# THE RELEVANCE OF CUSTOMARY INTERNATIONAL NORMS TO THE DEATH PENALTY IN THE UNITED STATES

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## I. INTRODUCTION

During the past decade, various litigants attempted to convince United States courts that international norms relating to the death penalty have an important bearing on the legality of certain execution practices, particularly juvenile execution.[1] The results have not been all that we wished for, but there have been distinct gains. A plurality of the Supreme Court held in *Thompson v. Oklahoma*[2] that the execution of persons below the age of sixteen violates the Eighth Amendment, relying in part upon international practice and normative instruments.[3] *Thompson* survives as precedent, continuing to mandate reversal of death sentences imposed on some young offenders.[4]

But in *Stanford v. Kentucky*,[5] a different plurality of the Supreme Court upheld the constitutionality of capital punishment for those aged sixteen or seventeen at the time of the crime, pointedly rejecting the relevance of both international norms and comparative practice to Eighth Amendment

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[1] *E.g.*, Brief for Amicus Curiae Amnesty International, Brief for Amicus Curiae International Human Rights Law Group, Brief for Amicus Curiae Defense for Children International - USA, Thompson v. Oklahoma, 487 U.S. 815 (1988) (No. 86-6169); Brief for Amicus Curiae Amnesty International, Brief for Amicus Curiae International Human Rights Law Group, Wilkins v. Missouri, 492 U.S. 361 (1989) (consolidated with and decided *sub nom.* Stanford V. Kentucky) (Nos. 87-5765, 87-6026); Brief for Amicus Curiae Amnesty International, State v. Furman, 858 P.2d 1092 (Wash. 1993) (No. 57003-5).

[2] 487 U.S. 815 (1988).

[3] 487 U.S. at 830-31 and n.34 (citing data drawn from *amicus curiae* brief of Amnesty International and study by Library of Congress staff).

[4] Flowers v. State, 586 So. 2d 978 (Ala. Crim. App. 1991) (relying on *Thompson* to reverse death sentence imposed on defendant aged fifteen; Alabama law provides no minimum age for execution, and children as young as fourteen may be tried as adults).

[5] 492 U.S. 361 (1989).

jurisprudence.[6] Post-*Stanford* courts have begun to treat the issue of juvenile execution with bored indifference.[7] While there have been some recent successful attacks on capital sentences for older juveniles, these cases have turned upon interpretations of unclear state statutes,[8] rather than constitutional limits or international norms.[9] As a result, state legislatures remain apparently free to reimpose the death penalty on older juveniles.[10]

International concern with the death penalty has not been limited to juvenile execution. A number of distinct issues have been addressed at the international level, including exemptions for other classes of offenders (pregnant women and persons aged over seventy), restriction of the death penalty to the "most serious crimes," procedural protections such as a right to appeal or eligibility for clemency, long delays on death row pending execution, the torturous character of some modes of execution, as well as the

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[6] 492 U.S. at 369 n.1 (Scalia, J., plurality opinion):

> We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant.

The four dissenters who had constituted the plurality in *Thompson* (Brennan, Marshall, Blackmun, and Stevens) continued to rely on comparative practice and international instruments. *Id.* at 389-90.

[7] *See, e.g.*, Wright v. Virginia, 427 S.E.2d 379 (Va. 1993); Hain v. Oklahoma, 852 P.2d 744, (Okla. Crim. App. 1993).

[8] State v. Furman, 858 P.2d 1092, 1102 (Wash. 1993) (in absence of any statutory minimum age for execution, age eighteen is presumptive minimum; offenders as young as eight could be tried as adults); State v. Bey (I), 548 A.2d 846, 873 (N.J. 1988) (1986 amendment setting age of execution at eighteen applied retroactively to seventeen-year-old offender, court determining that legislature of New Jersey never intended juveniles to be death-eligible under 1982 law that set no minimum age).

[9] The Washington Supreme Court made no reference in State v. Furman, 858 P.2d 1092 (Wash. 1993), to the *amicus curiae* brief filed by Amnesty International detailing international norms and execution patterns relating to juvenile offenders. *See supra* note 1.

