December 2008

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ROPER V. SIMMONS: THE EXECUTION OF JUVENILE CRIMINAL OFFENDERS IN AMERICA AND THE INTERNATIONAL COMMUNITY'S RESPONSE

JACQULYN GIUNTA

INTRODUCTION

The execution of juvenile criminal offenders is in the spotlight of both the national and international legal arena. As the sole proponent of this policy throughout the international community, the United States has faced intense criticism in upholding this archaic form of punishment. The Supreme Court, for a long time, held there was no national consensus rejecting juvenile executions and not a violation of the Eighth Amendment. In the 2005 decision of Roper v. Simmons,¹ however, the Supreme Court overturned Stanford v. Kentucky² holding that juvenile executions were a violation of the cruel and unusual punishment. This note will analyze the shift in American opinion throughout the past three decades and focus on the international policy on juvenile executions. In addition, this Note will consider the weight of authority the Supreme Court gives the international community in deciding its cases.

¹ 543 U.S. 551 (2005).

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I. BACKGROUND

A. Origin of the Eighth Amendment

Under the Eighth Amendment of the United States Constitution, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."3 Such language was derived from the English Bill of Rights of 1689.4 The intent of the English law was to prevent arbitrary and irregular enforcement of harsh penalties.5 Parliament restricted monarchs from imposing unbalanced punishments on criminal actions.6 In an effort to stabilize English society and law, such sentencing limitations led to a controversial debate amongst government officials.7 Despite the enactment of the Bill of Rights in 1689 and sentencing limitations, seventeenth and eighteenth century England still had a strong proclivity toward harsh punishments represented by the large number of persons tried and executed.8 This demonstration showed that the English judicial system took a very “loose” view of what was deemed “cruel and unusual punishment”.9

3 U.S. CONST. amend. VIII.
4 Bill of Rights, 1689 (Eng.) (stating “excessive bail out not to be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted”).
5 See Anthony Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 CAL. L. REV. 839, 845–46 (1969) (commenting on English purpose for such amendment and its need for preventing discriminatory punishments); see also Furman v. Georgia, 408 U.S. 238, 242 (1974) (Douglas, J., concurring) (“There is evidence that the [cruel and unusual punishment] provision of the English bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties . . . .”).
6 See Bill of Rights, supra note 4 (creating an impediment to harsh punishments); see also Furman, 408 U.S. at 247, n. 9 (noting that in the early 1800’s English law the death penalty could be imposed “for stealing five shillings or more,” but that it was abolished in 1827).
7 See Furman, 408 U.S. at 247, n. 9 (acknowledging outcry from the English monarch when the Crown no longer had power to impose capital punishment at will); see also Criminal Statutes Repeal Act, 7 & 8 Geo. 4, c. 27 (1827) (abolishing harsh penalty of death for stealing more than 5 shillings in Britain during the nineteenth century).
8 See Joshua E. Kastenberg, An Enlightened Addition to the Original Meaning: Voltaire and the Eighth Amendment’s Prohibition against Cruel and Unusual Punishment, 5 TEMP. POL. & CIV. RTS. L. REV. 49, 53 (1995) (showing that under the 1752 Act of King George II, public display of deceased was permitted); id. (noting that from 1749 to 1799, “there were a total of 1,696 persons executed in London alone”); see also ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 276 (Penguin Books 1963) (1973) (supporting proposition that 1,696 executions were attributable to London and Middlesex during that period).
9 Kastenberg supra note 8, at 54.
The adoption of the English precedent of Cruel and Unusual Punishment was debated in the United States during the First Congress. Our founding fathers determined that the legislature could not have unrestrained authority to determine punishments and that human rights protections were necessary. Thus, the purpose behind the Eighth Amendment in American jurisprudence was born. Since the adoption of the Eighth Amendment to the American Constitution, the debate over the constitutionality of the death penalty has existed at the heart of our society and legal system. Although the constitutionality debate was spurred by the Eighth Amendment, the enforcement of the death penalty has been a regular practice in America since colonial times.

B. Setting the Precedent for Roper v. Simmons

The Supreme Court has had a tumultuous history with respect to the death penalty and the parameters of "cruel and unusual punishment" under the Eighth Amendment. The Supreme Court addressed this issue for the first time in 1879 in Wilkerson v. Utah. In that case, the defendant was sentenced to death by

\[\text{References:}\]


11 See Furman, 408 U.S. at 321 (Marshall, J., concurring) (reviewing Patrick Henry's speech at the Virginia Convention and confirming authority of legislature to make laws, but insisting human rights protection be incorporated into Bill of Rights via Eighth Amendment); see also Granucci, supra note 5, at 839-40 (discussing foundations for Eighth Amendment jurisprudence).

12 See Rumann, supra note 10, at 666 (arguing that Eighth Amendment has been unfairly limited and improperly influences outcomes of post-conviction judgments); Matthew Silversten, Sentencing Coker v. Georgia to Death: Capital Child Rape Statutes Provide The Supreme Court an Opportunity to Return Meaning to the Eighth Amendment 37 GONZ. L. REV. 121, 122-23 (criticizing Furman and claiming it was improperly decided).


15 99 U.S. 130 (1878).
public shooting as punishment for premeditated murder.\textsuperscript{16} Although the Court could not define "cruel and unusual punishment" with precision, it was able to conclude punishments involving torture were prohibited.\textsuperscript{17} When analyzing this emerging concept, the Supreme Court did compare the practice of capital punishment in the United States to the practices of other countries.\textsuperscript{18} The Supreme Court’s review of international opinion and policy on capital punishment was a point of contention throughout the next century and remains contentious to the present day.\textsuperscript{19}

For the next fifty years the Supreme Court tinkered with the boundaries of the Eighth Amendment in a series of cases.\textsuperscript{20} In the 1958 landmark case of \textit{Trop v. Dulles},\textsuperscript{21} the Supreme Court dealt with the issue of denationalization. In that case, the petitioner was a private in the United States Army, convicted by a general court-martial of desertion while serving in French Morocco.\textsuperscript{22} The private was sentenced to three years hard labor, forfeiture of monetary payments, and a dishonorable discharge from the U.S. military.\textsuperscript{23} After sentencing, the petitioner was denied a United States passport and classified as denationalized by the United States government due to his dishonorable discharge under 8 U.S.C. §1481(a)(8).\textsuperscript{24} The central issue for the Supreme Court

\textsuperscript{16} \textit{Id.} at 130–31.
\textsuperscript{17} \textit{Id.} at 135–36.
\textsuperscript{18} \textit{Id.} at 134–35 (noting that similar rules prevail in other countries); see \textit{Furman}, 408 U.S. at 322 (commenting on how the Supreme Court arrived at the precedent set).
\textsuperscript{20} \textit{See} \textit{In re Kemmler}, 136 U.S. 436, 443–44 (1890) (holding that merely ‘unusual’ punishment is not unconstitutional); see \textit{also} \textit{Weems} v. United States, 217 U.S. 349, 373 (1910) (recognizing that the Constitution is a fluid document and that as our society evolves so will the Court’s interpretation and application of the Constitution).
\textsuperscript{21} 356 U.S. 86 (1958)
\textsuperscript{22} \textit{Id.} at 87.
\textsuperscript{23} \textit{Id.} at 88 (summarizing that a “general court-martial convicted petitioner of desertion and sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge”); see 8 U.S.C. § 1481 (a)(8) (2007) (§ 8 repealed in 1978) (stating “[a] person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . (g) deserting the military or naval forces of the United States’ provided “he is convicted thereof by court martial”).
\textsuperscript{24} \textit{See Trop}, 356 U.S. at 88 (summarizing that petitioner’s passport application was “denied . . . under the provisions of Section 401 (g) of the Nationality Act of 1940 . . . ”); see \textit{also} Amy D. Ronner, \textit{Denaturalization and Death: What it Means to Preclude the Exer-
was whether 8 U.S.C. §1481(a)(8), which sets the standard for when a person shall lose his nationality, violated the Eighth Amendment.\textsuperscript{25}

The Supreme Court held that the denationalization of the petitioner was a violation of the Eighth Amendment.\textsuperscript{26} In so holding, the Court utilized “evolving standards of decency” as the basis for interpreting the Eighth Amendment.\textsuperscript{27} According to the Court, “evolving standards of decency” will “mark the progress of a maturing society.”\textsuperscript{28} This standard has been one of the most formative in the history of the Supreme Court. \textit{Trop v. Dulles} signifies the setting of a new benchmark for cases concerning the Eighth Amendment. Not only is this case significant for setting a new national standard, but it also sets forth the Supreme Court’s reflections on the practices of other countries.\textsuperscript{29} When reviewing international practices, the Court acknowledged that out of eighty-four nations, only two countries, Turkey and the Philippines, enforced the punishment of denationalization for desertion.\textsuperscript{30} Nevertheless, while the \textit{Trop} ruling favors the rights of prisoners, the
United States is often considered to be among a minority of nations with sub-par human rights principles.\textsuperscript{31}

II. COMPARISON OF \textit{STANFORD V. KENTUCKY, ROPER V. SIMMONS} AND THE AMERICAN OPINION

A. The Comparison Between Stanford and Roper

In the 1989 case of \textit{Stanford v. Kentucky}, the Supreme Court held that juvenile execution did not violate the Eighth Amendment prohibition of cruel and unusual punishment.\textsuperscript{32} \textit{Stanford} was a case that resulted from two consolidated juvenile offender cases that culminated in death sentences.\textsuperscript{33} The Court affirmed the lower court decisions, upholding the capital sentences.\textsuperscript{34} In an opinion by Justice Scalia, the Court’s reasoning included a series of factors considering whether capital punishment of juvenile offenders fell within the standard of “cruel and unusual” set by the Eighth Amendment.\textsuperscript{35} The Court relied on the Trop standard of


\textsuperscript{33} See \textit{Stanford}, 492 U.S. at 364–67 (“These two consolidated cases require us to decide whether the imposition of capital punishment on an individual for a crime committed at 16 or 17 years of age constitutes cruel and unusual punishment under the Eighth Amendment.”); see also Graff, \textit{supra} note 32, at 490 (“[t]he Court faced two consolidated cases in Stanford: one involving Kevin Stanford, who raped and murdered a gas station attendant when he was 17, and the other involving Heath Wilkins, who likewise murdered a convenience store attendant when he was 16 years old.”).

