Children, the Death Penalty and the Eighth Amendment: An Analysis of Stanford v. Kentucky

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CHILDREN, THE DEATH PENALTY AND THE EIGHTH AMENDMENT: AN ANALYSIS OF STANFORD v. KENTUCKY

I. Introduction

Constitutional challenges to the death penalty most often have their foundations in the “cruel and unusual” punishment language contained in the eighth amendment. \(^1\) Despite strong arguments against the constitutionality of the death penalty, \(^2\) the United States Supreme Court, in the 1976 case of Gregg v. Georgia, \(^3\) held constitutional capital punishment for the crime of murder under both the eighth \(^4\) and fourteenth \(^5\) amendments. \(^6\) “According to Gregg, a penalty must both abide by contempo-

1. U.S. Const. amend. VIII. The eighth amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” \(\text{Id.}\)
2. See, e.g., Furman v. Georgia, 408 U.S. 238 (1972) (per curiam). The Court stated its holding in a brief per curiam opinion which failed to set out the majority’s reasoning. \(\text{Id.}\) Justice Brennan, in concurrence, concluded that capital punishment was unconstitutional because it was unusually severe, arbitrarily inflicted, substantially rejected by contemporary society and failed to more effectively serve any penal purpose. \(\text{Id.}\) at 286 (Brennan, J., concurring). Justice Marshall, also concurring, concluded that capital punishment was unconstitutional because it was “excessive and unnecessary” in light of possible penological goals. \(\text{Id.}\) at 358 (Marshall, J., concurring). He also stated that if it was not excessive, “it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.” \(\text{Id.}\) at 360 (Marshall, J., concurring). His test of the death penalty’s unacceptability was measured by the opinion of “people who were fully informed as to the purposes of the penalty and its liabilities [who] would find the penalty shocking, unjust, and unacceptable.” \(\text{Id.}\) at 361 (Marshall, J., concurring).
4. For the text of the eighth amendment, see supra note 1.
5. U.S. Const. amend. XIV, sec. 1. Section one of the fourteenth amendment provides:
All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
\(\text{Id.}\)
6. See Gregg, 428 U.S. at 168-69. The Court stated:
The Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment. But until Furman v. Georgia, the Court never confronted squarely the fundamental claim that the punishment of death always, regardless
primary society’s perceptions of standards of decency and accord with the ‘dignity of man’ to pass eighth amendment analysis.’’

 Constitutional challenges to the death penalty have an added dimension when the offender is a juvenile. Until recently, the Supreme Court avoided addressing the constitutionality of capital punishment applied to offenders under the age of eighteen. In 1988, however, the Court addressed capital punishment for fifteen-year-old offenders and stated that such punishment violates the eighth amendment. Never-

of the enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was presented and addressed in Furman, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional per se; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may even be imposed. We now hold that the punishment of death does not invariably violate the Constitution.

Id.

7. Gersten, The Constitutionality of Executing Juvenile Offenders: Thompson v. Oklahoma, 24 CRIM. L. BULL. 91, 105 (1988); see Gregg, 428 U.S. at 173. The Court stated: “[A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment . . . . A penalty also must accord with ‘the dignity of man’, which is the basic concept underlying the Eighth Amendment.” Id.

8. See V. Streib, Death Penalty for Juveniles 34-37 (1987). According to some, the death penalty for juveniles does not make a measurable contribution to the goals of retribution and deterrence. Id. at 34-35. “Society does not feel the same satisfying, cleansing reaction when a child is executed” because of the child’s lack of complete responsibility. Id. at 35. Therefore the principle reason in favor of retribution is not met. Id. The goal of deterrence, too, is not met by juvenile executions because “young persons are inexperienced and unable to avoid detrimental choices in general.” Id. at 36.