[10] Moreover, Justice O'Connor's crucial concurrence in *Thompson*, 487 U.S. at 833, 848-49 (1988), excluded the death penalty only for offenders under the age of sixteen in states whose legislatures had never specifically set a minimum age for execution. Given the current hysteria over youth crime, the risk of new legislation setting very young ages for death-eligibility cannot be dismissed. *See, e.g., 4 Florida Teenagers Charged in Killing of Tourist*, N.Y. TIMES, Oct. 23, 1993, *available in* LEXIS, News Library, Majpap File (Florida thirteen-year-old charged with capital crime; Attorney General states that Florida will not execute anyone under age of sixteen but will not interfere in prosecution); Jolayne Houtz, *Hardened kids doing harder time for crimes*, SEATTLE TIMES, Mar. 2, 1994, at A1 (increase in number of juveniles standing trial as adults in Washington State from 101 in 1992 to 157 in 1993).

overarching question of abolition.[11]

With respect to issues other than juvenile execution, there is little evidence of alertness or receptivity to the international dimension of capital punishment even among American jurists critical of existing execution practices. Justice Blackmun's passionate denunciation in *Callins v. Collins*[12] of the constitutionality of capital punishment within our flawed justice system makes no reference to the anomalous position occupied by the United States in comparison to other economically advanced and democratic nations. Judge Reinhardt's learned dissent on the constitutionality of hanging as a mode of execution ranges widely through historical sources, asserting that judges may utilize the "tools of philosophy, religion, logic and history, in an effort to obtain a full understanding of the nature of a civilized society."[13] But except for one closing reference to the rejection of hanging by "most other nations" and "the rest of the civilized world,"[14] Judge Reinhardt limits his discussion of the international dimension of the issue to two brief mentions of practice in "the English speaking world."[15]

Why have American courts assessing the legality of capital punishment largely been impervious to the international aspect of the questions confronting them? At least three possibilities suggest themselves: (1) our theories of customary law in the death penalty area have been flawed and therefore deservedly unconvincing; (2) our theories have been valid but our advocacy has been deficient; or (3) our theories have been valid and our advocacy has been appropriate, but the courts have rejected or ignored both because of the peculiar political sensitivity of capital punishment.

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[11] *See generally* Joan Fitzpatrick & Alice Miller, *International Standards on the Death Penalty: Shifting Discourse*, 19 BROOK. J. INT'L L. 273 (1993); WILLIAM SCHABAS, THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW (1993); ROGER HOOD, THE DEATH PENALTY (1989).

[12] Callins v. Collins, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting).

[13] Campbell v. Wood, 18 F.3d 662, 697 (9th Cir. 1994) (en banc) (Reinhardt, J., dissenting).

[14] *Id.* at 717.

[15] *Id.* at 697 (noting that in 1981 only four jurisdictions in the English-speaking world, three U.S. states and South Africa, retained hanging); and at 700 (noting that only South Africa and a few small Caribbean states had carried out judicial hangings in the English-speaking world since 1966).

## II. IS THERE ANY CUSTOMARY LAW RELATING TO THE JUDICIAL DEATH PENALTY?

In this discussion, I will limit myself to the judicial death penalty, leaving aside genocide and summary execution, though some of the attacks upon the concept of customary international human rights law place those prohibitory norms in doubt as well. Simma and Alston[16] see a peculiar American pathology at work in over-generous claims for the existence of customary human rights norms by both scholars and litigants in recent years. We have allegedly manifested solipsism (or "normative chauvinism")[17] in defining fundamental human rights identically to the U.S. Bill of Rights,[18] and have unwittingly been swept up by the American impulse to export our prescriptive and adjudicatory authority outside U.S. territorial bounds.[19]

Of our efforts to question the international legality of American death penalty practices, we can plead innocent on both charges. Juvenile execution serves as an excellent vehicle for exploring the general problem of the enforceability of customary human rights law in U.S. courts precisely because it concerns an arguable customary human rights norm not yet clearly reflected in the Constitution, with respect to which the major violations are occurring right here at home.[20] When a series of actual death sentences against juvenile offenders came under attack in domestic courts and the Inter-American Commission on Human Rights (IACHR),[21] U.S. human rights activists accepted the challenge to put theory into practice.[22]

An interesting parallel exists between the Eighth Amendment concept of

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[16] Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992).

[17] *Id.* at 94.

[18] *Id.* at 94-95.

[19] *Id.* at 86 (describing "the famous *Filartiga* jurisprudence" as "one of the few more likeable facets of the omnipresent tendency of U.S. courts to usurp jurisdiction beyond limits").

