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Critique of the Juvenile Death Penalty in the United States: A Global Perspective

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I. INTRODUCTION

Since 1990, only seven countries in the world have been documented as executing juvenile offenders: Iran, Nigeria, Pakistan, Saudi Arabia, Yemen, the Democratic Republic of Congo, and the United States of America.[1] Yemen has now outlawed the executions of juveniles and the President of Pakistan, in accordance with legislation passed in 2000, commuted the death sentences of all death row juvenile offenders.[2] Of the remaining countries that execute childhood offenders, the United States has carried out the largest number of known executions.[3] This raises the question of whether, in doing so, the United States is violating international treaties to which it is a party and other treaties that, although not a party to, are accepted by many of the world's nations.

II. THE UNITED STATES' STANCE, INTERNATIONAL TREATIES AND THE WORLD VIEW

The application of the death penalty to juvenile offenders is a concept that is older than the Constitution of the United States. The first documented juvenile execution was that of Thomas Graunger in 1642 in Plymouth Colony, Massachusetts.[4] Since then, 366 juvenile offenders have been executed in the United States and of these, twenty-two were executed between 1973 and 2003.[5]

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1. Amnesty International USA, *Juvenile Offenders*, *at* http://www.amnestyusa.org/abolish/ event/dpjuveniles.html (last visited Oct. 10, 2003).

2. *Id.*

3. Amnesty International, *Juveniles and The Death Penalty: Executions Worldwide since 1990*, *at* http://www.web.amnesty.org/ai.nsf/index/ACT500111998 (last visited Oct. 10, 2003).

4. Victor L. Streib, *The Twenty -Third Annual Law Review Symposium The Ultimate Penalty: A Multifarious Look at Capital Punishment: Symposium Article: Emerging Issues in Juvenile Death Penalty Law*, 26 OHIO N.U.L. REV. 725, 728 n.17 (2000). Graunger, a sixteen year old boy, was convicted of bestiality with a mare and a cow. "Following the letter of the law of Leviticus, the good citizens of Plymouth Colony first killed the mare, then the cow, then all the calves, and then the boy." *Id.*

5. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes: January 1, 1973 – June 30, 2003, at*

While the United States continues its policy of sentencing juveniles to the death penalty, international standards have moved away from the death penalty in favor of protection for those under the age of eighteen.[6] The international movement was not so much an immediate shift in the popular consensus as it was a gradual change that began in 1948 with the Universal Declaration of Human Rights.[7] Signed in 1948 by the United States, the document's preamble states, "[m]ember States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms."[8] The Declaration specifically mandates in Article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[9] While the death penalty is not explicitly referred to in the Declaration, the Declaration would later become acknowledged as one of the first document to recognize universal rights and to develop a plan to implement those rights among all member states.[10]

In 1977, two additional Protocols were added to the Geneva Convention that directly addressed the execution of juveniles. In the first Protocol, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, the death penalty for an offense related to armed conflict would not be carried out on individuals under the age of eighteen at the time of the act.[11] In the second Protocol, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, individuals who were not eighteen at the time of the offense, who were pregnant, or who were moth-

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http://www.law.onu.edu/faculty/streib/juvdeath.htm (last visited July 1, 2003). The most recent execution occurred on April 3, 2003 in Oklahoma. *Id.*

6. *See* BASIC DOCUMENTS IN INTERNATIONAL LAW, 192-195 (Ian Brownlie CBE, Q.C. ed., Oxford University Press 2002). *See also All Human Rights For All: 1948-1998, Universal Declaration of Human Rights, at* http://www.un.org/Overview/rights.html (last visited Oct. 10, 2003).

7. BASIC DOCUMENTS IN INTERNATIONAL LAW, *supra* note 6.

8. *Id.* at 192.

9. *Id.* at 193.