\textsuperscript{34} See \textit{Stanford}, 492 U.S. at 380 (holding that “judgments of the Supreme Court of Kentucky and the Supreme Court of Missouri are therefore affirmed”) (emphasis omitted); see also Graff, \textit{supra} note 32, at 490 (noting that “[t]he Court upheld the death sentences of both juveniles”).

\textsuperscript{35} See \textit{Stanford}, 492 U.S. at 369 (quoting \textit{Coker v. Georgia}, 433 U.S. 584, 592 (1977) (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the
“evolving standards of decency that mark the progress of a maturing society.” 36 The Court reasoned that such evolving standards of society cannot be a subjective standard set by the Supreme Court, but instead, must be based on objective evidence—most notably the national consensus on juvenile execution. 37 The Supreme Court referenced the law of the state legislatures in each of the fifty states to determine the national consensus. 38 Its research reflected that the nation lacked a uniform consensus regarding juvenile executions. As of 1989, “[o]f the 37 states whose laws permit capital punishment, 15 decline to impose it on 16-year-olds and 12 on 17 year-olds.” 39 As a result, the Court was unwilling to place the label of “cruel and unusual punishment” on juvenile executions for sixteen or seventeen year old offenders. 40

The Court left this decision to the discretion of state legislatures and jury members, who represented American society and were not hesitant to sentence juvenile offenders, ages sixteen and seventeen, to death. 41

In March 2005, a mere sixteen years after Stanford v. Kentucky, the Court again considered the issue of juvenile executions in the case of Roper v. Simmons. 42 This case dealt with a seven-

maximum possible extent.”); see also Graff, supra note 32, at 490 (alluding to Stanford in that “applying the death penalty to juvenile offenders 16 and older did not offend the Eighth Amendment”).

36 See Stanford, 492 U.S. at 369 (confirming the precedent that Trop had when examining the boundaries of the Eighth Amendment law).

37 See id. (posing that the Court cannot look at justices’ personal ‘standards of decency’ but those of American society as a whole); see also Anthony M. Despotes, Applying Atkins v. Virginia to Juvenile Defendants: The End is Near for the Constitutionality of Executing Juveniles, 34 MCGEORGE L. REV. 851, 852 (2003) (mentioning the “emerging ‘national consensus’ against executing juveniles”).

38 See Stanford, 492 U.S. at 371 n.2 (noting the following states which preclude capital punishment of offenders under 18 in 1989: California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Hampshire, New Mexico, Ohio, Oregon and Tennessee); id. (stating that three states preclude the death penalty for offenders under the age of 17 in 1989: Georgia, North Carolina and Texas).

39 See id. at 370.

40 See id. at 370–71 (stating that “[t]his does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual”).

41 See id. at 369–71 (stressing that “Georgia was the sole jurisdiction that authorized such a punishment.”); see also Colin Garrett, Death Watch, 30 CHAMPION 46, 47 (National Association of Criminal Defense Lawyers, Inc.) (2006) (stating that “in the Coker decision, the Supreme Court repeatedly referred to ‘adult rape,’ and the Georgia law it invalidated applied only to the rape of an adult”).

42 543 U.S. 551 (2005) (holding that Eighth Amendment prohibits imposition of the death penalty for crimes committed when offenders were under the age of 18 years).
teen year old offender convicted of murder and sentenced to death. In a five to four decision written by Justice Kennedy, the Supreme Court held that all juvenile executions were considered cruel and unusual punishment under the Eighth Amendment.

The historic decision overturned Stanford v. Kentucky; however, the Court relied on reasoning nearly identical to that employed by the Stanford court. The Court analyzed the modern trend in the national consensus and focused on the evolving standards of decency considered in Trop. The Court held that American society, as a whole, viewed juvenile offenders as less culpable and not worthy of the same harsh sentence as an adult offender guilty of the same crime. The Court relied upon three basic reasons in its analysis: (1) juvenile offenders lacked the maturity and the capacity to understand the ramifications of their actions; (2) juveniles were more likely to fall victim to negative outside influences such as peer pressure; and (3) juveniles were not yet fully formed beings with entirely established character traits. The Court concluded that the juvenile's insufficient culpability compelled a ruling that juveniles are eligible only for sentences less severe than death.

The analysis of a juvenile's mental capacity was not the only variation between the Court's opinions in these two cases. In

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43 Id. at 555 (stressing the issue that for the "second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime").
44 Id. at 554.
45 Id. at 560–61 (citing to trend against cruel and unusual punishment set forth in Trop).
46 Id. at 558 (reviewing expert evidence of Simmons's extremely immature personality which should have been considered at his sentence now being offered by his post-conviction counsel).
47 See Roper v. Simmons, 543 U.S. 551, 569 (2005) (pointing out that parents and a variety of scientific studies reflect that "[a] lack of maturity and an underdeveloped sense of responsibility are found in the youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill considered actions and decisions").
48 Id. at 569 (discussing the second difference between juvenile offenders and adults).
49 Id. at 571 (explaining the third difference between juvenile offenders and adults, distinguishing by less established character traits and personality).
50 Id. at 570 ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults"). See Thompson v. Oklahoma, 487 U.S. 815, 833-38 (1988) (explaining that juveniles are less mature and responsible than adults and that a defendant's youth should be a mitigating factor in punishment).
Stanford, the Supreme Court concluded that the majority of Americans did not object to juvenile executions. Justice Scalia noted that various segments of American society including public interest groups, opinion polls of ordinary citizens, and those involved in the legal community, were unable to agree. A lack of consensus was a justifiable reason for the Supreme Court to uphold the practice of juvenile executions within the criminal justice system. As Justice Brennan pointed out in his dissenting opinion in Stanford, the American community had spoken out against juvenile executions in the state legislatures. Twelve states that permitted capital punishment did not allow the death penalty for juvenile offenders. In addition to those twelve states, fifteen states, including the District of Columbia, did not permit the death penalty at all. Lastly, three states refused to allow the execution of a criminal offender under the age of seventeen. A total of thirty states have barred the death penalty for juvenile criminal offenders. Although not a complete consensus against the death penalty, in 1989 the pendulum of social opinion

51 See Stanford v. Kentucky, 492 U.S. 361, 372–73 (1989), overruled by Roper v. Simmons, 543 U.S. 569 (2005) ("[E]ven if it were true that no federal statute permitted the execution of persons under 18, that would not remotely establish-in the face of a substantial number of state statutes to the contrary-a national consensus that such punishment is inhumane... ").
52 See id. at 377 (concluding that American society could not commit to a solidified answer regarding death penalty and juveniles).
53 See id. ("A revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.").
54 See id. at 384–85 (Brennan, J., dissenting) (discussing the various state jurisdictions that prohibit juvenile execution).
55 See id. at 384 (Brennan, J., dissenting) (referencing to note 2 on page 371 the twelve states and the corresponding statute respectively: California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Hampshire, New Mexico, Ohio, Oregon, Tennessee).
57 See Stanford, 492 U.S. at 371 n. 2 (referencing three States that prohibit execution of offenders under 17: Georgia, North Carolina and Texas).
58 See id. at 384 (Brennan, J., dissenting) (listing the state statistical data against juvenile execution).
was certainly swinging away from capital punishment, especially for juvenile criminal offenders.\textsuperscript{59}

Since \textit{Stanford}, traditional states, like Texas and Virginia, have faithfully continued this practice. Since 1994, Texas led the way with eleven juvenile executions, while Virginia and Oklahoma carried out three and two juvenile executions, respectively.\textsuperscript{60} Prior to the Supreme Court’s ruling in \textit{Roper v. Simmons}, there were twenty-nine inmates who had committed crimes as juveniles awaiting execution in Texas, fourteen in Alabama, five in Mississippi, four in Arizona and Louisiana, three in Florida and South Carolina, two in Georgia and Pennsylvania, and one in Nevada and Virginia.\textsuperscript{61} As of September 15, 2004, there were juvenile offenders on death row in the United States.\textsuperscript{62} In comparison, in 2004, there were 3,314 adult criminal offenders on death row according to U.S. Department of Justice Office of Justice.\textsuperscript{63}

Moreover, in 1988, immediately preceding the \textit{Stanford} decision, juveniles committed approximately nine percent of homicides in the United States but received less than two percent of the death sentences.\textsuperscript{64} Moreover, while the number of death row

\textsuperscript{59} See Frank Green, \textit{High Court Ponders Young killers’ Fate/It considers Whether to Bank Execution of Those Who Kill at 16/17}, RICHMOND TIMES DISPATCH, Oct. 14, 2004, at A12 (stating that since the 1989 Supreme Court ruling only three states have executed juvenile offenders from 1994 to 2004); see also \textit{Furman}, 408 U.S. at 372, Appx. I (Marshall, J., concurring) (listing states that have abolished the death penalty).

\textsuperscript{60} See Green \textit{supra} note 59, at A12 (listing the state statistical data). See also Alberta Phillips, \textit{We Must Draw the Line at Executing Juvenile Offenders}, AUSTIN AMERICAN-STATESMAN, Sept. 1, 2002, at H3 (criticizing Texas’ practice of executing juvenile offenders).

\textsuperscript{61} See Green \textit{supra} note 59, at A12 (listing juvenile inmates in various states awaiting execution).