9. Note, Juvenile Death Penalty: Counsel’s Role in the Development of a Mitigation Defense, 53 BROOKLYN L. REV. 767, 768 (1987). Recent case law suggests an initial reluctance on the part of the Supreme Court to squarely address the issue of capital punishment for juveniles, and then, once addressed, a reluctance to extend the holding to all offenders under the age of 18. Id. at 795-805. For example, consider the circumstances surrounding the case of Roach v. South Carolina. James Terry Roach was 17 years old when he sexually molested Carlotta Hartness and then murdered her and her boyfriend, Thomas Taylor. Id. at 795-96. Roach filed a petition of certiorari with the United States Supreme Court on the issue of age, which was denied. Id. at 795 n.197 (citing Roach v. South Carolina, 444 U.S. 1026 (1980)). The United States Supreme Court denied Roach’s petition of certiorari two more times. Id. (citing Roach v. Martin, 474 U.S. 865 (1985); Roach v. South Carolina, 455 U.S. 927 (1982)); see Eddings v. Oklahoma, 455 U.S. 104 (1982) (citing Lockett v. Ohio, 438 U.S. 586, 606 (1978)). The issue of the constitutionality of capital punishment for juveniles was not fully developed because defense counsel did not present sufficient evidence of mitigating factors. Id. at 799-805; see Trimble v. State, 300 Md. 387, 478 A.2d 1143 (1984) (17-year-old who commits rape and murder not shielded from capital punishment by eighth amendment), cert. denied, 469 U.S. 1230 (1985).

10. Thompson v. Oklahoma, 487 U.S. 815 (1988). In Thompson, the Court addressed the issue of the death penalty for minors. Id. at 818-19. The Court,
theless, the Court left unanswered whether capital punishment imposed on sixteen- and seventeen-year-old offenders would pass constitutional scrutiny.

In 1989, in the consolidated cases of Stanford v. Kentucky\(^\text{11}\) and Wilkins v. Missouri,\(^\text{12}\) the Supreme Court addressed the constitutionality of capital punishment for sixteen- and seventeen-year-old offenders.\(^\text{13}\) In this much anticipated decision, a plurality of the Court rejected a strict application of the two-prong test set forth in Gregg.\(^\text{14}\) Although the plurality, in reviewing the respective sentences under the first prong of the cruel and unusual punishment test, stated that capital punishment for a sixteen-year-old offender was consistent with "the evolving standards of decency that mark the progress of a maturing society," it declined to apply an excessiveness analysis under the second prong.\(^\text{15}\)

This Note will discuss the cruel and unusual punishment clause\(^\text{16}\) of the eighth amendment and will trace the Supreme Court's scrutiny of the states' use of capital punishment in light of the two-prong test of Gregg\(^\text{17}\) and its applicability to juvenile offenders.\(^\text{18}\) It will also discuss the Stanford decision and its inquiry into the contours of the cruel and unusual punishment clause.\(^\text{19}\) Additionally, this Note proposes that jury sentences and international norms are relevant factors when addressing issues of eighth amendment interpretation and should have been considered in Stanford when the Court inquired into the "evolving standards of decency that mark the progress of a maturing society."\(^\text{20}\)

\(^{\text{11}}\) For a further discussion of Thompson, see infra notes 88-100 and accompanying text.

\(^{\text{12}}\) Id. at 838. For a further discussion of Thompson, see infra notes 88-100 and accompanying text.

\(^{\text{13}}\) Id. at 2969 (1989). The petitioner, Kevin Stanford, was approximately 17 years and four months old at the time he committed murder. Id. at 2972.

\(^{\text{14}}\) Id. at 2969. The petitioner, Heath Wilkins, was approximately 16 years and six months of age at the time he committed murder. Id. at 2973.

\(^{\text{15}}\) Id. at 2980. For a discussion of the plurality's methodology, see infra notes 117-43.

\(^{\text{16}}\) Stanford, 109 S. Ct. at 2980 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958)). For a discussion of the Court's application of the Gregg test, see infra notes 130-43 and accompanying text.

\(^{\text{17}}\) For a discussion of the cruel and unusual punishment clause, see infra notes 21-34 and accompanying text.

\(^{\text{18}}\) For a discussion of Supreme Court death penalty cases, see infra notes 33-72 and accompanying text.

\(^{\text{19}}\) For a discussion of Stanford's interpretation of cruel and unusual punishment, see infra notes 112-21 and accompanying text.