10. Christopher R. Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law*, 28 INT'L J. LEGAL INFO 150 , 152 (2000).

11. *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Article 77, ¶5, *available at* http://fletcher.tufts.edu/multi/texts/BH707.txt (last visited Oct. 10, 2003).

ers of young children would not receive the death penalty.[12] While the United States was the motivating force behind the first Geneva Convention in 1864 and a signatory to its multiple successive treaties, the United States has not ratified the two protocols from 1977.[13]

The next significant agreement, which went into effect in 1978, was the American Convention on Human Rights.[14] It contained a statement that no person under 18 years of age or over 70 nor any pregnant woman would receive the death penalty.[15] The United States signed the Convention but never ratified it.[16]

In 1984, the United Nations endorsed the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which signified the strong agreement that existed among nations regarding the minimization, if not the abolition, of the death penalty.[17] However, since the document was not voted upon, it is not legally binding.[18] The document states that no person under the age of eighteen at the time of the crime will be sentenced to death nor will such a penalty be used on pregnant women, new mothers, or those who have become insane.[19]

In 1990, the Convention on the Rights of the Child came into force.[20] It included a statement that children under the age of eighteen would not be sentenced to capital punishment or life im-

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12. *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* Article 6, ¶4, *at* http://fletcher.tufts.edu/multi/texts/BH708.txt (last visited Oct. 10, 2003).

13. Amy E. Eckhert, *"Unlawful Combatants" or "Prisoner of War": The Law and Politics of Labels,* 36 CORNELL INT'L L.J. 59, 66 (2003). The United States did ratify the treaties that arose in 1883, 1907, 1929, and 1949. *Id.* Protocols I and II contain numerous clauses beyond the ones cited and it would be unfair to assume that the only reason that the United States has not ratified the treaty is because of these statements.

14. *American Convention on Human Rights Pact of San Jose Costa Rico,* Article 4, ¶5, *at* http://www.oas.org/juridico/english/Treaties/b-32.htm (last visited Oct. 10, 2003).

15. *Id.*

16. Kent V. Anderson, Jonathan E. Hawley, Richard H. Parsons, *Challenging the Detention of a Client Who Has Been Declared a Material Witness or the Incommunicado Detention of any Client,* 27 MAR-CHAMP 14 , 22 (2003).

17. Office of the High Commissioner for Human Rights, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, at* http://www.unhchr.ch/html/menu3/b/h_comp41.htm (last visited Oct. 10, 2003).

18. Annika K. Carlsten, *Young Enough to Die? Executing Juvenile Offenders in Violation of International Law,* 29 DENV. J. INT'L L. & POL'Y 181, 193 (2001).

19. *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,* ¶3, *at* http://www.unhchr.ch/html/menu3/b/h_comp41.htm (last visited Oct. 10, 2003).

20. Office of the High Commissioner for Human Rights, *Convention on the Rights of the Child, available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm (last visited Oct. 10, 2003).

prisonment without the possibility of release.[21] At least 191 nations ratified this United Nations document with the exception of two countries, Somalia and the United States.[22]

III. THE UNITED STATES' RESERVATION TO INTERNATIONAL VIEWS ON JUVENILE CAPITAL PUNISHMENT

While the United States may not be a part of many of the treaties that contain prohibitions on the execution of juveniles, it is a member of the International Covenant on Civil and Political Rights (hereinafter "ICCPR").[23] Before the United States ratified the ICCPR in 1992, it entered five reservations.[24] Among them was a reservation to Article 6, which prohibited the execution of persons under eighteen, a stipulation that is contrary to the terms of the ICCPR because Article 4 prohibits derogations from Article 6.[25] The United States also included an affirmation of its right to try juveniles as adults in certain circumstances.[26] Of the 144 signatories to the treaty, the United States was the only nation that entered a reservation to Article 6. This resulted in eleven foreign nations filing complaints against the United States with the Human Rights Commission.[27]

IV. DETERMINING INTERNATIONAL LAW

Treaties are an important tool for comparing the policy of the United States with the world-view because they are sources that help to determine whether domestic laws comport with interna-

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21. *Id.* at Article 37(a).