\textsuperscript{64} Don Colburn, \textit{Most Put to Death for Juvenile Offenses are Black Males}, THE WASHINGTON POST, Jul. 19, 1988 at Z16 (discussing majority racial component of juvenile offenders put to death); \textit{UPI-CONTEXT: Execution of Children}, UNITED PRESS INTERNATIONAL, Feb. 23, 1987 (criticizing America’s use of juvenile death penalty and discussing how more than 100 nations with the death penalty, less than half prohibit executions for juvenile offenders).
inmates drastically increased in the 1980's, the number of juvenile offenders on death row did not. Further support for the cessation of the imposition of the death penalty against juvenile offenders was exhibited in an opinion poll taken in 1986 in Georgia, a state which executed more juvenile offenders than any other. In Georgia, two out of every three residents stated that a life sentence should be the maximum punishment imposed on juvenile offenders. In addition to this small number of executions, there were also states like South Dakota, which statutorily permitted the death penalty but had not executed a criminal offender since the Supreme Court’s Furman decision in 1972. Nevertheless, the Supreme Court rejected all objective evidence which, at the very least, showed stronger support against juvenile executions than in favor of it. An ironic end to this ruling was in 2003 when the Governor of Kentucky commuted the death sentence of Kevin Stanford, a juvenile offender, and sentenced him to life in prison without parole. The Governor declared, “[w]e ought not to be executing people who, legally, were children,” although the Supreme Court held it was constitutional to execute this same defendant. The Governor's decision, on behalf

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66 See Don Colburn, Most Put to Death for Juvenile Offenses Are Black Males, WASH. POST, Jul. 19, 1988, at Z16 (citing that number of death row juveniles has remained relatively constant); Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?did=204&scid=27#streibcaselist (last visited Mar. 25, 2007) (showing that number of juveniles on death row numbered only 71 as of December 31, 2004).

67 See Colburn, supra note 66 (stating what Georgia opinion poll revealed); Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid=15&did=411 (last visited October 11, 2007) (showing 2004 Gallup poll indicating increased support against the death penalty).


69 See Stanford, 492 U.S. at 384 (Brennan J., dissenting) (pointing out that there were thirty states that would not have supported the death penalty in that case's situation).


71 See Roper, 543 U.S. at 565.
of the people of Kentucky, is indicative of a sentiment that many Americans do not support the execution of juveniles.\textsuperscript{72} It is this rejection of the Supreme Court’s decision in \textit{Stanford} that compelled the Court to reanalyze its assessment of public opinion.\textsuperscript{73}

In \textit{Roper}, the Court used a similar analysis to the one used in 2002 in \textit{Atkins v. Virginia},\textsuperscript{74} where the Court held that the execution of mentally retarded criminal offenders violated the Eighth and Fourteenth Amendments.\textsuperscript{75} Similar to the \textit{Stanford} and \textit{Roper} dichotomy, the \textit{Atkins} decision overturned long-standing precedent established in \textit{Penry v. Lynaugh},\textsuperscript{76} decided the same day as \textit{Stanford v. Kentucky}. As in \textit{Atkins}, the Court examined direction taken by the states during the time between the \textit{Penry} and \textit{Stanford} decisions and the \textit{Atkins} and \textit{Roper} decisions.\textsuperscript{77} Although the change in opinion with respect to the execution of juvenile offenders was less dramatic than the change in public opinion on the execution of the mentally handicapped, the Court believed the “direction” of the states was toward prohibition of juvenile executions.\textsuperscript{78} Since \textit{Stanford}, “five states [had] abandoned capital punishment for juveniles.”\textsuperscript{79}

Did these five States really make the difference in swinging the national consensus against juvenile executions? Or, was there no real change in public opinion? The Court’s argument in support of a slower pace for the abolition of juvenile executions in comparison to the execution of the mentally retarded is contradictory. At the time the Court decided \textit{Penry}, “only two death penalty states had prohibited the execution of the mentally retarded.”\textsuperscript{70} In contrast, “[w]hen [the Court] heard \textit{Stanford}, twelve

\textsuperscript{72} See id. at 566 (pointing out that over time, more and more states have abandoned juvenile death penalty); Death Penalty Information Center, http://www.deathpenaltyinfo.org/article.php?scid=15&did=411 (last visited Mar. 25, 2007) (showing a 2004 Gallup poll that indicates increasing support against the death penalty).

\textsuperscript{73} See \textit{Roper}, 543 U.S. at 566 (stating that “[s]ince \textit{Stanford}, no State that previously prohibited capital punishment for juveniles has reinstated it.”).

\textsuperscript{74} 536 U.S. 304 (2002) (holding that capital punishment in these types of cases was unconstitutional).

\textsuperscript{75} Id. at 321 (holding that capital punishment in these types of cases was unconstitutional).

\textsuperscript{76} 492 U.S. 302 (1989).

\textsuperscript{77} Id. at 335 (stating that there was not sufficient evidence of a national consensus against capital punishment for the mentally retarded).

\textsuperscript{78} See \textit{Roper}, 543 U.S. at 568 (citing that a majority of States did not have the death penalty for those under eighteen years of age).

\textsuperscript{79} See id. at 567.

\textsuperscript{80} See id. at 566.
death penalty states had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17.\textsuperscript{81} Here, the Court contradicts itself. It appears there was no real change in public opinion regarding juvenile executions. The evidentiary proof used to overturn Stanford does not vary significantly from the evidence used to support the Court’s holding in Stanford.\textsuperscript{82} The only other explanations are that the Court simply desired the validation from the last five states before determining the status of juvenile executions under the Eighth Amendment; or, perhaps that the majority of the Court recognized its misinterpretation of the national consensus in Stanford.

**B. American Opinion Expressed in State Courts**

In December 2003, a court in Fairfax County, Virginia heard a case that received nationwide attention—People of the Commonwealth of Virginia v. Lee Boyd Malvo.\textsuperscript{83} Malvo is known to most Americans as the “sniper”, who terrorized the Washington D.C. area with his accomplice, John Allen Muhammad.\textsuperscript{84} Malvo was convicted of capital murder for the October 14, 2002 killing of Linda Franklin.\textsuperscript{85} The conviction and death penalty sentence of John Allen Muhammad was a simple one for the prosecution. Requesting the death penalty for seventeen-year-old Malvo, however, proved the real feat.\textsuperscript{86}

The media attention surrounding the Malvo sentencing concentrated on one key factor: Malvo’s age. In a state that led in juvenile executions at a time before the Supreme Court’s decision in Roper,\textsuperscript{87} there was still speculation that Malvo would not re-

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\textsuperscript{81} See id.
\textsuperscript{82} See id. (noting States’ trends and attitudes towards death penalty).
\textsuperscript{83} 63 Va. Cir. 22 (Va. Cir. Ct. 2003).
\textsuperscript{84} See Henri E. Cauvin, Malvo’s Age Was the Deciding Factor, WASH. POST, Dec. 24, 2003, at A01 (citing identity of snipers); see also Maryland: Two Snipers Indicted Again, N.Y. TIMES, Jun. 17, 2005, at A5 (pointing out names of snipers).
\textsuperscript{86} See Cauvin, supra note 84 (describing the conviction as the “easy part” and the sentence as the “real battle”); see also Serge F. Kovaleski & Patricia Davis, Many Victims, Families Dismissed; Malvo’s Relatives Relieved, WASH. POST, Dec. 24, 2003 (stating the disappointment of a surviving victim at the jury’s decision to spare his life).
\textsuperscript{87} See Frank Green, Debate Rages Over Juvenile Execution / Malvo Trial is drawing Attention to U.S. Laws That Allow The Practice, RICHMOND TIMES DISPATCH, Nov. 20, 2003
ceive the death penalty because of his age. The speculation by the press proved accurate. In a case that was considered a prosecutorial dream given the overwhelming evidence of Malvo's involvement in the killing spree, Lee Boyd Malvo was sentenced to life in prison. According to jurors in the case, Malvo's age was a strong mitigating factor in their sentencing determination.

The sentencing of Malvo speaks volumes about the "national consensus" regarding juvenile executions. If a jury, who believed that Malvo was a cold-blooded killer of innocent people he had never met, felt he should not be sentenced to death, who in our society meets the standard for juvenile execution? In fact, Malvo's attorney did not refute any evidence offered by the prosecution regarding the murders, but instead, delivered a defense focused primarily on Malvo's age and mental illness. The trial brought this controversial issue of juvenile execution to the fore-

(noting that since 1976 when Supreme Court reinstated death penalty, Virginia has executed three offenders convicted of capital murders when they were seventeen); Cauvin, supra note 84 (stating that Virginia is one of the most aggressive states in pursuing the death penalty and one of only seven to execute juveniles since 1976).

See Cauvin, supra note 84 (noting that Malvo's attorney, to spare his client's life, would need to convince the jury that Malvo was simply a child "worthy of his mercy"); see also Kovaleski, supra note 86 (stating opinion of a victim's sister that the decision to spare his life was probably because of his age).

See Cauvin, supra note 84 (stating that Malvo's age "turned out to be the ace that saved the teenager's life"); Kovaleski, supra note 86 (stating opinion of a widow Malvo killed: they "really looked at his age and not the crimes he committed").

See Carol Morello, Hamil R. Harris & Michelle Boorstein, Tormented Jurors Argued, Cried and Waivered Before Agreeing to Life, WASH. POST, Dec. 24, 2003 (commenting that it took the jury 8 hours of deliberation in which jurors became so conflicted that ultimately decision for life in prison was one of resignation); see also Cauvin, supra note 84 (alluding to "mass of evidence arrayed against Malvo").

See Morello, supra note 90 (explaining that jury member William G. Hurdle said in an interview that he was initially for the death penalty, but ultimately was content with the decision of life in prison, even though he stated, "I feel that [Malvo] was a calculating, cold-blooded, heartless killer"); see also Barakat, supra note 91 (stating opinion of juror Angelique Nedera, that Malvo would still be dangerous in prison and "would influence others in jail").