[20] Amnesty International's data at the time Wilkins v. Missouri, *supra* note 1, was briefed, indicated that only eight juveniles had been judicially executed between 1979 and 1988. Three of those executions took place in the United States; the remainder occurred in Pakistan (two), Barbados, Bangladesh and Rwanda. Brief, *supra* note 1, at 30.

[21] In addition to the cases listed in note 1, the Inter-American Commission on Human Rights decided a petition filed on behalf of James Terry Roach and Jay Pinkerton in 1987. Case 9647, Inter-Am. C.H.R. 61, OEA/Ser.L./V./II.71, doc. 9 rev. 1 (1987).

[22] *See supra*, note 1.

"evolving standards of decency"[23] and the customary law requisites of state practice and *opinio juris*. Both require proof of purposive acts or abstentions. The chief benchmark for application of the Eighth Amendment to constrain legislative discretion is the "evolving standards of decency that mark the progress of a maturing society."[24] These "evolving standards" are measured primarily by reference to the penal practices of the states of the American union, adopted out of a conscious effort to avoid cruelty. The Eighth Amendment elements of practice and consciousness are roughly analogous to the state practice and *opinio juris* elements of customary law (though lacking the requisite that the consciousness be directed outward toward peer states).

Justice Scalia emphasized in *Stanford*[25] that "objective" factors should dominate Eighth Amendment analysis, just as actual state practice should dominate determinations of customary law.[26] But Scalia's narrow focus on explicit, prohibitory state laws counts only conscious acts of abstention taking the form of positive legal obligation.[27] Similarly restrictive claims that penal practices "count" towards formation of a customary norm only when they are undertaken in conscious regard for other nations[28] seem to collapse the practice and *opinio juris* elements of customary law.

Scalia's error is illustrated by his miscounting of Washington State among the jurisdictions approving the execution of juvenile offenders.[29] Under Scalia's approach, Washington technically counts as a jurisdiction that approves the execution of eight-year-olds, since its legal minimum age for trial as an adult is eight and its death penalty statute prescribes no separate minimum age.[30] To rely on such inadvertent legislative drafting to categorize Washington as a jurisdiction whose ethos sanctions the official killing of small children is absurd. A recent interpretive ruling by the

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[23] Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion).

[24] *Id.*

[25] Stanford v. Kentucky, 492 U.S. 361 (1989) (Scalia, J., plurality opinion).

[26] *See, e.g.*, Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987).

[27] *Stanford*, 492 U.S. at 370-71.

[28] Simma & Alston, *supra* note 16, at 96, 99-100.

[29] *Stanford*, 492 U.S. at 370 n.2 (not including Washington on list of states precluding capital punishment for those under age eighteen at the time of the crime).

[30] WASH. REV. CODE § 9A.04.050 (1992) (permitting trial as adult by children as young as eight); § 10.95.070 (1992) (specifying the mitigating factors for capital punishment, including "the age of a defendant," but setting no minimum age for execution).

Washington Supreme Court sets a minimum age of eighteen for execution under these ambiguous statutes.[31]

Evidentiary issues relating to customary law and to the Eighth Amendment raise a fundamental question—why should the purposive acts of a large majority of states in rejecting a certain penal practice constrain, through enforceable legal norms, the discretion of other states inclined to pursue a more draconian approach? And should the fact that a particular state, perhaps rather belatedly, chooses to depart from the predominant and more humane practice, lead to the conclusion either that no norm ever existed, or, alternatively, that the nonconforming state is entitled to exemption from the norm as a persistent objector?

Despite the difficulty in determining what practice counts, proof of an international penal norm must begin with state practice. This is as true in the death penalty area as it was in the *Lotus* case.[32] Abstentions constitute the state practice element of prohibitory penal norms. In the death penalty and most other human rights contexts, this practice is "dense," consisting of literally millions of actual and potential penal acts. In the *Lotus* case, the universe of pertinent incidents consisted of four municipal decisions, after the Permanent Court of International Justice had rejected on relevancy grounds some of the more general jurisdictional arguments made by France.[33] As two of the relevant cases were consistent and two were inconsistent with the France's postulated norm of non-prosecution, the Court was not convinced that a customary norm had been proven.[34]

France's poor showing in the *Lotus* case may have been the result of faulty advocacy or of a dearth of relevant practice. Possibly it is a rare event for a collision-causing ship's officer to enter the national territory of his victims shortly after a collision, thereby potentially subjecting himself to the reach of that state's criminal courts. But the advantage to France in the *Lotus* case was that, if it had been able to prove a consistent practice of non-prosecution, that pattern would have been very telling. Consistent abstentions from prosecution in such circumstances, despite serious injuries to

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[31] State v. Furman, 858 P.2d 1092 (Wash. 1993).