22. Riga Swan, Ph.D., *Moral, Economic, and Social Issues in Children's Health Care: On Statutes Depriving a Class of Children of Rights to Medical Care: Can this Discrimination be Litigated?*, 2 QUINNIPIAC HEALTH L.J. 73 (1998/1999). The United States signed the document in 1996 but never ratified it. *See Ex parte* Marcus Pressley, 770 So. 2d 143, 148 (Ala. 2000).

23. Erica Templeton, *Killing Kids: The Impact of Domingues v. Nevada on the Juvenile Death Penalty as a Violation of International Law*, 41 B.C. L. REV 1175, 1185 (September 2000).

24. SCOTT N. CARLSON & GREGORY GISVOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS 201-221 (Transitional Publishers, Inc. 2003). *See also International Covenant on Civil and Political Rights: Declarations and Reservations, at* http://www.hri.ca/fortherecord1997/documentation/reservations/ccpr.htm, pg. 15-16 (last visited July 26, 2002).

25. *United Nations Treaty Collections, at* http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm (modified Feb. 5, 2002). *Specifically see* Article 6, ¶5. *Id.*

26. *Id.*

27. Templeton, *supra* note 21, at 1186.

tional treaties and policies. In deciding a juvenile death penalty case, domestic constitutional law may provide a basis for appeal, particularly the Eight Amendment dealing with cruel and unusual punishment, but international law may also be introduced. The three primary sources of international law are treaties, customary international law, and *jus cogens* norms.[28] *Jus Cogens* are "those from which no derogation can be justified and which can only be changed by a subsequent norm of the same character."[29] The United States Supreme Court, as early as 1804, stated, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[30] It is clear that this ideology has filtered down to the lower courts as exemplified by a 1980 opinion that stated, "[u]pon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law."[31]

The Supreme Court has employed customary international law as a basis for deciding cases, and, as a result, the issue of whether or not the abolition of the juvenile death penalty has become customary and a *jus cogens* norm is raised. After evaluating Protocol I and Protocol II to the Geneva Convention,[32] the American Convention on Human Rights,[33] the Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty,[34] the Covenant on the Rights of the Child,[35] and the International Cove-

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28. Linda Jane Springrose, *Strangers in a Strange Land: The Rights of Non-Citizens Under Article 36 of the Vienna Convention on Consular Relations*, 14 GEO. IMMIGR. L.J. 185, 207 (1999).

29. 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, 321-22 (2003).

30. Murray v. Charming Betsy, 6 U.S. 64, 81 (1804).

31. Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

32. *See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Article 77, ¶5, *at* http://fletcher.tufts.edu/multi/texts/BH707.txt (last visited Oct. 10, 2003); *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Article 6, ¶4, *available at* http://fletcher.tufts.edu/multi/texts/BH708.txt (last visited Oct. 10, 2003).

33. *American Convention on Human Rights Pact of San Jose Costa Rico*, Article 4, ¶5, *at* http://www.oas.org/juridico/english/Treaties/b-32.htm (last visited Oct. 10, 2003).

34. Office of the High Commissioner for Human Rights, *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, *at* http://www.unhchr.ch/html/menu3/b/h_comp41.htm (last visited Oct. 10, 2003).

35. Office of the High Commissioner for Human Rights, *Convention on the Rights of the Child*, Article 31(a), *at* http://www.unhchr.ch/html/menu3/b/k2crc.htm (last visited Oct. 10, 2003).

nant on Civil and Political Rights,[36] a strong argument exists that the international norm is no longer one that supports the execution of juvenile offenders.

V. UNITED STATES CASE LAW

The issue of whether the United States is fulfilling its obligations arising from the treaties to which it is a party was recently raised in *Domingues v. Nevada*.[37] When Domingues was seventeen, he was convicted of murdering a woman and her four-year-old son, a crime Domingues committed when he was sixteen.[38] Following his sentence, he filed a motion for a correction of illegal sentence arguing that the "execution of a juvenile offender violates an international treaty ratified by the United States and violates customary international law."[39] The treaty Domingues was referring to was the International Covenant on Civil and Political Rights (hereinafter "ICCPR").[40] The Supreme Court of Nevada held that since the United States entered a reservation to the article forbidding the imposition of the death penalty on those under eighteen, Domingues was not illegally sentenced.[41] However, the opinion did not discuss whether sentencing a juvenile to the death penalty was contrary to customary international law.