See Cauvin, supra note 84 (noting that Malvo's defense led by Craig S. Cooley and Michael S. Arif harped on defendant's age and portrayed Malvo as a victim who fell prey to his accomplice's brainwashing techniques); see also Kovaleski, supra note 86 (stating that the opinion of County State's Attorney Douglas F. Gansler, that the defense "did a masterful job by conceding Mr. Malvo's guilt and then focusing the trial on Mr. Malvo's age, his psyche" and Muhammad's influence on him).
front of public debate. The national attention focused on Malvo’s sentence sent a strong message to the legislature and criminal justice system, as a whole, that the majority of Americans feels it is wrong to execute juveniles.94

There is, however, a small group of Americans disappointed by the ruling in Roper.95 Inmates who committed crimes as juvenile offenders and were previously serving time on death row are now serving life in prison.96 For Prisoners like Randy Arroyo, who had faced execution for kidnapping and killing an Air Force officer while stealing a car, the news of the Roper decision was devastating.97 Mr. Arroyo now believes his appeal will never be heard, which would destroy all hope for an acquittal.98 Death row inmates get access to free legal services to pursue their appeal in federal court, while prisoners serving life sentences are not offered such services.99 Pro bono attorneys will not accept appellate cases from inmates unless they are on death row.

The reason that pro bono attorneys will only represent those sentenced to death is pragmatic. According to David R. Dow, director of the Texas Innocence Network, the non-profit organizations simply do not have the resources to represent lifers,100 particularly given that in the past decade, the number of inmates serving a life sentence has almost doubled.101 In addition, the

94 See Cauvin, supra note 84 (quoting George Kendall, former director of the NAACP Legal Defense Fund’s criminal justice project: “I think in 10 years we will look back and this [Malvo’s sentence] will have been a significant event”); see also Linda A. Malone, From Breard to Atkins to Malvo: Legal Incompetency and Human Rights Norms on the Fringes of the Death Penalty, 13 WM. & MARY BILL RTS. J. 363, 364 (2004) (positing that Malvo trial showed an overall public rejection to juvenile executions).

95 See Roper v. Simmons, 543 U.S. 551, 551 (holding that execution of individuals under age of 18 at time of their capital crimes is prohibited); see also Adam Liptak, Serving Life, With No Chance of Redemption; No Way Out: Dashed Hopes, N.Y. TIMES, Oct. 5, 2005, at A1 (citing the story of a death row inmate that, as a result of the decision, would likely remain in prison for life).

96 See generally Roper, 543 U.S. 551 (outlawing juvenile executions); Liptak, supra note 95 (illustrating scene on death row as “pandemonium of banging, yelling and whoops of joy among many of the 28 men whose lives were spared by the decision.”).

97 See Liptak, supra note 95 (noting Arroyo’s devastation at the decision).

98 See id. (stating Arroyo’s opinion that his “chances of an appeal] have gone down the drain”).

99 Id. (noting that death row inmates receive free legal services).

100 Id. (citing reason pro bono services are not available to lifers).

101 See Alexandra Marks, Prisons Review Results from 'Get-Tough' Ear; The Number of Convicted Felons Serving Life Sentences has Increased 83 Percent, but Crime is Down by 35 Percent, CHRISTIAN SCIENCE MONITOR, May 12, 2004 (noting number of convicted felons serving some kind of life sentence has rocketed to 127,000 nationwide—an 83 percent
number of juvenile lifers has increased by seventy-four percent in the last decade.\(^{102}\)

To request capital punishment during the penalty phase may seem like an outrageous concept to free members of society. Nonetheless, this reality is common given the alternative of a life in prison with little hope of parole or appeal.\(^{103}\) According to the director of the Equal Justice Initiative of Alabama, six men convicted of capital crimes requested a death sentence rather than life in prison.\(^{104}\) Experts throughout the legal field believe this is a risky, but often wise decision, for innocent defendants or those convicted with procedural flaws.\(^{105}\) Capital punishment cases are given the highest priority in the appeals system, given the seriousness of the sentence, while cases involving lifers are less likely to be heard on appeal.\(^{106}\) Ultimately, the fate of men like Mr. Arroyo is now life in prison amongst the masses of the general population, no longer confined to a single cell on death row.

### III. The International Community and Juvenile Executions

The United States is considered to be deficient when it comes to certain human rights practices, namely juvenile executions.

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\(^{102}\) See Marks, supra note 101 (citing that critics contend that the country’s prisons are crowded with juveniles); see also Liptak, supra note 95 (stating that even though the “historical data on juvenile offenders is incomplete,” of the 18 states that are able to provide data from 1993, there has been a 74% increase in juvenile lifers).

\(^{103}\) See Marks, supra note 101 (calling the 1990s the get tough decade during which prison sentences were lengthened with limited parole options); see also Liptak, supra note 95 (noting that “more than one in four in lifers will never even see a parole board” and that such parole boards usually “include representatives of crime victims and elected officials not receptive to pleas for lenience”).

\(^{104}\) This trend began with a convict named Walter McMillian convicted of capital murder in Alabama in 1988. The judge in the case overrode the jury’s recommendation of life without parole and handed down the sentence of death by electrocution. As a result, lawyers opposed to capital punishment took Mr. McMillian’s case on appeal and he was exonerated five years later. See Liptak, supra note 95.

\(^{105}\) Liptak, supra note 95 (suggesting that if you are innocent, asking a jury for the death penalty may be wise).

\(^{106}\) Justice Alex Kozinski, a Federal Court of Appeals Judge in California stated that, “Capital cases get an automatic royal treatment, whereas non-capital cases are fairly routine.” Id. In addition, Mr. Arroyo’s attorney, David R. Dow, remarked that if Mr. Arroyo’s case was not a capital case it would have been “terminated in the very early stages of investigation.” See id. A death sentence affords more opportunities to appeal their conviction altogether. See also Beth DeFalco, Push to abolish death penalty could put killers on the street; Loophole may permit parole, NEW JERSEY RECORD, Feb. 11, 2007, at A03.
The United States government trumpets our nation as the guarantor and defender of human rights, yet repeatedly grants exemptions from basic international human rights policies to fit its need. The United States has lost credibility amongst the international community as a result of this self-serving tailoring and, at times, complete rejection of international human rights covenants. In an era where globalization is all but complete it begs the question, why does the United States consistently fail to give proper recognition to the standards of the international community?

Although used a moral model to show the trend among various nations, international treaties are often given no weight by the United States. When executing these treaties the main objective is to achieve united international cooperation. As such, when a nation submits a reservation about specific language, the language will be removed, provided it does not go to the core of

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110 See Reid v. Covert, 354 U.S. 1, 18 (1957) (indicating that treaties are only binding if not in violation of the Constitution or a federal statute); see also Vicent J. Samar, Justifying the Use of International Human Rights Principles in American Constitutional Law, 37 COLUM. HUMAN RIGHTS L. REV. 1, 17 (2005) (suggesting that finding contradiction between a treaty and U.S. law is simply another way to avoid acknowledging international authority).
the agreement.111 Despite this flexibility, the United States still failed to cooperate with the international community. The United States’ failure to comply is exemplified below in three leading examples.

A. International Treaties against Juvenile Executions

Since 1990, only six countries have executed criminal offenders under the age of eighteen: Iran, Nigeria, Pakistan, Saudi Arabia, Yemen and the United States.112 There are three main treaties which played a critical role in abandoning the international practice of juvenile executions: The Universal Declaration of Human Rights,113 The International Covenant on Civil and Political Rights,114 and The Convention on the Rights of the Child.115

i. Universal Declaration of Human Rights

The repercussions of World War II sparked the first international treaty on human rights: The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948.116 This declaration was intended as an absolute right to life proclamation.117 Article 5 of the Declaration states, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading
treatment or punishment". In the years following the declaration, the United Nations realized its goal to wipe out the death penalty in its entirety was too progressive for the international community; instead, its later treaties focused on protecting the weaker in society including, pregnant women, juveniles, and elderly. The Universal Declaration of Human Rights, however, was one of the first treaties on human rights and has served as the precedent for most international commissions and treaties including, the Inter-American Commission on Human Rights, later adopted as the American Convention on Human Rights, the African [Banjul] Charter on Human and People's Rights and the European Convention for the Protection of Human Rights.

ii. International Covenant on Civil and Political Rights

Following the Universal Declaration of Human Rights was the International Covenant on Civil and Political Rights (ICCPR).

118 See Declaration of Human Rights, supra note 113, Art. V.

119 See History of the Death Penalty, supra note 117 (emphasizing that although the notion of complete abolition of capital punishment was a superb theory, it simply was not a realistic goal in the 1950's); see also Declaration of Human Rights, supra note 113, Art. XXV (indicating motherhood and childhood are entitled to special care and assistance).


121 See id. (stating under Article 5, "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. . . [c]apital punishment shall not be imposed upon person who, at the time the crime was committed, were under 18 years of age or over 70 years; nor shall be applied to pregnant women [Art. 4(5)].").


123 See European Convention for the Protection of Human Right, available at http://www.hri.org/docs/ECHR50.html (stating in Article 3, "[n]o one shall be subjected to torture of inhuman treatment or punishment.").

124 See International Covenant on Civil and Political Rights, supra note 114.
Under Article 6(5) of the covenant, “[s]entence 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.” The United States partially ratified this treaty in 1992. The treaty was intended to force the United States to adopt such regulations into American jurisprudence. In complying with this treaty, the United States was required to submit reports explaining measures taken to conform to the regulations of the treaty. However, the United States did not adopt this treaty in its entirety. Instead, the U.S. made a series of exemptions called RUDS, or “reservations, understanding and declarations, to ensure no [legal] change [within] domestic law.” One of the biggest reservations was to Article 6(5) of the ICCPR—the United States specifically objected to the abolition of juvenile executions. Under this treaty, any country that chose to ratify the

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126 See Dorsen, supra note 107, at 152 (indicating that U.S. had only entered into three treaties since 1992.); see also International Covenant on Civil and Political Rights, supra note 114 (suggesting that states may make reservations to treaties, but the types of reservations are limited).

