia, Wisconsin, and the District of Columbia without such statutes.\textsuperscript{160} Capital offenses include first degree murder in Arizona, Colorado, Florida, Idaho, Louisiana, Maryland, Missouri, Nebraska, New Mexico, Nevada, North Carolina, Pennsylvania, Tennessee, and Wyoming; aggravated murder

\textsuperscript{153} 10 U.S.C. § 906(a) (1988).
\textsuperscript{158} See Greenfeld, supra note 13, at 8, tbl. 4.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 6, tbl. 1; Death Row, supra note 11, at 1.
in Kentucky, Oregon, and Utah; aggravated first degree pre-meditated murder in Washington; murder under aggravating circumstances in California, Delaware, Illinois, and Indiana; assassination and murder, including contract murder and felony murder, of a specified category of victims in specified circumstances in Arkansas, Colorado, Connecticut, Mississippi, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, South Dakota, Texas, Virginia, and Wyoming; treason in California, Georgia, and Louisiana; aircraft hijacking in Georgia, and aircraft piracy in Alabama and Mississippi; kidnapping when the victim is killed in Colorado and Kentucky; kidnapping with gross permanent physical injury inflicted on the victim in South Dakota; kidnapping for ransom or kidnapping with bodily injury when the victim dies in Georgia; aggravated kidnapping when the victim or rescuer dies and aggravated assault or aggravated kidnapping by a state prisoner under specified circumstances in Montana; arson causing death in Arkansas; train wrecking in California; illegal sale of specified drugs to a person who dies from these drugs in Connecticut; and statutory rape in Mississippi.\footnote{161}

At the end of 1991, thirty-four of the thirty-six states with capital punishment statutes provided for automatic review of all death sentences.\footnote{162} The exceptions are Arkansas, which has no specific provision for automatic review, and Ohio, which provides for review by the court of appeals and the supreme court only "upon appeal" by the defendant.\footnote{163} While thirty-one states provide for automatic review of both the conviction and sentence, Idaho, Indiana, and Montana only require review of the sentence.\footnote{164}

Further, the minimum age requirement for capital punishment varies among the states. To impose the death penalty, eleven states, as well as the federal government, require a minimum age of eighteen at the time of the offense.\footnote{165} In four states, Georgia, New Hampshire, North Carolina, and Texas, the offender must be seventeen years old when the crime occurs, although in North Carolina, if the offender commits murder while incarcerated for a prior murder, the minimum age may be reduced

\footnote{161 Greenfeld, supra note 13, at 6, tbl. 1.} \footnote{162 Id. at 7.} \footnote{163 Id. The federal death penalty procedures also do not provide for automatic review. Id.} \footnote{164 Id.} \footnote{165 Id. at 7, tbl. 3.}
Death penalty statutes in Alabama, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Nevada, Oklahoma, and Wyoming apply to offenders sixteen years of age and older. In Virginia, the minimum 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 wherein the juvenile is tried as an adult. Eight states—Arizona, Delaware, Florida, Idaho, Montana, Pennsylvania, South Carolina, and Washington—do not specify a minimum age for imposition of the death penalty.

Finally, as to the methods of execution, twenty-two states use lethal injection, twelve use electrocution, six use lethal gas, three use hanging, and two use a firing squad.

II. EVOLVING INTERNATIONAL NORMS WITH RESPECT TO CAPITAL PUNISHMENT

A. International Instruments

The movement to abolish capital punishment worldwide has witnessed steady, but not energetic, growth. As early as 1968 the United Nations General Assembly declared its objective of gradually but progressively restricting the range of offenses punishable by death. Since that time the U.N. has not departed from its ultimate goal of abolition, but what began as an ambitious movement has met with increasingly focused opposition in the last several years.