Judge Rose noted in his dissenting opinion that since the ICCPR indicates there is to be no derogation from the prohibition on the execution of those under eighteen,[42] the real issue is whether or not the United States is a party to the treaty.[43] If the reservation was essential to the United States acceptance of the entire treaty, the ratification may be null.[44] However, if evidence exists that the United States intended to accept the treaty as a whole, it could be

36. PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL & POLITICAL RIGHTS 201-21, *supra* note 22.

37. 961 P.2d 1279 (1998).

38. *Id.*

39. *Id.*

40. *See* Office of the High Commissions for Human Rights, *International Covenant on Civil and Political Rights*, *at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Oct. 10, 2003).

41. *Domingues*, 961 P.2d at 1280.

42. Office of the High Commissions for Human Rights, *International Covenant on Civil and Political Rights*, *at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Oct. 10, 2003). Article 4 lists several articles that should not be derogated from, including Article 6.

43. *Domingues*, 961 P.2d at 1281 (Rose, J., dissenting).

44. *Id.* (Rose, J., dissenting).

bound by all of the provisions regardless of the reservation.[45] As a result, Justice Rose would reverse the denial of Domingues' motion by the district court and remand the case for a hearing on the impact of the ICCPR on juvenile sentencing.[46]

The Supreme Court of Alabama in *Ex parte Pressley* also examined the issue of whether the United States' reservation to the ICCPR was invalid.[47] Pressley was sentenced to death for murdering two individuals during the course of a robbery when he was under the age of eighteen.[48] On appeal, he raised the issue of whether international law and international treaties prohibit the execution of juvenile offenders.[49] The court was not convinced that the Senate's reservation to the ICCPR was illegal.[50] The opinion further noted that state laws permitting the imposition of the death penalty for those under eighteen have withstood constitutional scrutiny in spite of the existence of different treaties.[51] However, the court cited cases that were based on constitutional law rather than international law, thereby addressing the separate issue of *whether* the treaty controlled, rather than *how* international law applies to the death penalty.

The first case referenced in *Ex parte Pressley* held that sixteen and seventeen year-old individuals could be sentenced to death without violating the Eighth Amendment's bar on cruel and unusual punishment.[52] Four Justices, Brennan, Marshall, Blackmun and Stevens, dissented in the *Stanford* opinion noting that the execution of juvenile offenders violates contemporary standards of decency and is seen as unacceptable in the international realm.[53]

The second case cited in *Ex Parte Pressley,* and based on Eighth Amendment grounds, is *Thompson v. Oklahoma,* a precursor to *Stanford.*[54] The Supreme Court held that the Eighth and Fourteenth Amendment barred the execution of an individual who was sixteen years of age or younger at the time the crime was commit-

45. *Id.* (Rose, J., dissenting).
46. *Id.* (Rose, J., dissenting).
47. *Ex parte* Pressley, 770 So.2d 143 (Ala. 2000).
48. *Id.* at 144.
49. *Id.* at 147. Pressley also challenged the State's use of peremptory strikes. *Id.* at 144.
50. *Id.* at 148.
51. *Id.* at 148.
52. 492 U.S. 361, 379 (1989).
53. *Id.* at 405.
54. 487 U.S. 815 (1988).

ted.[55] The opinion stated that "it would offend civilized standards of decency to execute a person . . . less than 16 years old at the time of his or her offense [which] is consistent with the views . . . expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community."[56]

Reviewing these two Supreme Court cases, *Stanford* and *Thompson*, it would appear that the cases upon which the Supreme Court of Alabama relied do not actually support its holding in *Pressley*.[57] Not only are the holdings in *Stanford* and *Thompson* based on constitutional law, but also the remarks made by the Supreme Court relating to international law appear to favor the exclusion of juvenile capital punishment rather than support its retention.