127 See Dorsen, supra note 107, at 152 (commenting that such reports were to be submitted explaining legislative, judicial, administrative and other measures taken to achieve the goal of the treaty); see also Laurel Remers Pardee, The Dilemma of Dowry Deaths: Domestic Disgrace or International Human Rights Catastrophe?, 13 ARIZ. J. INT’L & COMP. L. 491, 506 (1996) (describing ICCPR’s reporting system).

128 See Dorsen, supra note 107, at 152–53 (describing what effect Reservations, Understandings, and Declarations (RUDs) have on implementing ICCRP); see also Jack L. Golsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa L. REV. 399, 401–02 (2000) (discussing use of RUDs).

129 See Elizabeth Burleson, Juvenile Execution, Terrorist Extradition, and Supreme Court Discretion to Consider International Death Penalty Jurisprudence, 68 ALB. L. REV. 909, 917 (2005) (“The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.”) (quoting the U.S. Reservation to Art. 6 of ICCPR); see also Chrissy Fox, Implications of the United States’ Reservations and Non-Self-Executing Declaration to the ICCPR for Capital Offenders and Foreign Relations, 11 TUL. J. INT’L & COMP. L. 303, 317 (2003) (describing article 6(5) as juveniles “main hurdle” to using ICCPR as an argument against death penalty).
covenant, including the United States, was required to examine its reservations and discard any that were not consistent with the purpose of the covenant. The United Nations Human Rights Committee found that the reservation went against “peremptory norms” and was completely “incompatible with the purpose of the treaty.” Prior to the Roper decision, the United States refused to discard this reservation permitting juvenile executions and stated that the treaty was non-self-executing.

A self-executing treaty is one that “does not require any legislation for it to enter into effect” and become enforceable, while a non-self-executing treaty is one that demands further domestic legislation to make such treaty enforceable under domestic law. The trend of the United States Senate is to interpret international treaties like the International Covenant on Civil and Political Rights as non-self-executing. There is a reoccurring problem with self-executing treaties in the federal system because the power to ensure compliance with these automatically effective international treaties is left to Congress, the Judiciary and/or the Executive Branch. Many times this requirement is

\[131\] See Dorsen, supra note 107, at 153 (noting the United States was required to review and eliminate any reservations that did not comply with ICCPR's goals); see also Kristina Ash, U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence, 3 NW. U. J. INT'L HUM. RTS. 7, 25 (2005) (arguing that the U.S. needs to consider whether its RUDs are “necessary in light of U.S. goals in signing the ICCPR”).

\[132\] See Dorsen, supra note 107, at 153 (finding that the U.S. went beyond the scope of allowed peremptory norms); see also Ash, supra note 131, at 20 (noting that many countries objected to U.S. reservations).

\[133\] See Dorsen, supra note 107, at 152–53 (noting that U.S. considers ICCPR’s provisions to be “non-self-executing”); see also Jason Costa, Alone in the World: The United States’ Failure to Observe the International Human Right to Compensation for Wrongful Conviction, 19 EMORY INT’L L. REV. 1615, 1642–43 (2005) (stating that U.S. has declared ICCPR as not self-executing, but Roper v. Simmons has shown that courts are more willing to consider “international human rights norms”).

\[134\] See Malone, supra note 94, at 386 (defining self-executing treaty); see also Ash, supra note 131, at 10 (discussing U.S. contention of non-self executing treaties).

\[135\] See Malone, supra note 94, at 386 (describing what non-self-executing treaties entail); see also Ash, supra note 131, at 10 (discussing use of non-self executing treaty status).

\[136\] See Malone, supra note 94, at 387 (noting additional steps are necessary in a non-self-executing treaty); see also Curtis A Bradley, International Delegations, the Structural Constitution, and Non-Self-Execution, 55 STAN. L. REV. 1557, 1588 (2003) (recognizing a recent trend towards presuming treaties are non-self-executing).

\[137\] See Malone, supra note 94, at 387 (acknowledging that compliance becomes even more difficult to accomplish when it involves state cooperation); see also Ash, supra note 131, at 10 (noting difficulties of declaring non-executing treaties as the norm).
neglected by the three branches of the United States government. By 1997, five years after ratification, the United States still did not establish a monitoring system to ensure compliance with ICCPR nor any other international treaty.\footnote{See Dorsen, supra note 107, at 153–54 (emphasizing importance of these qualifications for success of international compliance of ICCPR, the Convention Against Torture and Other cruel and Inhuman, or Degrading Treatment of Punishment (the Torture Convention) and the International Convention for the Elimination of All Forms of Racial Discrimination (the Race Convention)); see also Betraying the Young, Children in the U.S. Justice System, AMNESTY INT’L, Nov. 20, 1998, available at, http://web.amnesty.org/library/Index/engAMR510601998 (discussing inadequacies in the U.S. for ensuring human rights for children).} The U.S. Senate thought that with the ratification of ICCPR, the United States was ensuring its place as an international human rights role model.\footnote{See S. Rep. No. 102-23 (1992), reprinted in 31 I.L.M. 645, 649 (1992) (noting that many other states have adopted ICCPR and the United States needs to become one of them in order to “strengthen the impact of U.S. efforts in the human rights field”).} In reality, however, the United States received considerable backlash from the international community specifically criticizing the reservation for juvenile executions.\footnote{See Fox, supra note 130, at 306 (stating that many countries voiced their opposition to U.S. RUDS); see also Carol J. Williams, The McVeigh Execution: Most from Abroad See the U.S. as This Side of Barbaric: Reaction: From Europe to the Middle East, Majority of the Media Condemn the McVeigh Death Penalty, L.A. TIMES, Jun. 12, 2001, at A16 (noting that a majority of European countries are against death penalty convictions).} Eleven countries objected to this direct contradiction of the purpose of Article 6(5).\footnote{See Warren, supra note 126, at 321 (noting countries that objected to Article 6(5)’s purpose); see also Elizabeth A Reimels, Playing for Keeps: The United States Interpretation of International Prohibitions Against the Juvenile Death Penalty - The U.S. Wants to Play the International Human Rights Game, But Only If It Makes the Rules, 15 EMORY INT’L. L. REV. 303, 318 (2001) (stating that eleven countries filed objections to U.S. RUDS).} One hundred forty-nine nations all signed the ICCPR and none openly objected to the ban on juvenile executions except for the United States.\footnote{See Warren, supra note 126, at 322 (noting how many countries signed ICCPR and that none other than U.S. made a reservation for juvenile executions); see also Antoine L. Collins, Caging the Bird Does Not Cage the Song: How the International Covenant on Civil and Political Rights Fails to Protect Free Expression Over the Internet, 21 J. MARSHALL J. COMPUTER & INFO. L. 371, n. 65 (2003) (listing countries who have signed ICCPR).} Again the only response from the United States was that it “disagreed that customary international law established a clear prohibition [of the death penalty] at the age of 18.”\footnote{See Warren, supra note 126, at 322 (quoting The Exclusion of Child Offenders from the Death Penalty Under General International Law, AMNESTY INT’L, May 3, 2003, available at http://web.amnesty.org/library/Index/ENGACT500042003?open&of=ENG-392).} It is almost impossible to understand how the United States was able to make such a bold statement...
considering the language in Article 6(5). Article 6(5) clearly states, "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age . . . ." Yet the United States never wavered from its position despite the intense pressure from the entire international community. As a result of this reservation, the United States lost its seat on the United Nations Human Rights Commission for one year. Since falling below the international human rights standard set forth by the United Nations, the United States has adopted the practice of ignoring the Commission's policies whenever they are in direct conflict with domestic law.

The last battle with the international community prior to the Roper decision was in 2003, when United Nations Human Rights Commission resolution called upon the six states that participated in the execution of those under the age of eighteen to abolish the practice. By 2003, the fact that over thirty state legislatures prohibited juvenile executions gave a clear indication that American public opinion was strongly against the practice. This afforded the United States an opportunity to acknowledge its obligations to the international community and, perhaps more

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144 See International Covenant on Civil and Political Rights, supra note 114.

145 See Fox, supra note 130, at 317 (recognizing that United States' policy on juvenile executions is far different from other countries); Reimels, supra note 141, at 345 (arguing ways to counter U.S. resistance to adoption of international sentiment).

146 See Warren, supra note 126, at 322 ("The embarrassment of losing its seat on the Human Rights Commission for one year had no moderating effect on U.S. diplomacy in Geneva."); see also Bishop, supra note 31, at 1118 (noting that President Bush felt the U.S. was still a world leader in human rights despite losing its seat).


148 See Warren, supra note 126, at 322 (noting that a 2003 Commission "called upon states to abolish the death penalty for those under 18 if still adhering to this practice); see also Bradley, supra note 136, at 492-94 (describing U.S. death penalty history, listing how many juveniles have been executed, and noting how many states have allowed it).

149 See Roper v. Simmons, 543 U.S. 551, 564 (2005) (calculating that 30 states currently outlaw juvenile execution); American Bar Association of Juvenile Death Penalty Resources & Information, http://www.abanet.org/crimjust/juvjuv/pdf/quickfactsfigures.pdf (last visited on Mar. 27, 2006) (stating in its quick facts that 43 states have never executed a juvenile offender, 3 states have performed 82% of juvenile execution in the U.S. since the reinstatement of capital punishment in 1976, 31 prohibit this policy by law and 19 states do not).
importantly, properly represent the opinion of its own constituents. Rather than seize this opportunity, the United States proposed an amendment to remove the language that requested the elimination of juvenile execution in these six states.\(^\text{150}\) Again, the United States caused uproar in the international community.\(^\text{151}\) In fact, fifty-one nations voted against this amendment including Libya and China, whose human rights policies have been consistently called into question.\(^\text{152}\) No other country voted for such an amendment; again, the United States stood alone in its conviction that juvenile executions are permissible despite overwhelming opposition both nationally and internationally.\(^\text{153}\)

iii. The Convention on the Rights of the Child

The Convention on the Rights of the Child, Article 37, states that “[n]either capital punishment nor life imprisonment without the possibility of release shall be imposed for offenses committed by persons below eighteen years of age.”\(^\text{154}\) One hundred ninety-five...
two nations ratified this treaty. The United States and Somalia are the only two nations who have not yet ratified the Convention. In fact, when one looks at the states which have ratified treaties to abolish juvenile executions, every other nation in the world—except the United States—was either a member of ICCPR or the CRC.