[32] S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7, 1927).

[33] *Id.* at 22-31.

[34] *Id.* Professor Weisburd reads the *Lotus* case as standing for the proposition that contrary state practice defeats an asserted customary norm. Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 32-35 (1988). But a case in which half the discoverable incidents of state practice contradict the proposed norm need not stand for a such a categorical principle.

nationals and opportunity to prosecute, strongly suggest the operation of an international prohibitory norm. Explanatory diplomatic correspondence or other direct evidence of motivation would help satisfy the element of *opinio juris,* but would not be strictly necessary for proof of relevant state practice.

But patterns of abstention do not always speak for themselves.[35] Sometimes they can be understood as carrying normative significance only by reference to explicit statements of principle. These statements may take the form of codification in treaties or expression in the "soft law" of General Assembly resolutions. Simma and Alston acknowledge that "the existence *vel non* of a rule of international customary law not requiring interaction, and not really running between States, can only be ascertained by finding expressions of a respective international *opinio juris.*"[36] For Simma and Alston, this signifies not a special character of customary law formation in the human rights field but a fatal flaw, since *opinio juris* would then " 'count' . . . twice,"[37] and, even worse, be "the only relevant element,"[38] completely displacing practice. They suggest that since human rights norms generally lack "this element of interaction . . . [and do] not 'run between' States in any meaningful sense," recognizing them does "violence . . . to the established formal criteria of custom."[39]

But what about those "formal criteria of custom"? They are not as immutable as the skeptics suggest. The *jus gentium,* based on a combination of natural law precepts and interactions among a diverse group of actors, including but not strictly limited to nation-states, was superseded in the nineteenth century by state-centered positivist concepts of customary law.[40] Why should we be frozen in that century-old mode? Customary law should adapt itself to the new realities of the human rights era. In this era, a state's steps to protect the basic dignity of its own nationals cannot always plausibly be explained as having been taken in complete disregard to potential international legal responsibility.

For example, presume that over a ten-year period retentionist states almost

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[35] Simma and Alston observe that "[a]bstentions *per se* mean nothing; they become meaningful only when considered in the light of the intention motivating them." *Supra* note 16, at 103-04.

[36] *Id.* at 100.

[37] *Id.* at 96.

[38] *Id.* at 100.

[39] *Id.* at 99.

[40] *See generally,* Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights,* 25 GA. J. INT'L & COMP. L. 147 (1995-96).

uniformly abandon hanging as a mode of execution. If some of those states have substituted stoning and beheading for hanging, we would not conclude that a customary anti-hanging norm had emerged. If serious crime had miraculously disappeared from the face of the earth, leaving no practical scope for the employment of the noose, postulating an international anti-hanging norm would likewise be questionable.

But assume instead a situation of continuing high rates of serious crime, accompanied by the systematic substitution of more humane methods of execution for hanging. This pattern of state behavior could very well be the material expression of a common normative consciousness that hanging is excessively cruel and inimical to basic human dignity. Even though this pattern of practice lacks inherent elements of state interaction, our theories of customary law formation should be sufficient to assess when and if it is the material manifestation of an emergent norm.

The failure to codify actual death sentencing patterns into national law has sometimes been seen as disproving the existence of a customary norm.[41] For instance, with respect to juvenile execution, despite highly consistent sentencing patterns,[42] national laws do not uniformly adopt the precise age of eighteen as the threshold of death-eligibility.[43] And for Justice Scalia, the textual diversity of state death penalty laws was fatal to proof that juvenile execution had become "cruel and unusual" under the Eighth Amendment.[44]