The 1980s came to a close with the General Assembly's adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights in December 1989. Aiming at the abolition of the death penalty, the Protocol obligates representatives of each state to "take all necessary measures to abolish the

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166 Greenfeld, supra note 13, at 7, tbl. 3.
167 Id.
168 Id.
169 Id.
170 Id. at 7, tbl. 2.
171 See generally Fitzgerald & Miller, supra note 3.
174 See id. at operative para. 2.
death penalty within its jurisdiction." The vote on promulgation of the Protocol in the Third Committee was 55-28-45, reflecting the dissent on substantive grounds by the Islamic bloc countries that oppose abolition as antithetical to their religious precepts.

Other international actions also highlight the movement to abrogate capital punishment. For example, in 1983 Protocol Six to the European Convention on Human Rights declared the abolition of the death penalty in time of peace. This was based on a 1973 resolution that capital punishment was "inhuman and degrading within the meaning of Article 3 of the European Convention" and a 1962 study of the death penalty in Europe.

In addition, the 1984 Protocol to the American Convention on Human Rights to Abolish the Death Penalty resolved "in accordance with the spirit of Article 4 [of the Convention] and the universal trend to eliminate the death penalty, to call on all countries in the Americas to abolish it." Nonetheless, in the 1990 debates on the Protocol, the United States voiced particularly strong dissent.

B. State Practice

The United States has not joined the international movement to abolish capital punishment. During the 1980's, twenty countries abolished the death penalty for all crimes, four abolished it for ordinary crimes, and several instituted moratoria on execu-

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175 See id. at Annex, art. 1(2).
177 For extensive discussion, see Fitzgerald & Miller, supra note 3, at nn.262-323 and accompanying text.
180 Council of Europe, The Death Penalty in European Countries (1962).
In addition, twenty countries and territories retain the death penalty for ordinary crimes, but have not executed anyone during the past ten years or more. No western country reintroduced the death penalty during this period. In contrast, ten states in the United States began executing criminals during this decade.

According to a recent Amnesty International report, the United States is in the company of China, Muslim countries, and third world nations, primarily in Africa, in continuing the practice of executions. As of February 1993, forty-nine countries had abolished the death penalty for all crimes, and an additional fifteen have abolished it for all but exceptional crimes. Cyprus, Italy, Malta, Spain, and the United Kingdom are the only Western European countries which impose the death penalty and then only for exceptional crimes. In addition, several Central and Eastern European countries—Croatia, the Czech Republic, the German Democratic Republic (now part of Federal Republic of Germany), Hungary, Romania, the Slovak Republic, and Slovenia—have joined the Western European countries in abolishing the death penalty.

C. Emerging International Standards With Respect to Capital Punishment of Juvenile Offenders

1. Customary International Law?

Although the prohibition of the death penalty appears to resist the formulation of a tangible prohibition, its non-application to juveniles, those under the age of eighteen at the time of their offenses, is clearly emerging as customary international law. Of particular importance is a series of international instruments explicitly forbidding the use of capital punishment for juveniles. These instruments include: the International Covenant on Civil

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184 See id. tbl. 3.
185 See id.
187 Amnesty Int’l, supra note 183, at tbl. 4.
189 Id. at 3. "Exceptional crimes" are those defined under military law or crimes committed in exceptional circumstances such as in wartime. Id.
190 Id.
191 See id. at 23.
192 See generally Nanda, supra note 7.
and Political Rights, the American Convention, the Fourth Geneva Convention, the Convention Relative to the Protection of Civilian Persons in Time of War, the 1977 Protocols to the Geneva Conventions, the Additional Protocol relating to the Protection of Victims of International Armed Conflicts (Protocol I), and the Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), and the Convention on the Rights of the Child. The movement toward abolition of the death penalty for offenders under eighteen is further embodied in a series of United Nations resolutions and safeguards enacted throughout the 1980s. Even the United States may arguably be bound by this customary rule of law, despite its recent reservation to its ratification of the International Covenant on Civil and Political Rights.