IV. THE WEIGHT GIVEN TO INTERNATIONAL POLICY AND LAW BY THE SUPREME COURT

A. Analysis of International Opinion in Roper v. Simmons

In Stanford v. Kentucky, a decision written by Justice Scalia, the majority of the Court rejected outright the notion of using the policies and laws of the international community to guide the United States in “evolving standard of decency.” It was clear in this opinion that only the United States could determine what constituted “cruel and unusual punishment.” Despite the fact that international community was already crying out for a change, the notion of adopting standards from beyond our borders was rejected in Stanford.

155 See Burleson, supra note 130, at 916 (stating “the CRC has been ratified by 192 States”); see also Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (2006), http://www.ohchr.org/english/bodies/docs/status.pdf (listing all signatories to principal human rights treaties) [hereinafter Status of Ratifications].

156 See Burleson, supra note 130, at 916 (explaining that both United States and Somalia have however signed the Convention; see also Status of Ratifications, supra note 155 (documenting signatories to human rights treaties).

157 See Burleson, supra note 130, at 916 (stating “every country other than the United States is a party to either the CRC or the ICCPR without reserving the right to execute juvenile offenders.”); see also see also Status of Ratifications, supra note 155 (documenting signatories to human rights treaties).

158 See Stanford v. Kentucky, 492 U.S. 361, 368 (1989), overruled by Roper v. Simmons, 543 U.S. 551 (2005) (stating “[i]n determining what standards have “evolved,” however, we have looked not to our own conceptions of decency, but to those of modern American society as a whole.”).

159 See id. at 379–80. The two methodologies, proportionality based on blame worthiness of the defendant and that punishment makes “measurable contribution to acceptable goals of punishment”, blend together and set the standard in our society. Scalia further comments that the only other option would be one’s personal preference—paying no mind to the international community. Id.

160 “We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age. Ac-
Even Justice O'Connor's concurring opinion failed to give any weight to the international community. Like Justice Scalia, Justice O'Connor concentrated on the lack of consensus throughout the United States. Justice O'Connor broke from the plurality, however, concerning the Court's constitutional obligation to ensure that the "nexus between the punishment imposed and the defendant's blameworthiness" is proportional." As in Thompson v. Oklahoma, she emphasized the necessity of applying the standards of proportionality of punishments under the Eighth Amendment. Ultimately, Justice O'Connor agreed with Justice Scalia that these cases cannot be solved by the implementation of the proportionality test alone.

In contrast, the dissenting opinion written by Justice Brennan offered some recognition of the international community. Justice Brennan recognized the importance of international norms in evaluating the "evolving standards of decency." Relying on an amicus curiae brief submitted by Amnesty International, Justice Brennan noted that fifty countries, including almost all of Western Europe, had abolished the death penalty in all cases. Of those countries that still employed the death penalty, the majority forbid imposing it on juveniles. In addition, many of the

cordingly, we conclude that such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment." Id. at 380.

161 See id. at 381–82 (O'Connor, J., concurring) (positing that the United States has yet to come to a national consensus and as such, refuses to find juvenile executions unconstitutional until that day arises).

162 "[T]here remains a constitutional obligation imposed upon this Court to judge whether the "nexus between the punishment imposed and the defendant's blameworthiness" is proportional." Id. at 382.

163 Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that execution of criminal offenders under age 15 was unconstitutional under the Eighth Amendment).


165 See id. ("Nor, finally, do I believe that this case can be resolved through the kind of disproportionality analysis employed in Part V of the plurality opinion.").


167 "Many countries, of course -- over 50, including nearly all in Western Europe -- have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason." Id. (Brennan, J., dissenting).

168 See id. at 389 (Brennan, J., dissenting) (stating that of nations retaining capital punishment, the vast majority, 65 countries in total, prohibit execution of juveniles); see also The Death Penalty: Executions of Child Offenders Since 1990, AMNESTY INT'L, Feb. 27, 2007, available at http://web.amnesty.org/pages/deathpenalty-children-stats-eng [hereinafter Executions of Child Offenders] (noting that, since 1990, that UN has documented 53
countries that still employed the death penalty had, nonetheless, ratified international treaties such as CRC and ICCPR that prohibit juvenile executions. Over a decade before the *Roper* decision, the United States was one of the only countries in the world that permitted the execution of offenders under the age of eighteen.

In neither the plurality nor the concurring opinion in *Stanford* was there a response to the statistics offered by the dissent regarding the international community's laws on juvenile executions. The United States, already well aware of its minority position, failed to respond to international policy.

In *Roper v. Simmons*, the majority opinion finally acknowledged the international community. Justice Kennedy made the most poignant statement: "Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." Yet, Justice Kennedy com-

executions for offenses committed by individuals under the age of 18 and all occurred in nine countries: China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, USA and Yemen).

See *Stanford*, 492 U.S. at 389 (Brennan, J., dissenting) (positing that 61 countries that employ capital punishment have ratified treaties prohibiting imposition of death penalty against juveniles even though they have not adopted statutes prohibiting execution of juvenile offenders); see also Convention on the Rights of the Child, GA/RES/44/25/, annex, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49 (1989), available at http://www.unicef.org/crc/index_30229.html (finding that 192 countries have ratified the Convention, and only the United States and Somalia have yet to do so).

Compare *Stanford*, 492 U.S. at 389 (Brennan, J., dissenting) (explaining that since 1979 there have only been eight juvenile executions throughout the world; three of them took place in the United States and the remainder occurred in Pakistan, Bangladesh, Rwanda, and Barbados) with *Executions of Child Offenders*, supra note 168, (stating that 53 executions of child offenders have occurred worldwide since 1990, with 19 of them having occurred in the United States, and the remainder occurring in China, the Democratic Republic of Congo, Iran, Nigeria, Pakistan, Saudi Arabia, Sudan, and Yemen).

See Amnesty International USA, Death Penalty Fact Sheet, http://www.amnestyusa.org/abolish/juveniles.html (last visited Mar. 5, 2007) (noting that prior to 2005, the United States had not abolished capital punishment of juveniles even though sixteen individual states had abolished application of death penalty to juveniles and the vast majority of Americans opposed capital punishment for juvenile offenders); Human Rights Watch, U.S.: Supreme Court Ends Child Executions (Mar. 1, 2005), available at http://hrw.org/english/docs/2005/03/01/udom10231.htm (positing that the United States has executed 22 child offenders since 1976 despite the fact that international treaties and customary international law forbid the execution of child offenders).

*Id.* at 575.
mented that the policy of the international community is not “a controlling factor”; for it is the job of the United States Supreme Court to interpret the meaning of the Eighth Amendment. Ultimately, the Court commented on the practice of other nations, but walked a fine line to ensure that the international community’s position was ignored.

It appears the Court was comfortable with the degree of consideration it gave to the international community. In fact Justice Kennedy commented that since *Trop v. Dulles*, the Supreme Court has looked to the law of other nations to evaluate the parameters of the Eighth Amendment. Yet, the Supreme Court made no mention of the failure to heed the advice of the international community at the time the treaties were executed. For instance, the federal and state governments do not review international treaties and or report on compliance with international human rights. It took the Supreme Court decades to mention international norms in its decisions on juvenile executions. In *Roper*, the Supreme Court elected to recognize the United States’ failure to comply with Article 37 of the United Nations Convention on the Rights of the Child and ICCPR Article 6(5). The

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174 See id. (noting responsibility of interpreting the Eight Amendment remains the Court’s).

175 See id. at 577 (listing countries that have executed juveniles since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo and China and noting that since then all seven countries have abolished their practice formally or have publicly vowed to ban juvenile executions—leaving left only the United States); cf. *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989), overruled by *Roper*, 543 U.S. at 551 (2005) (Brennan, J., dissenting) (illustrating that even before *Roper*, only select nations, namely Pakistan, Bangladesh, Rwanda and Barbados, disagreed with the international community’s collective sentiment that death penalty should not be imposed on juveniles).

176 See *Roper*, 543 U.S. at 575–76 (providing list of cases in which the Supreme Court states opines on the international community’s Eighth Amendment and death penalty sentiment); see also *Trop v. Dulles*, 356 U.S. 86, 102–103 (1958) (discussing general rules of “civilized nations” regarding punishment).

177 See *Roper*, 543 U.S. at 551.

178 See Dorsen, *supra* note 108, at 154 (stating that efforts to review and report compliance with international treaties are essential parts of international cooperation); but see *Human Rights Watch*, *World Report 2001: United States* 1 (2001), http://www.hrw.org/wr2001/usa/index.html (noting that in 2000 the United States submitted two reports detailing its compliance with the Convention on Elimination of All Forms of Racial Discrimination and the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment to the respective treaty-monitoring bodies).

179 See *Roper*, 543 U.S. at 576 (positing that the United States and Somalia stand alone as the only states who have not ratified Article 37 of the United Nations Convention on the Rights of the Child).
mere mention of these international treaties showed progress, considering their existence was not accredited in the *Stanford* plurality opinion.\(^{181}\) The lack of monetary support for these international standards is yet another clear indication of our nation's lack of commitment to ensure compliance. Should American citizens be complacent about our Supreme Court's disregard of international norms or should the citizens demand more from the government?