Particularly troubling in *Ex parte Pressley* is the concurring opinion of Judge Houston, who believed that although the Senate reservations to the ICCPR may not be valid, the Supreme Court's failure to grant certiorari in *Domingues* was controlling.[58] Judge Houston acknowledges that a refusal to grant review is not equivalent to a statement on the merits of the case.[59] Yet, he concludes that because there are times when the United States Supreme Court will give reasons, unrelated to the merits, for not granting review and this was not one of those times, he could assume that certiorari was denied based on the merits.[60] However, even the Judge himself is not convinced by this line of reasoning, and ends his opinion with, "I concur in the result, and I pray in doing so I am not committing an 'unforgivable act.'"[61]

One of the more recent cases that raised the issue of the ICCPR was *Servin v. Nevada*.[62] Servin was sentenced to death by lethal injection for the murder and robbery of a woman, a crime he committed when he was sixteen years old.[63] While the Supreme Court of Nevada upheld its decision in *Domingues*, it reversed Servin's death sentence based upon a state statute that required the court

55. *Id.* at 838.
56. *Id.* at 830.
57. Recall that *Pressley* purported to examine whether or not the United State's reservation to the ICCPR is valid, which is an issue of international and not constitutional law.
58. *Pressley*, 770 So.2d at 151 (Houston, J., concurring).
59. *Id.* (Houston, J., concurring).
60. *Id.* (Houston, J., concurring).
61. *Id.* (Houston, J., concurring).
62. 32 P.3d 1277 (Nev. 2001).
63. *Servin,* 32 P.3d at 1280.

to consider Servin's age at the time of the offense as a mitigating factor, which would make the death penalty excessive punishment.[64] Servin was re-sentenced to two consecutive life sentences without the possibility of parole.[65]

VI. THE UNITED STATES MAY REVIEW ITS STANCE

In 2002, three United States Supreme Court cases suggest that the future of the juvenile death penalty rests on shaky grounds.[66] In June, the Supreme Court decided *Atkins v. Virginia.*[67] Atkins was convicted of abduction, armed robbery and capital murder and sentenced to death. [68] On appeal, Atkins argued that he is "mentally retarded" and, therefore, could not be sentenced to death.[69] The United States Supreme Court, overruling the Supreme Court of Virginia and relying primarily on the Eighth Amendment, held that sentencing a mentally retarded criminal to the death penalty is excessive punishment.[70] Contained in the Court's reasoning, though, are references to mental capacity and childlike qualities, which could be revisited when deciding future juvenile death penalty cases.[71]

In the second case, *Patterson v. Texas*, a divided United States Supreme Court denied a stay of execution and petition for certiorari from Patterson for the capital murder he committed when he was seventeen years old.[72] Justice Stevens, Ginsburg and Breyer dissented in the decision of the Court.[73] Justice Stevens referenced his continued belief that the Eighth Amendment prohibits the imposition of the death penalty on defendants below eighteen years of age, a statement he first concurred in when Justice Brennan dissented in *Stanford.*[74] Stevens wrote in *Patterson*:

> Since that opinion [in *Stanford*] was written, the issue has been the subject of further debate and discussion both in this

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64. *Id.* at 1290. *See also* NEV. REV. STAT. §200.035(6).
65. *Id.* at 1290.
66. *See* Atkins v. Virginia, 536 U.S. 304 (2002); Patterson v. Texas, 536 U.S. 984 (2002); *In re* Stanford, 123 S. Ct. 472 (2002).
67. 536 U.S. 304.
68. *Id.* at 307.
69. *Id.* at 310.
70. *Id.* at 321.
71. *See id.* at 310, 314 n.8, 316, 318.
72. 536 U.S. 984 (2002) (Breyer, J., Ginsburg, J., Stevens, J., dissenting).
73. *Id.*
74. *Id.*

> country and in other civilized nations. Given the apparent consensus that exists among the States and in the international community against the execution of a capital sentence imposed on a juvenile offender, I think it would be appropriate for the Court to revisit the issue at the earliest opportunity.[75] Justice Ginsburg and Breyer also stated that it was time the holding in *Stanford* be revisited, especially because of the Court's recent decision in *Atkins*.[76]