\(^{\text{20}}\) It is submitted that jury determinations and international norms are relevant in ascertaining civilized standards, as the dissent in Stanford indicated. Stanford, 109 S. Ct. at 2984-86 (Brennan, J., dissenting). For a discussion of jury determinations, see infra notes 162-85 and accompanying text. For a discussion
II. BACKGROUND

A. Cruel and Unusual Punishment

The eighth amendment’s cruel and unusual punishment clause has its origins in the English Bill of Rights, and the principle it represents traces back to the Magna Carta. Although the English “cruel and unusual punishment” clause focused on punishments disproportionate to the offenses involved, it “appears to have been also directed against punishments unauthorized by statute and beyond jurisdiction of the sentencing Court.” Conversely, the framers of the American version were primarily concerned “with proscribing ‘tortures’ and other ‘barbarous’ methods of punishment.” Through evolving constitutional analysis, the eighth amendment’s cruel and unusual punishment clause today essentially prohibits “all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.”

In reviewing a punishment under the cruel and unusual punishment clause, the Supreme Court employs a “heavy” presumption that the enacting legislature acted constitutionally. The Court does not require the state legislature to select the least severe penalty possible, so long as the penalty chosen rationally relates to the legitimate ends of punishment: retribution, deterrence, incapacitation and rehabilitation. Consequently, it is contingent on the challenger to rebut this presumption in order to avoid the prescribed punishment.

Three possible avenues are available for a challenger to rebut this heavy presumption in favor of the state. First, he can attempt to make the difficult showing that the punishment in issue was unconstitutional at the time of the eighth amendment’s adoption. Second, he may of international norms and their effect on the United States, see infra notes 186-244 and accompanying text.


24. Id. at 170 (citing Granucci, “Nor Cruel and Unusual Punishments Inflicted”: The Original Meaning, 57 CALIF. L. REV. 839, 842 (1969)).


26. Gregg, 428 U.S. at 175.

27. Id.

28. Id. The Gregg Court stated that the burden of proof rests upon the party who attacks the judgment of the democratically-elected legislatures. Id.

29. The Court may consider what was cruel and unusual in 1789 as one indicator of cruel and unusual punishment today. See generally Furman v. Geor-
show that the punishment has become cruel and unusual in the views of conventional society, and therefore, unconstitutional. Finally, he may attempt to show that the punishment is “excessive” and consequently not in “accord with the dignity of man.” The following section will discuss the Court’s eighth amendment scrutiny of states’ use of capital punishment in light of this heavy presumption against challengers to the death penalty.

B. Eighth Amendment Scrutiny of the Death Penalty

The Court, in the seminal case of Gregg v. Georgia, set forth a two-prong test for determining the continued validity of a state imposed punishment that passed muster under the initial historical analysis. If the punishment fails under either prong, the petitioner overcomes the presumption of constitutionality and the punishment is struck down. The first prong of the test questions whether society has come to view the punishment under consideration as cruel and unusual. Thus the issue may be framed as whether society, if it were enacting the eighth amendment today, would ban the particular punishment. The second prong of the Gregg test analyzes the excessiveness of the punishment in order to ensure that it comports with the basic concept of human dignity. The basic distinction between the two prongs is that the first

90 U.S. 238, 244 (1972) (Douglas, J., concurring). The debates of the First Congress shed little light on the framers’ true intent, although there is evidence to believe that the framers would have condoned whipping as well as the cutting off of ears. Id. (quoting 1 ANNALS OF CONG. 754 (1789)). See generally Sandalow, Constitutional Interpretation, 79 MICH. L. REV. 1033, 1035 (1981).

30. See Gregg, 428 U.S. at 171 (citing Weems v. United States, 217 U.S. 349, 373 (1910)). The Gregg Court held that the eighth amendment is to be interpreted in a “flexible and dynamic manner” in accordance with changing and evolving notions of societal values. Id. For a further discussion of contemporary society’s perceptions of standards of decency, see infra notes 38-44.

31. Gregg, 428 U.S. at 183-84. In order to be proportional to the crime, and not excessive, a punishment must meet penological goals such as retribution and deterrence. Id. For a further discussion of the “excessiveness” analysis, see infra notes 59-70 and accompanying text.

32. Because authorization of the death penalty falls within acceptable state authority, this heavy presumption against the challenger is employed by the Supreme Court when it reviews the constitutionality of state-imposed death sentences.