Finally, the Supreme Court commented on the parameters of the Eighth Amendment based upon the laws of England, the nation from which its drafters descended. In recent years, England abolished the death penalty entirely.\(^{182}\) Such a policy is hardly out of line with most Western European countries.\(^{183}\) The movement to abolish juvenile executions in England began in the 1930’s\(^ {184}\) and came to fruition in 1948 under the Criminal Justice Act.\(^ {185}\) As stated earlier, the language of the Eighth Amendment in the United States Constitution comes directly from the English Bill of Rights.\(^ {186}\) It is remarkable that it took almost sixty

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\(^{180}\) See id. (noting that the United States ratified ICCPR only subject to a reservation concerning Art. 6(5), which prohibits the capital punishment for anyone under 18 at the time of the offense).


\(^{184}\) See generally Children and Young Person’s Act of 1933, http://www.swarb.co.uk/acts/1933CaYPAct.shtml (last visited Mar. 31, 2007) (creating England’s first major modern move towards abolishing juvenile death penalty); see also *Roper*, 543 U.S. at 577–78 (stating that in 1930, an official committee of the United Kingdom recommended that the minimum age for execution be raised to 21 and in response the Children and Young Person’s Act of 1933 was passed to prohibit execution of those aged 18 at the date of sentencing).

\(^{185}\) See *Roper*, 543 U.S. at 577–78 (noting that the Criminal Justice Act of 1948 prohibited execution of any person under 18 at the time of the offense in the United Kingdom).

\(^{186}\) See *Roper*, 543 U.S. at 577 (positing that Eighth Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689); see also *Trop v. Dulles*, 356 U.S. 86, 99–100 (1958) (stating that “cruel and unusual punishment” in Eighth Amendment was taken directly from the English Declaration of Rights of 1689).
years for the United States to extract from the language derived from the English Bill of Rights the idea that the execution of juveniles was cruel and unusual.187

Both Justice O'Connor and Justice Scalia dissented in Roper.188 Justice O'Connor's response to Justice Kennedy's reliance on international policy in interpreting the Eighth Amendment was a mere paragraph.189 Simply put, Justice O'Connor acknowledged that the United States is one of the few countries that still permits juvenile executions.190 Ironically, as quickly as Justice O'Connor concluded her analysis of the international community's stance on juvenile executions, she stressed that the international community does not determine the outcome of the Supreme Court's interpretation of the Eighth Amendment.191 Justice O'Connor stated that the Supreme Court has always given adequate consideration to the policies and laws of the international community in interpreting the Eighth Amendment.192 Specifically, the Court drew its interpretation of the Eighth Amendment from "maturing values of civilized society."193 Despite the fact that Stanford v. Kentucky dealt with the identical issue, Justice O'Connor ignored Stanford in her analysis of international sentiments.194 Nor, did she offer a reason for her failure to weigh international law.195

Justice O'Connor posited that the United States is in accord with international policy, particularly when dealing with the is-

187 The United Kingdom began prohibiting capital punishment of juvenile offenders in 1948, while the United States only began prohibiting it in 2005 through the Roper decision. See Roper, 543 U.S. at 559–60, 577–78; see also Criminal Justice Act, 11 & 12 Geo. 6, ch. 58 (Eng.) (abolishing capital punishment of juvenile offenders in the United Kingdom).
188 See Roper, 543 U.S. at 587 (O'Connor, J., dissenting).
189 Id.
190 Id.
191 See id. (stating "that the actions and views of other countries do not dictate the outcome of our Eighth Amendment inquiry . . . ").
192 See id. (identifying a number of cases wherein the Court looked to foreign and international law as guideposts).
193 See id. (explaining that the Eighth Amendment inquiry is derived from society's changing mores).
194 O'Connor did analogize the present case to the Stanford case, noting that the court "concluded that proportionality arguments similar to those endorsed by the Court [in Roper] did not justify a categorical Eighth Amendment rule against capital punishment of 16- and 17-year-old offenders." See id. at 591–92 (O'Connor, J., dissenting).
195 Although Justice O'Connor did discuss the Stanford decision, she fails to mention the case in her analysis of international law. Id. at 603–05 (O'Connor, J., dissenting).
sue of punishment where there is such a strong consensus as to fundamental human rights standards.\textsuperscript{196} According to Justice O'Connor, United States citizens should not be surprised by this consistency.\textsuperscript{197} It is shocking that Justice O'Connor, known as mediator between the liberal and conservative justices of the Court, only addressed one side of the argument.\textsuperscript{198} She did not comment on the country's gross rejection to commit to the international community's ban on juvenile execution from the inception of the Universal Declaration of Human Rights.\textsuperscript{199} Instead, Justice O'Connor used international opinion as a tool to solidify the American consensus, which in her opinion did not exist.\textsuperscript{200} Justice O'Connor stated that the international policy of abolishing juvenile executions is a "recent emergence."\textsuperscript{201} No attempt was made to reconcile this statement with the fact that international treaties, which prohibited this practice, were born decades ago and thereafter gained the support of every single nation, but for the United States.

Justice Scalia, with whom Chief Justice Rehnquist and Justice Thomas joined, wrote the second dissenting opinion in the \textit{Roper} case.\textsuperscript{202} Justice Scalia gave a scathing response to the majority's position on the authority of international law.\textsuperscript{203} He did not con-

\textsuperscript{196} See id. at 605 (O'Connor, J., dissenting) (concluding that, in many respects, international and domestic consensus is largely the same, but where, as in the instant case, there is no "domestic consensus", the "recent emergence of an otherwise global consensus" will not alter the domestic rule).

\textsuperscript{197} Id.

\textsuperscript{198} See Wilson Ray Huhn, \textit{The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to "Foreclose the Unanticipated."} 99 AKRON L. REV. 373, 402–04 (2006) (discussing Justice O'Connor's history of steering a middle course in Establishment cases); Michael D. Lemonick and Viveca Novac, \textit{The Power Broker}, TIME MAGAZINE, July 3, 2005 (describing O'Connor's impact on the court as "far greater in part because she could join either the more liberal or the more conservative side of a divided court, depending on the case").


\textsuperscript{200} \textit{Roper}, 543 U.S. at 605 (O'Connor, J., dissenting).

\textsuperscript{201} Id.

\textsuperscript{202} Id. at 607 (Scalia, J. dissenting).

\textsuperscript{203} Id. at 622 (stating "[t]hough the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage.").
front the issue directly, but instead, hid behind the concept of separation of powers.\textsuperscript{204} Justice Scalia contended that the Supreme Court does not have the authority to ratify treaties for the United States;\textsuperscript{205} thus Article 37 of the United Nations Convention on the Rights of the Child and the ICCPR lent no evidentiary support for the majority's decision.\textsuperscript{206} Secondly, Justice Scalia mocked the naive belief of the majority and the international community that simply because certain countries have signed onto these treaties, juvenile executions do not continue in tyrannical countries across the world.\textsuperscript{207} Such a statement begs the question, is it better to support a policy rejected publicly by all, but practiced in hiding by the tyrannical few?

Although decades beyond the appropriate time, the U.S. could have solidified its position as a human rights protector to ensure juvenile executions no longer occur behind the iron curtain of tyrannical governments. By implementing a program to monitor its accordance with international human rights standards, the United States had an opportunity to put a super power's weight behind the aforementioned international treaties. Such efforts are preferable to turning a blind eye to the practices of tyrannically societies. Only then can the United States hold itself out to the international community as a human rights advocate.

Justice Scalia offered an interesting, yet unsupported, argument that the countries which have jumped onto the international bandwagon of abolishing juvenile executions in most instances have “mandatory death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason.”\textsuperscript{208} Justice Scalia contradicted himself in the second phase of this argument when he opined that the international opinion should be given no weight because the majority of

\textsuperscript{204} Id. at 622-23 (remarking “[u]nless the Court has added to its arsenal the power to join and ratify treaties”, the Court has no authority to consider the weight of an non-ratified treaty in determining the meaning of the Constitution).
\textsuperscript{205} Id. (commenting that only Executive and Legislative branches have constitutional authority to sign and ratify international treaties).
\textsuperscript{206} Id. (noting that the United States' reservation of Article 6(5) of the ICCPR and the decline of the U.S. to ratify Article 37 of the United Nations Convention on the Rights of the Child still remains today, despite the Supreme Courts holding in this case).
\textsuperscript{207} Id. (positing that in nations with inadequate court systems and absolute government control participate in the killing of offenders under 18 year old without regard to these international treaties they have 'ratified').
\textsuperscript{208} Id. (commenting that he suspects “most” treaty signatories of maintaining the equally reprehensible practice of mandatory capital punishment).
American juries already excluded juvenile offenders when administering the death penalty. His reasoning alone set forth clear evidentiary proof there was a strong national consensus against the death penalty for juveniles. It seems nonsensical, then, for Justice Scalia to dissent in *Roper* on basis that no unified consensus existed.

Lastly, Justice Scalia offered an unmasked analysis of how little weight the Supreme Court or United States policy gives to international policy. He referenced many aspects of American jurisprudence that stand in opposition to the norms and policies of the international community. To support his position, Justice Scalia drew attention to some of the nation’s most controversial issues including separation of Church and State, criminal procedure and evidentiary rules. In each of these instances the United States is a member of the small minority ignoring the views of its fellow nations. The United States turned its back

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209 Id. at 623–24 (offering the rationale that since juries act as the sentencing authority, they will almost always withhold the death penalty from a juvenile, except "in the rare cases where it is warranted").

210 Id. at 624 ("More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it"); see also *Developments in the Law—International Criminal Law: VI. The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 Harv. L. Rev. 2049, 2068 (2001) (explaining Scalia’s approach requiring prerequisite that similar American practice exists before Court will mention foreign law).

211 See *Roper*, 543 U.S. at 624 (Scalia, J. dissenting) ("In many significant respects the laws of most other countries differ from our law . . ."); see also Catherine B. Pober, *The Eight Amendment’s Proscription Against Cruel and Unusual Punishments Requires a Categorical Rejection of the Death Penalty as Imposed on Juvenile Offenders Under the Age of Eighteen: Roper v. Simmons*, 44 Duq. L. Rev. 121, 134 (2005) (stating that Scalia’s dissent cited several examples of other countries whose laws are different from those of the United States).