The reservation of the United States to the juvenile death penalty provision of the International Covenant presents an interesting question. It is arguable that under the International Covenant on Civil and Political Rights such a reservation is not permitted. Furthermore, a persuasive argument can be made

193 Id. at art. 4(5).
197 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 U.S. 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.
199 Id. at 336 (directing that state may not formulate reservation which is "incompatible with the object and purpose of the treaty").
that under the Vienna Convention on the Law of Treaties such a reservation is incompatible with the objects and purposes of the Covenant.\textsuperscript{201}

1. State Practice

An overwhelming number of countries have abolished the death penalty for offenders under the age of eighteen. At least seventy-two countries do not allow the death penalty for offenders below eighteen,\textsuperscript{202} 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 tacitly abolished the juvenile death penalty.\textsuperscript{203} In contrast, the United States stands 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.\textsuperscript{204}

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.\textsuperscript{205} An unknown number of juvenile offenders have been executed by Iran and Iraq.\textsuperscript{206} In 1992, another juvenile was put to death in the United States.\textsuperscript{207}

III. Appraisal

As noted by one participant in the process, "[e]verything that could be said for and against the death penalty has already been

\begin{footnotes}
\footnote{the Limitations of the Flexible System Governing Treaty Formation, 29 Tex. Int'l L.J. — (forthcoming).}
\footnote{Vienna Convention on the Law of Treaties, supra note 198, at 336.}
\footnote{AMNESTY INT'L, supra note 183, at 78-79.}
\footnote{Id.}
\footnote{See Thompson v. Oklahoma, 487 U.S. 815, 838 (1988). It is debatable whether 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 rather than on the Eighth and Fourteenth Amendments. Id. at 858.}
\footnote{AMNESTY INT'L, supra note 183.}
\footnote{AMNESTY INT'L, supra note 183, at 79.}
\end{footnotes}
said. What remains is to make a choice." The debates that have continued on the international scene for so many years have indeed remained inconclusive; no international consensus has yet emerged regarding abolition of capital punishment.

Similarly, there is no consensus within the United States. The one forum in which U.S. capital punishment law is receiving its most active public consideration is the Supreme Court. In several recent cases, such as Thompson and Stanford, serious discussion has taken place regarding the influence of international trends upon the American debate. Although such arguments have been rejected by a plurality of the Court, they are derived from historical precedents and sound comparative principles, and will be made again. Regardless of whether the Court adopts these arguments, it can nevertheless analyze, in its own search for "evolving standards of decency," the same arguments put forth in the various international and national fora around the world, some of which have found, for example, that capital punishment does not serve its intended goals of retribution and deterrence.

The Supreme Court may allow its consideration of the Eighth Amendment's Cruel and Unusual Punishment Clause to be informed by evidence of international practice. Although at present customary international law does not prohibit the death penalty, the world community has in great measure supported the abolition of capital punishment in the case of juvenile offenders. As this principle crystalizes, the arguments in favor of its usage as a principle of U.S. law under the Supremacy Clause of Article VI of the United States Constitution will become more compelling. In the meantime, should the Court continue its reliance exclusively on American practices, its rulings will appear increasingly inappropriate.

As to the Court's interpretation of the Eighth Amendment, opponents of capital punishment have argued that the Court should read the words "cruel and unusual" disjunctively rather than conjunctively since there is no authoritative record of what the first Congress meant in using the phrase. Professor Don-
nelly contends that a “[m]ajoritarian interpretation of the Eighth Amendment seems most likely of the competing interpretations to be in disagreement with [the Founding Fathers’] views.”

Critics also argue that the Eighth Amendment prohibits capital punishment because it does not serve legitimate penological functions and because it is particularly barbarous and cruel. These arguments deserve serious consideration both by Congress, the state legislatures, and the Supreme Court. The United States should join the majority of western nations in abolishing the death penalty.

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there is evidence that at the time of the adoption of the Eighth Amendment “and” and “or” may have been used interchangeably. *Id.* at 100 n.532.

210 *Id.* at 101 (noting founding fathers were distrustful of majority).