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[41] A student note on the *Stanford* case asserts that "[e]ven today, 61 countries that impose the death penalty in practice do not distinguish juveniles from adult offenders." Laura Dalton, Note, *Stanford v. Kentucky and Wilkins v. Missouri: A Violation of an Emerging Rule of Customary International Law*, 32 WM. & MARY L. REV. 161, 192 n.257 (1990). The author proposes, as a condition for the recognition of a customary international norm establishing a minimum age of eighteen for execution, the following proof:

> [T]he only legitimate way to explore the creation of a rule of customary international law that would prohibit the juvenile death penalty is to determine the practices of nations prior to the creation of the American, European, or African conventions on human rights in order to establish a consistent state practice coupled with *opinio juris* and, in addition, to look to the practices of the nations presently uninvolved in the treaties or with reservations to the death penalty clauses to prove sufficient universal compliance to establish the norm as a rule of customary international law.

*Id.* at 192.

[42] Brief for Amnesty International, *supra* note 1.

[43] Dalton, *supra* note 41.

[44] Stanford v. Kentucky, 492 U.S. 361, 370-71 (1989). In contrast, the majority of the Ninth Circuit that upheld the constitutionality of hanging denigrated the proof that all but two states had by legislation officially repudiated the practice of hanging as excessively cruel.

Yet it is not obvious why legal texts should carry so much more weight than actual sentencing practices. It is true that legal texts in general are easier to discover than sentencing decisions. But, unlike many other penal practices that are potentially subject to customary norms, the death penalty is a well-studied subject for which rather good data are available.[45] It seems that something more than the quality of the empirical data concerns the critics who demand explicit and universal codification as a prerequisite to recognition of a prohibitory norm in the human rights field.

Indeed, for the skeptics, neither practice alone nor codification alone satisfies the state practice prong of customary law. The norm against torture, for example, is highly codified in national law, but frequently breached.[46] Skeptics such as Weisburd, Simma and Alston conclude that this inconsistent practice disproves the existence of any customary norm against torture.[47]

For other scholars, the fact that acts of torture are typically denied by guilty governments and are virtually never inflicted under a claim of right means that the contrary practice does not disprove the norm, but only establishes that the norm is often breached.[48] Breaches of the norm against torture lack a normative dimension because of the absence of accompanying claims of right. Acts of torture, genocide or summary execution can be contrasted, for example, to breaches accompanied by new claims of right, that over time and with increasing acquiescence create new norms. Perhaps, then, the real significance of uniform codification of a penal practice in national law is that departures from the law by rights-abusing state officials will generally *not* be accompanied by claims of right. As a consequence, breaches of the norm should neither disprove the norm's existence nor lead to the evolution of a replacement norm.

In the case of juvenile execution, unlike torture, hypocrisy is not the key

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While these statutes reflected "public perception," they cast no light on the "actual pain" inflicted by hanging, which the majority adopted as its Eighth Amendment benchmark. Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994) (en banc).

[45] In addition to the data compiled by Amnesty International, *supra* note 1, the Secretary-General of the United Nations conducts periodic surveys of death penalty practices. *See, e.g., Capital Punishment: Report of the Secretary-General*, U.N. ESCOR, 2d Sess., Agenda Item 1, U.N. Doc. E/1990/38/Rev.1 (1990).

[46] AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES (1984).

[47] Weisburd, *supra* note 34, at 32-35; Simma & Alston, *supra* note 16, at 96-98.

[48] Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L L. J. 53, 79-82 (1981).

problem since actual practice is very consistent though the laws on the subject are facially diverse. But the United States is a key dissenting actor, both *de facto* and *de jure*, on the international death penalty scene. It is striking that U.S. representatives did not dissent on principled grounds at the time of the codification of the norm in human rights treaties.[49] When President Carter sent the International Covenant on Civil and Political Rights and the American Convention on Human Rights to the Senate for ratification, the State Department testified that juvenile execution was a practice never engaged in by the United States.[50] While that statement was true at the time (shortly after the *de facto* moratorium on the death penalty was lifted in the post-*Gregg* era),[51] events have overcome us and juvenile execution has become an unfortunate reality in the American experience.

Simma and Alston might conclude that no juvenile execution norm ever emerged, because the practice was always too equivocal and not sufficiently other-state-regarding even when it seemed uniform. In comparison, the IACHR suggested that the United States was a persistent objector to an emerging norm against juvenile execution.[52] I am puzzled by those who find that state practice to constitute a norm must be internationally conscious, but who carve out exceptions for non-conforming states who never (or only belatedly) express principled disagreement with the norm. If supporting practice must be purposive and accompanied by *opinio juris*, it is hard to see why the mere fact of inconsistent practice should create an exception, especially where that practice occurs after the crystallization of the norm.[53]

Another problem in invoking international standards relating to the death penalty is that many are vague or aspirational, such as the increasingly

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[49] *See* Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 682-86 (1983).