Finally, in *In re Stanford*, the United States Supreme Court denied a petitioner's application for writ of habeas corpus requesting the Court to hold his execution unconstitutional since he was under the age of eighteen when he committed the offense.[77] The Court, however, was again split in its decision, with Justices Stevens, Souter, Ginsburg and Breyer dissenting.[78] These justices believed that, given their recent decision in *Atkins* and the bare majority of the Court that supported the holding in the 1989 *Stanford* case, the juvenile death penalty should be reconsidered.[79] The dissent referenced the twenty-eight states that expressly forbid the execution of juvenile offenders and the thirty states that forbid the execution of "mentally retarded" individuals.[80] Given the apparent policy of the states, the Court found it unjust that there is such a disparate result between the two groups.[81] Justice Stevens, authoring the dissent, concluded by stating,

> [a]ll of this leads me to conclude that offenses committed by juveniles under the age of 18 do not merit the death penalty. The practice of executing such offenders is a relic of the past and is inconsistent with evolving standards of decency in a civilized society. We should put an end to this shameful practice.[82]

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75. *Id.*
76. *Id.*
77. 123 S. Ct. 472. *See also Stanford*, 537 U.S. 968 (2002).
78. *Stanford*, 537 U.S. 968.
79. *Id.* at 472 (dissenting op.). The dissenting justices stated that, "In *Atkins*, we held that the Constitution prohibits the application of the death penalty to mentally retarded persons. The reasons supporting that holding, with one exception, apply with equal or greater force to the execution of juvenile offenders." *Id.*
80. *Id.* at 472-73 (dissenting op.).
81. *Id.* (dissenting op.).
82. *Id.* at 475 (dissenting op.).

VII. THE CURRENT STATUS OF JUVENILE DEATH ROW INMATES

In the United States, there are currently seventy-eight individuals on death row who received death sentences for crimes they committed when they were juveniles.[83] While the international community continues to require a statement in its treaties and in its documents that capital punishment for juveniles will not be tolerated, the United States maintains its policy of sentencing juveniles to the death penalty. As the only member nation to the ICCPR that entered a reservation to this prohibition, and one of only five countries that continue to execute juveniles, the hope of change is not promising.[84] Whether the United States is violating international customs and norms as well as international treaties by continuing the executions is an issue independent of personal belief systems.

While state courts have held that the reservations to the ICCPR are valid and have continued to sentence juveniles based on this belief,[85] the United States Supreme Court has yet to decide the issue. Even though the Supreme Court has stated, through a bare majority, that the juvenile death penalty is not unconstitutional based on the Eighth Amendment,[86] it has never based its decision on international law. Especially in light of the Court's recent decision in *Atkins* and the apparent split among the justices, the issue of whether the United States will recognize a prohibition against the juvenile death penalty could soon be decided. The question is, will the court strike the juvenile death penalty down on Eighth Amendment grounds, by analogizing to its holding in *Atkins,* or will it strike it down by showing deference to international norms and treaties?

Justice Blackmun, suggesting a decision based on all of the above standards, noted in an address regarding juvenile capital

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83. American Bar Association, *Factsheet: The Juvenile Death Penalty* (last modified April, 2003) www.abanet.org/crimjust/juvjus/juvdp.html. Although these individuals were between 16 and 17 when they committed the crimes which resulted in their sentence, they are currently between the ages of 19 and 42.

84. See *International Covenant on Civil and Political Rights, at* http://www.fletcher.tufts.edu/multi/texts/BH498.txt, Article 4 paragraph 2; Article 6, paragraph 5, pg. 2, 3, accessed July 24, 2002. *See also International Covenant on Civil and Political Rights: Declarations and Reservations, at* http://www.hri.ca/fortherecord1997/documentation/reservations/ccpr.htm, pg. 18-19, accessed July 26, 2002.

85. *See Domingues*, 961 P.2d at 1279; *Pressley*, 770 So. 2d at 143; and *Servin*, 32 P. 3d at 1277.