34. For a discussion of this two-pronged test, see supra note 7 and accompanying text.

35. Gregg, 428 U.S. at 173-75.

36. For a discussion of this prong, see supra note 30 and accompanying text.

37. For a discussion of this prong, see supra note 31 and accompanying text; see also Gregg, 428 U.S. at 173. In its evaluation of capital punishment the Gregg Court stated: “[W]hen a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction suitable to the most extreme of crimes.” Id. at 187. For a further discussion of this prong, see infra notes 52-61.
prong determines whether the punishment is \textit{per se} unconstitutional, while the second prong determines the constitutionality of its imposition in the particular situation.

1. \textit{Evolving Standards of Decency}

The Court looks to contemporary societal norms to determine whether public opinion has sanctioned certain forms of punishment.\(^\text{38}\) The Court specifically analyzed punishment in light of contemporary societal norms in \textit{Trop v. Dulles} \(^\text{39}\) where the phrase “evolving standards of decency that mark the progress of a maturing society” was first set forth.\(^\text{40}\) In \textit{Trop}, the Court held that stripping a person of citizenship for deserting the military was inconsistent with societal norms.\(^\text{41}\) The Court stated that “[w]hile the state has the power to punish, the [eighth] amendment stands to assure that this power be exercised within the limits of civilized standards.”\(^\text{42}\) The Court took into consideration standards within the national and international political community to determine whether denationalization was barred by the eighth amendment.\(^\text{43}\) \textit{Trop} thus established the principle of interpreting the eighth amendment in accordance with standards shared by “civilized nations.”\(^\text{44}\)

In the context of capital punishment, the Supreme Court in \textit{Gregg v. Georgia} \(^\text{45}\) incorporated the \textit{Trop} “evolving standards of decency” requirement into the first prong of its two part test.\(^\text{46}\) \textit{Gregg} involved a challenge to Georgia’s death penalty statute by a defendant convicted of murder.\(^\text{47}\) Contending that contemporary society rejected application of the death penalty under all circumstances, the petitioner argued that the imposition of the death penalty in his case violated both the eighth and fourteenth amendments.\(^\text{48}\) The Court agreed with the petitioner that an eighth amendment analysis required an inquiry into the values

\begin{itemize}
  \item \textbf{38.} For a discussion of this view, see \textit{supra} note 30.
  \item \textbf{39.} 356 U.S. 86 (1958).
  \item \textbf{40.} \textit{Id.} at 101.
  \item \textbf{41.} \textit{Id.} at 102. The Court stated: “The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.” \textit{Id.}
  \item \textbf{42.} \textit{Id.} at 100.
  \item \textbf{43.} \textit{Id.} at 101-02.
  \item \textbf{44.} \textit{Id.}
  \item \textbf{45.} 428 U.S. 153 (1976).
  \item \textbf{46.} \textit{Id.} at 173 (quoting \textit{Trop v. Dulles}, 356 U.S. 86, 101 (1957)).
  \item \textbf{47.} \textit{Id.} at 158-62. The petitioner Troy Gregg and his accomplice were charged with armed robbery and murder. \textit{Id.} at 158. The jury, at trial level, returned a sentence of death. \textit{Id.} at 161. The Supreme Court of Georgia affirmed the imposition of the death sentence for murder and “concluded that, considering the nature of the crime and the defendant, the sentences of death had not resulted from prejudice or any other arbitrary factor and were not excessive or disproportionate to the penalty applied in similar cases.” \textit{Id.}
  \item \textbf{48.} \textit{Id.} at 162.
\end{itemize}
held by modern society. The Court found as a factual matter, however, that society had not, as yet, rejected the death penalty as an appropriate punishment for murder. Consequently, the Court held that the punishment of death for the crime of murder did not, under all circumstances, violate the eighth and fourteenth amendments.

To ascertain "evolving standards of decency," the Gregg Court primarily looked to legislative enactments and jury sentences to determine whether or not modern day society endorses the death penalty as a punishment for murder. Through evaluation of capital punishment statutes, the Gregg Court determined that capital punishment had not been rejected by state legislatures as an appropriate punishment for murder. Furthermore, in reviewing actions of juries in sentencing, the Court concluded that they were compatible with legislative judgments because they reflected the "continued utility and necessity of capital punishment in appropriate cases." Thus, Gregg established utilization of legislative enactments and jury sentencing trends as indicators of contemporary society's values.