212 See *Roper*, 543 U.S. at 625 (Scalia, J. dissenting) (commenting that no other nation, including religiously neutral countries, demands the degree of separation of powers between Church and State demanded by U.S. courts).

213 Scalia first notes the unique United States constitutional right to a jury trial and the right to a grand jury indictment. Second, he identifies the exclusionary rule, which provides that evidence obtained during an illegal search and seizure is inadmissible in court, as a distinctively United States constitutional rule. He compares the American system with two democratic societies, Great Britain and Canada, which rarely exclude illegally obtained evidence. See id.

214 Scalia contrasts United States rules as opposed to the rules of a majority of other countries on a wide variety of issues, finding that the Court has been oblivious to these foreign views. See id. at 24–25. "The U.S. Supreme Court has failed to look with any regularity outside the borders of the United States for sources of inspiration." See The Hon-
on the international community when it comes to forming a united front in protecting basic human rights of the world's constituents. Justice Scalia depicted the Supreme Court's precarious recognition of international policy perfectly when he stated, "The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting for the foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry."

B. Transnational Judicial Dialogue and the United States' Participation

The treatment of international policy by the American judicial system has been at the center of debate among scholars in the legal profession. It has evolved into a common practice in the majority of the world to focus on the practices of other nations. This has only increased within the past few decades due to increased globalization. Such transnational judicial dialogue was


215 See L'Heureux-Dube, supra note 214, at 38 (noting U.S. Supreme Court has never referred to decisions of European Court or Commission of Human Rights); see also Melissa A. Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L.J. 487, 558 (2005) (quoting former member of Canadian Supreme Court, Justice L'Heureux-Dube, who states, "[i]n my opinion, the failure of the United States Supreme Court to take part in the international dialogue among the courts of the world, particularly on human rights issues, is contributing to a growing isolation and diminished influence.").

216 See Roper v. Simmons, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) (arguing that majority cites to foreign sources in attempt to set aside traditional American practice); see also Pober, supra note 213, at 134 (stating Scalia's suggestion that majority in Roper invoked foreign law when it agreed with its own opinions and ignored it otherwise).

217 Roper, 543 U.S. at 627.

218 Id.

219 See Waters, supra note 217, at 491 (noting this type of commentary between nations regarding comparative law has lead to strong and progressive transnational judicial dialogue); see also Developments in the Law, supra note 212, at 2049 (highlighting increase in number of domestic tribunals looking to international legal sources to assist their interpretation of domestic law).

220 See L'Heureux-Dube, supra note 216, at 16 (pointing to globalization in legal community and the effect of international influences on judicial decisions); see also Waters, supra note 217, at 492 (crediting Commonwealth courts in eighteenth century for this notion).
not a forced process through formal treaties; but instead, an informal discussion about substantive law. Since the conception of transnational judicial dialogue in the nineteenth century this practice has constantly evolved. For example, “cross-fertilization of ideas” between countries no longer consists only of substantive law; but rather, a comparative analysis has been born out of such dialogues. Ironically, during these comparative analysis dialogues, constitutional countries review the opinions handed down from the United States Supreme Court to mold their own countries’ laws. Nevertheless, throughout the past century, the philosophy of the United States Supreme Court has been to reject a comparative analysis of other country’s policies as having no effect on American jurisprudence. There is potential for progress with Atkins and Roper, which did not credit international authority per se, but illustrated a shift in the Supreme Court’s philosophy of transnational judicial dialogue, especially regarding human rights issues.

International human rights norms were acknowledged by Justice Kennedy in Roper. One danger in referencing such international policies is highlighting the United States’ failure to fol-

221 See Waters, supra note 217, at 492 (pointing to common history or tradition as source of judicial dialogue); see also Developments in the Law, supra note 212, at 2071 (noting evolution of international judicial dialogue from a simple conversation relying on published reports of the U.S. and Britain to complex dialogue citing cases worldwide).

222 Waters, supra note 17, at 492.

223 See id. at 492–93 (comparative analysis is most frequent in common law legal systems as opposed to civil law countries); see also Developments in the Law, supra note 212, at 2061–62 (“Although the ruling of any national court that deals with a substantive legal issue . . . may influence other courts that deal with analogous legal questions, only courts that engage in the international judicial conversation can contribute to the definition of the predominant international judicial norm and shape the development of international law.”).

224 See Waters, supra note 217, at 493 (noting nations that reference U.S. Supreme Court also look towards judicial decisions from Europe, Australia, Africa and Canada); see also Developments in the Law, supra note 212, at 2069 (positing that newly formed constitutional courts look to U.S. Supreme Court precedent, as well as precedents of foreign courts, to interpret their constitutional text).

225 See L’Heureux-Dube, supra note 216, at 15 (discussing U.S. Supreme Court’s failure to consider the judgments of the courts that referred to it in their decisions); see also Waters, supra note 217, at 557 (“[T]he tremendous influence of U.S. constitutionalism on the world’s constitutional courts . . . urges U.S. courts to pay more attention to foreign judicial opinions . . .”).

226 See Roper v. Simmons, 543 U.S 551, 576 (2005) (naming international treaties such as ICCPR and Article 37 of United Nations Convention on the Rights of the Child); see also Waters, supra note 217, at 571 (recognizing that international treaties are not binding within U.S. justice system but still giving certain degree of authority to such treaties).
low these norms. If the Supreme Court is willing to open the door to the policies and precedents set by the international community, it must be willing to admit the United States’ prior failures in implementing such policies. Looking forward, it seems that some Justices, like Justice Breyer, fully support the philosophy of comparative analysis with international courts when interpreting the Constitution and confronting human rights issues. With the addition of Chief Justice John G. Roberts, Jr. and Justice Samuel A. Alito, Jr., to the Court it will be interesting to see if this United States will finally take a step forward and become a participant in this transnational dialogue.

V. RECOMMENDATIONS

Although Justice Scalia’s dissent in Roper is flawed, he accurately asserted that the United States cannot vacillate in its recognition of international authority. For our country’s legal system to progress, it is imperative that we evaluate the policies of other nations. The Supreme Court should ultimately determine the bounds of the United States Constitution. International law must, however, be a factor. What does it say if our nation, arguably the last remaining super power in the world, is not a member of this transnational judicial dialogue? If the United States does not take steps to align itself with international soci-

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227 See Waters, supra note 217, at 571 (noting the Court has opened itself to criticism regarding legitimacy of its analysis of international norms); see also Developments in the Law, supra note 212, at 2064 (highlighting the U.S. Supreme Court’s absence from international judicial dialogue).

228 See Waters, supra note 217, at 571 (disagreeing with Supreme Court’s use of international treaties to support national consensus against juvenile executions); see also Developments in the Law, supra note 212, at 2070 (discussing U.S. Supreme Court’s reluctance to admit the U.S. Constitution is only one of many instruments defining legal norms).

229 Justice O’Connor has shown a willingness to consult foreign law, voicing the need for U.S. judges to look to international law to “facilitate the flow of international commerce.” See Anne-Marie Slaughter, 40th Anniversary Perspective: Judicial Globalization, 40 VA. J. INT’L L. 1103, 1118–19 (2000). Justice Breyer commented, “comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.” Further, he found that nothing could be “more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us.” Waters, supra note 217, at 573.

230 See Roper, 543 U.S. at 628 (Scalia, J., dissenting) (stating that foreign law should be cited only when used as a part of the basis of Court’s decision); see also Waters, supra note 217, at 574 (“[I]t seems likely that the use of foreign law in the Court’s constitutional jurisprudence represents, as Justice Scalia has predicted, ‘the wave of the future.’”).
ety our policies regarding human rights will soon become archaic—if they are not already.

Although it is probable that the average American has not been educated about the United States' failure regarding human rights on the international front, during the time of Stanford v. Kentucky there was clearly a national consensus against juvenile executions. The statistics offered by Justice Brennan's dissenting opinion in Stanford provide evidentiary proof. In retrospect the majority of the Court recognized its misinterpretation of national consensus in Stanford and thus reviewed the issue again in Roper.

There was not a significant change in the statistics in the sixteen years between the Supreme Court's decisions in Stanford and Roper. In total, thirty states prohibited the practice of juvenile executions—a majority. In 2005, an additional five states abolished juvenile executions—still a majority. It is possible that the national consensus would be even greater if the average American was informed about treaties such as ICCPR, CRC, and the Universal Declaration of Human Rights. To look at the "harsh reality" that the United States is the only nation that permits this policy is an outrage. It is the job of the State Legislature in each of the fifty states to make such materials accessible to every constituent.

The federal government should provide the adequate funding to ensure compliance with international human rights obligations. With the current state of the federal government, this need for reprioritization of funding could be a long process. First, the United States must give their full commitment to such outstanding treaties and enforce them within its borders. To lead the international community on such rights the United States must first set the precedent and demand compliance. Only then can the United States require that all nations—including tyrannical ones—respect other internationally accepted standards of human rights. If Justice Scalia is correct in his argument regarding tyrannical nations, then only diligent monitoring of the international community by formidable countries like the United States will ensure the enforcement human rights obligations globally.
CONCLUSION

The post-*Roper* era is an exciting time of potential progress for the Supreme Court. The Court has a heavy burden in trying to decipher the true American consensus. It is a mistake for the Supreme Court to rely solely on legislative history for evidentiary proof. The Court must look to the recent verdicts of juries and to the sociological trends of society. The Supreme Court’s accreditation to international policy will foster a constant transnational judicial dialogue. Such dialog dedicated to international cooperation on the human rights front is essential to U.S. progression. Globalization has made this world a small and tightly connected one. Only with the cooperation of all nations can we, as a society, survive.