[50] *International Human Rights Treaties: Hearings Before the Comm. on Foreign Relations*, 96th Cong., 1st Sess. 55 (1979) (Response by the Department of State to the "Critique of Reservations to the International Human Rights Covenants" by the Lawyers Committee for International Human Rights).

[51] *See* Gregg v. Georgia, 428 U.S. 153 (1976).

[52] Roach and Pinkerton decision, *supra* note 21, ¶ 54 (finding protest in the general reservation proposed to Article 4 of the American Convention on Human Rights by Carter Administration in December 1977).

[53] Oscar Schachter, *International Law in Theory and Practice*, 178 R.C.A.D.I. 9, 36-37 (1982).

fragile consensus on eventual worldwide abolition.[54] This makes international death penalty norms difficult to evoke effectively in litigation. Lack of clarity concerning the minimum age of execution inhibited the IACHR from recognizing a customary prohibition on execution of offenders under the age of eighteen in the *Roach and Pinkerton* case, for example.[55]

It is tempting to attack the problem of vagueness by reference to more precise treaty norms. Scholars and activists have been criticized for overly heavy reliance on treaty norms to prove customary human rights law.[56] Perhaps we have not been clear enough in distinguishing the two distinct roles that treaty provisions might play in proving the existence of a customary norm.

First is the still controversial theory that treaty provisions can themselves be counted among the relevant state practice for proof of a parallel customary norm binding non-parties.[57] If over one hundred states have made a solemn commitment not to execute juveniles, a commitment they honor in practice, does their practice "count" toward the proof of a parallel customary norm? Or should their practice be excluded because their abstention from juvenile execution can only be understood as adherence to their treaty commitments? If only the practice of non-parties counts, then as human rights treaties become more widely ratified, non-conforming, non-ratifying states will find it increasingly easy to prevent the recognition of customary human rights norms. If one believes in a purely consent-based system of customary law, premised on universal adherence, this prospect will not be troubling.[58] But the end result is that we will have customary norms only where we have no need for them.[59]

The second potential role of treaties in the formation of customary law is as a source of explanation for the states parties' compliance with the norm. Sometimes the terms or drafting history of a human rights treaty characterize its provisions as a codification of an already-existent customary norm. When dealing with penal practices that primarily affect a state's own nationals, it is often difficult to demonstrate that even a highly consistent practice of abstention is best understood as adherence to a customary norm.

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[54] *See generally* Fitzpatrick & Miller, *supra* note 11.

[55] Roach and Pinkerton decision, *supra* note 21, ¶ 60.

[56] *See* Weisburd, *supra* note 34.

[57] ANTHONY D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

[58] Weisburd, *supra* note 34, at 42-45.

[59] Blum & Steinhardt, *supra* note 48, at 82.

Let us assume, for example, that we have conclusive proof that pregnant women and infants are never executed anywhere in the world. This pattern might be explained by the fact that they never commit capital crimes, so the occasion of their execution simply never arises. Or, it might be that in each state a distinct cultural value has led state authorities, pursuing widely divergent normative paths, to reach the identical conclusion that such persons should not be death-eligible. Or, alternatively, state authorities might have been animated by a common, universal revulsion against the cruelty and indignity of execution of such persons. The codification of an exemption from execution for such persons in a major human rights treaty might serve a valuable evidentiary function in explaining that the observable but ambiguous pattern of state behavior was motivated by a shared consciousness that to act otherwise would be to fall beneath minimal standards of civilized behavior, imbuing the domestic penal practice with an international dimension.

Juries, prosecutors and legislatures are unlikely to characterize their conduct in international terms, even where it conforms perfectly to a postulated international norm. The codification of a prohibition in multilateral treaties supplies otherwise unavailable evidence that a particular penal practice is eschewed out of international concern and obligation.