The Court in Coker v. Georgia adhered to this precedent when it held that the eighth amendment forbade a death sentence for the crime of rape. Under the first prong of the Gregg test, the Coker Court, by reviewing state statutes and jury sentences, determined that "most American jurisdictions do not presently make rape a capital offense."

49. Id. at 171.
50. For a discussion of the appropriateness of the death penalty as a punishment for murder, see infra notes 51-52 and accompanying text.
51. Gregg, 428 U.S. at 187. The Court stated: "We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." Id. at 181-82.
52. Id. at 176. The Court emphasized the importance of jury actions to ascertain contemporary societal norms. Id. The Gregg Court also stated: "The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" Id. at 176 (quoting Gore v. United States, 357 U.S. 386, 393 (1958)). For a broader discussion of the relevance of jury sentencing trends, see infra notes 162-85 and accompanying text.
53. Gregg, 428 U.S. at 179-81. The Court stated: "The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 states have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person." Id. at 179-80 (footnote omitted).
54. Id. at 182. The Court noted that "the reluctance of juries in many cases to impose the death sentence may reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." Id.
56. Id. at 592.
57. Id. at 613 (Burger, C.J., dissenting). The Coker Court stated: The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape
Moreover, the Coker Court added another element to its objective determination of societal norms. Echoing Trop's standards of decency "shared by civilized nations," the Coker Court acknowledged international opinion concerning the acceptability of the death penalty as a punishment for rape.\textsuperscript{58} As a result, the Court recognized three factors—legislative enactments, jury sentencing trends and international standards—as relevant in assessing contemporary values under the eighth amendment.

2. **Punishment Must "Accord with the Dignity of Man"

In Gregg, the Court looked to legislative enactments and jury sentences to determine whether contemporary society endorsed capital punishment for the crime of murder. The Court stated, however, that although legislative measures were important means of ascertaining contemporary values,\textsuperscript{59} they "alone cannot be determinative of eighth amendment standards since that amendment functioned to safeguard individuals from the abuse of legislative powers."\textsuperscript{60} Thus, the Court refused to rely solely on objective indicia.\textsuperscript{61} Instead, the Court incorporated a second, more subjective test requiring that the punishment "accord with the dignity of man."\textsuperscript{62} As the Court stated, this means at least "that the punishment not be 'excessive.'"\textsuperscript{63} Under this prong, a punishment is excessive, and thus unconstitutional, if it in-

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\textsuperscript{58} Id. at 595-96.

With respect to sentencing, the Court noted: "Georgia juries have . . . sentenced rapists to death six times since 1973. This obviously is not a negligible number . . . . Nevertheless, it is true that in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence." \textit{Id.} at 597.

\textsuperscript{59} \textit{Id.} at 596 n.10. The Court stated "that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." \textit{Id.} (citing \textsc{United Nations, Department of Economic and Social Affairs, Capital Punishment} \textit{40}, 86 (1968)).

\textsuperscript{60} \textit{Gregg}, 428 U.S. at 174 n.19. The \textit{Gregg} Court discussed the weight and power of political majorities when state legislatures enact state statutes. \textit{Id.} at 175-76. The Court further stated that "'[t]his does not mean that judges have no role to play, for the eighth amendment is a restraint upon the exercise of legislative power.' \textit{Id.} at 174.

\textsuperscript{61} \textit{Id.} at 182.

\textsuperscript{62} \textit{Id.}

\textsuperscript{63} \textit{Id.} at 173 (citing \textit{Trop v. Dulles}, 356 U.S. 86, 100 (1958)).
In order to determine the proportionality of the punishment to the crime, the Gregg Court looked to see if the punishment served the goals of retribution and deterrence. In deciding whether goals of retribution were met, the Court stated that "the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." In determining whether the goal of deterrence was met, the Court stated that "[s]tatistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders" were presently inconclusive. The Court concluded that "in the absence of more convincing evidence . . . the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe." The Court utilized this proportionality analysis the following year in Coker, where the Court opined that death is an excessive punishment for rape because the crime does not, in and of itself, cause the death of the victim.

The Gregg decision thus established a methodology for analyzing the constitutionality of applying the death penalty to capital crimes. The Court did not apply the Gregg test in the context of juvenile capital punishment until 1988 when the Court, in Thompson v. Oklahoma, finally addressed the constitutionality of the death penalty for fifteen-year-old offenders.