86. *See Stanford,* 492 U.S. at 361.

punishment that the "interpretation of the Eighth Amendment, no less than that of treaties and statutes, should be informed by a decent respect for the global opinions of mankind."[87] He went on to say, "although the recent decisions of the Supreme Court do not offer much hope for the immediate future, I look forward to the day when the Supreme Court, too, will inform its opinions almost all the time with a decent respect to the opinions of mankind."[88]

VIII. CONCLUSION

Given the standards iterated in Protocol I and Protocol II to the Geneva Convention, the American Convention on Human Rights, the Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty, the Covenant on the Rights of the Child and the International Covenant on Civil and Political Rights, it is hard to imagine that the customary international law and the *jus cogens* are anything less than in opposition to the juvenile death penalty. The United States, however, has temporarily avoided the issue by placing reservations to the topic in the ICCPR, something that the document itself expressly prohibits.

As the world moves away from the acceptance of capital punishment for juvenile offenders, states may do likewise in their legislation. America currently has forty death penalty jurisdictions.[89] Eighteen of those mandate a minimum age of eighteen at the time the offense was committed before the penalty can be imposed.[90] Five of them have chosen the age of seventeen, and the other seventeen jurisdictions use the age of sixteen.[91] Thirteen jurisdictions do not apply the death penalty at all.[92]

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87. Justice Blackmun, *Justice Blackmun Addresses ASIL Annual Dinner*, The American Society of International Law, March, 1994, at 5.

88. *Id.*

89. Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes: January 1, 1973 - June 30, 2003* (last modified July 1, 2003), *at* http://www.law.onu.edu/faculty/streib/juvdeath.htm. This calculation includes 38 states and the federal government, both civilian and military. *Id.*

90. *Id.* The jurisdictions setting the minimum death penalty age at eighteen are: California, Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Tennessee, Washington, Federal Civilian, and Federal Military. *Id.*

91. *Id.* The five jurisdictions setting the minimum age at seventeen are: Florida, Georgia, New Hampshire, North Carolina, and Texas. *Id.*

92. *Id.* The American jurisdictions without the death penalty are: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *Id.*

Whether the United States Supreme Court will reconsider its view on the juvenile death penalty in light of *Atkins* remains undetermined. In reality, it is becoming increasingly clear that if the juvenile death penalty is declared unconstitutional, it will not be because of current international standards. Rather, current case law indicates it will be overturned on Eighth Amendment grounds. Hopefully, though, the decision will contain some reference to the importance of international norms in our legal system. The American Bar Association, embracing many of the concepts contained in the treaties and documents seeking the abolition of the juvenile death penalty, stated thorough its President, Alfred P. Carlton, Jr., that:

> Our position is not grounded on sympathy, but rather on common decency and fundamental justice, and the notion that we should punish according to culpability. We should reserve the most severe punishment for the worst offenders. Executing child offenders is inconsistent with these concepts. This does not suggest that teenagers should not face punishment for violating society's laws. It does mean that they should not pay for their mistakes with their lives. . . . We dare not hold children accountable for their actions to the same degree as we do adults. To do so serves no principle purpose and only demeans our system of justice.[93]

So even if the United States has not yet removed its derogations to the ICCPR or supported international views on the topic of the juvenile death penalty, there is an indication that our country's legal and political views are reaching a point that is consistent with those contained in international documents: that the death penalty should not be used in juvenile convictions, that it does not respect the "opinions of mankind," and "that it serves no principle purpose and only demeans our system of justice." Perhaps the situation is best summed up by Mariam Wright Edelman, founder and president of the Children's Defense Fund, who said, "If we don't stand up for children, then we don't stand up for much."[94]

Lori Edwards

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93. American Bar Association, *Overview of the Juvenile Death Penalty Today* (last modified Spring 2003), *at* www.abanet.org/crimjust/juvjus/juvdp.html.

94. *See Children Quotes*, *at* http://www.wisdomquotes.com/cat_children.html (last visited Dec. 4, 2003).