Relying on treaty obligations to supply proof of *opinio juris* triggers the same objections discussed above concerning use of treaty provisions to supply evidence of consistent state practice.[60] The attitude of states conforming to the asserted *customary* norm is crucial to the formation of customary law, not the attitude of states accepting the conventional obligation. But while empirical data may sometimes be available to prove a consistent penal practice among non-ratifying states, it will be the rare case indeed where any direct evidence of a consciousness of international legal obligation will exist in relation to domestic penal practices, with the exception of *Lotus*-type situations where the crime creates an international incident.

But why must we rely on the terms or drafting history of human rights treaties, or on General Assembly resolutions, for proof of *opinio juris*? Why not locate *opinio juris* in protest or forceful countermeasures against non-conforming practice? The sad reality is that, at best, protest is likely to be verbal and unlikely to be widespread. Mother Theresa, the Pope and two

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[60] Weisburd, *supra* note 34; Dalton, *supra* note 41.

million Italians protested the death sentence imposed on fifteen-year-old Paula Cooper,[61] but no state took forceful countermeasures, imposed economic sanctions or severed diplomatic relations over the case. The skeptics draw the conclusion that no norm exists. I suggest that customary law formation in the human rights field cannot reasonably be premised on the willingness of third party states to intervene forcefully to protect victims.

Simma and Alston have raised important questions as to whether our focus on customary law has been misplaced, when we should have been attempting to establish general principles of law, or, alternatively, natural-law-based norms of *jus cogens* that avoid the difficulties of consistent practice and consent.[62] They concede at least a customary human rights norm of a *droit de regard*, permitting diplomats in intergovernmental organizations to criticize each other without interfering in domestic sovereignty.[63] While this seems cold comfort to human rights activists, well-aware that human rights principles are easily sacrificed by diplomats on the altar of expediency, a *droit de regard* is not without some significance in relation to the death penalty. Capital punishment has been discussed as a human rights issue at least since the drafting of the Universal Declaration of Human Rights, but recent years have seen an increasingly aggressive posture by retentionist states, including the United States, attempting to shut off discussion of the death penalty on both domestic sovereignty and cultural relativity grounds.[64] Thus, establishing even so much as a *droit de regard* in the death penalty context must be counted as something of a victory.

But neither a *droit de regard* nor a general principle of law is likely to save the lives of the juveniles on death row. Only a domestically enforceable norm will have that material impact.

## III. STRATEGIC CHOICES IN LITIGATING THE LEGALITY OF JUVENILE EXECUTION

The two basic options for challenging the legality of juvenile execution in courts of the United States are: (1) proof of a customary norm of international law that invalidates contrary state law under the Supremacy Clause;

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[61] Lisa Kline Arnett, Comment, *Death at an Early Age: International Law Arguments Against the Death Penalty for Juveniles*, 57 U. CIN. L. REV. 245, 255 (1988).

[62] Simma & Alston, *supra* note 16.

[63] *Id.* at 98-99.

[64] Fitzpatrick & Miller, *supra* note 11.

or (2) reliance on an international norm against juvenile execution to interpret the "Cruel and Unusual" punishment clause of the Eighth Amendment.[65] Both arguments were made, for example, in the *Stanford* case.[66]

The customary law approach has the advantage of simplicity and the benefit of the historical recognition of customary law as an enforceable source of law in United States courts.[67] But the strengths of the customary law strategy are undermined by three detriments.

First, this approach hinges on satisfying all the theoretical objections to the existence of customary norms discussed in Section II above. Second, successful pursuit of this approach requires establishing a hierarchy between customary international law and state statutes. While the logic of such a hierarchy under the Supremacy Clause is clear, little direct precedent can be found to support it.[68] Third, courts skeptical of the legal nature of customary law are likely to be highly disinclined to give it dispositive force in the face of contrary law adopted by domestic political actors, even if relevant precedent directs them to do so.[69]

The Eighth Amendment interpretive approach has a number of merits, especially the lack of need to satisfy the technical requirements for proving a customary norm. The dearth of juvenile death sentences outside the United States speaks for itself with regard to the "unusual" nature of the practice. Until Justice Scalia's pugnacious parochialism in *Stanford*,[70] the Supreme Court had indicated a willingness to include a canvass of comparative practices among the relevant data in assessing what the "evolving standards of decency" entail.[71] The treaties likewise serve as pertinent reference points by defining, with admirable precision, contemporary international standards of decency, without any need for proof of their binding effect on

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[65] *See* Hartman, *supra* note 49.

[66] *See supra* note 1.

[67] The Paquete Habana, 175 U.S. 677 (1900).

[68] RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1), cmt. d and nn.2,3 (1987).

[69] Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986), *cert. denied sub nom.* Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986). Given the exclusive authority of federal executive officials over foreign policy, it is unlikely that state officials would be found to have engaged in a "controlling executive act" that precludes the application of customary international law. *See* The Paquete Habana, 175 U.S. 677, 700 (1900).

[70] *See* 492 U.S. at 369.

[71] *See* Coker v. Georgia, 433 U.S. 584, 592 n.4. 596 n.10 (1977); Enmund v. Florida, 458 U.S. 782, 796-97 n.22 (1982).

the United States.

But the short shrift given to international practice and treaty norms even by the *Thompson* plurality[72] signals the flaws in this approach. Without proof that the rejection of juvenile execution elsewhere in the world imposes a binding legal obligation on the United States, there is no compelling reason for U.S. courts to give these data prominence in interpreting the Eighth Amendment.

Whether customary or treaty norms should control the interpretation of the Constitution raises interesting issues. In the case of a clear conflict between a constitutional provision and a customary or treaty norm, precedent suggests that the Constitution would control.[73]

Where constitutional norms are vague (as in the Eighth Amendment context), the interpretive principle of *The Charming Betsy* comes into play.[74] The *Charming Betsy* principle is premised on the attribution of an internationally law-abiding character to the law-giver whose unclear enactments are at issue.[75] Eighth Amendment "evolving standards of decency" in an increasingly interdependent world call for a cosmopolitan rather than parochial approach.

Although the United States Constitution lacks an explicit provision similar to that of Article 25 of the German Basic Law, assimilating international customary norms into national law,[76] there are strong reasons to interpret unclear constitutional provisions so as to be consistent with international norms where possible. Not only does this approach help insure the international law-abiding character of the United States, it helps avoid a clash between two important interpretive principles—that statutes should be

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[72] Justice Stevens referred to the views of "other nations that share our Anglo-American heritage" and "leading members of the Western European community," as well as to "three major human rights treaties [that] explicitly prohibit juvenile death penalties." Thompson v. Oklahoma, 487 U.S. 815, 830-31 and n.34 (1988) (Stevens, J., plurality opinion).

[73] RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(3) (1987); Reid v. Covert, 354 U.S. 1 (1957) (Black, J., plurality opinion).

[74] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

[75] For a particularly clear exposition of this principle, see Chew Heong v. United States, 112 U.S. 536 (1884).

[76] Simma & Alston, *supra* note 16, at 86 (indicating that German courts are prevented by Article 25 of the German Basic Law from interpreting and applying German law in a manner violating general rules of international law).

construed, where possible, to be consistent with the Constitution[77] and with international law.[78] As the Supreme Court has noted,[79] both rules have their roots in Chief Justice Marshall's opinion in *The Charming Betsy*.

## IV. THE PROBLEM OF THE JUDGES

To some observers, efforts to gain recognition for the binding legal nature of customary human rights norms through litigation on the death penalty may have been a quixotic undertaking. The federal courts have been progressively deregulating state death penalty regimes by constricting the substantive scope of Eighth Amendment rights and systematically precluding review on federal *habeas corpus*.[80] It was unlikely that, simultaneously, those courts would have placed the American death penalty system under the governance of international law, even with respect to such a relatively peripheral issue as juvenile execution.

The sad fact is that the death penalty in the United States has little to do with penology and little to do with law. It is politics, and symbolic politics at that.[81] Even with perfectly coherent theories of customary law formation and brilliant advocacy, our chances of success would have been slim. Whether these political realities should have inhibited our advocacy is a matter for personal judgment.

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[77] *See, e.g.*, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 499-501 (1979).

[78] *See supra* note 74 and accompanying text.

[79] DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[80] *See* Vivian Berger, *Justice Delayed or Justice Denied?—A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665 (1990); Stephen P. Garvey, Note, *Politicizing Who Dies*, 101 YALE L.J. 187 (1991); Joseph L. Hoffmann, *The Supreme Court's New Vision of Federal Habeas Corpus for State Prisoners*, 1989 SUP. CT. REV. 165; Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305.

[81] *See* FRANKLIN E. ZIMRING AND GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1986).