64. Id. The Gregg Court opined:
When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.

65. Id. at 183.
66. Id. at 184.
67. Id. at 184-85.
68. Id. at 187.
70. Id. at 597-98. The Coker Court also stated: "These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Id. at 597.
72. For a discussion of Thompson, see infra notes 88-100 and accompanying text.
C. The Death Penalty for Juveniles

1. The Death Penalty for Juveniles at Common Law

William Blackstone, in his famous Commentaries on English Common Law, wrote that an offender’s “defect of understanding” barred maximum punishment.\(^{73}\) Blackstone included infancy as one of several classes which fell under this blanket term.\(^{74}\) Blackstone divided infancy into three stages: *infantia*, the period from birth until seven years of age; *pueritia*, which included ages seven to fourteen; and *pubertas*, which was the period from fourteen to twenty-five.\(^{75}\) During the last stage, minors were held culpable for their crimes and could face capital punishment.\(^{76}\) In many cases, however, children between the ages of seven and fourteen were put to death because the “capacity of doing ill, or contracting guilt, [was] not so much measured by years and days as by the strength of the delinquent’s understanding and judgment.”\(^{77}\) Essentially, an individual’s peculiar capacity was the determinative factor. Yet, despite the willingness of the common law to impose capital punishment on offenders under the age of fourteen, the execution of children was never common in England.\(^{78}\)

The tradition of sparing minors under the English common law apparently carried over into the colonies. “Of the 14,029 known legal executions in American history, [over the span of the last three hundred years] 287 [or two percent] of them have been for crimes committed by persons under the age of eighteen.”\(^{79}\)

73. 4 W. BLACKSTONE, COMMENTARIES \(\ast\)21.

74. *Id.* Blackstone wrote:

[T]here are three circumstances where the will does not join with the act: 1. Where there is a defect of understanding . . . . 2. Where there is understanding and will sufficient residing in the party, but not called forth or exerted at the time of the action done . . . . 3. Where the action is constrained by some outward force and violence.

*Id.* (footnote omitted). Infancy fell under the first circumstance where there was a defect of understanding. *Id.*

75. *Id.* at \(\ast\)22 Blackstone noted: “Infants under the age of discretion ought not to be punished by any criminal prosecution whatever. What the age of discretion is, in various nations, is a matter of some variety.” *Id.* Under the civil law, minors were considered to be those under the age of 25. *Id.*

76. *Id.* at \(\ast\)23.

77. *Id.* Blackstone wrote: “Also, under fourteen, though an infant shall be *prima facie* adjudged to be *doli incapax* [incapable of guile], yet if it appear[s] to the court and jury that he was *doli capax* [capable of guile], and could discern between good and evil, he may be convicted and suffer death.” *Id.* (footnotes omitted).

78. V. STREIB, supra note 8, at 24.

2. Supreme Court Cases

In the 1978 case of Lockett v. Ohio,\(^80\) the Supreme Court first recognized the issue of minors and the death penalty.\(^81\) In Lockett, the Court stated that the "eighth and fourteenth amendments require that the sentencer ... consider[], as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense,"\(^82\) including age.\(^83\) Four years after Lockett, in Eddings v. Oklahoma,\(^84\) the Supreme Court directly faced the issue of the death penalty for minors.\(^85\) Because "the trial court 'refused' to consider relevant mitigating evidence in violation of Lockett v. Ohio," however, the Court's holding skirted the age issue.\(^86\) Nevertheless, the majority intimated that there appeared to be no constitutional bar to the imposition of the death penalty on sixteen-year-old offenders.\(^87\)

In 1988 the Supreme Court, in Thompson v. Oklahoma,\(^88\) finally addressed the issue of the death penalty for juveniles.\(^89\) The Court, in a plurality decision,\(^90\) held that the execution of a person who was less than sixteen years of age at the time of the offense violated civilized stan-

\(^81\) Id. at 589.
\(^82\) Id. at 604 (emphasis in original). "[S]entencing procedures should not create 'a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.'" Id at 601 (quoting Gregg v. Georgia, 428 U.S. 153, 188 (1976)).
\(^83\) Id. at 608. The Court considered Lockett's contention that "her death sentence [was] invalid because the statute under which it was imposed did not permit the sentencing judge to consider, as mitigating factors, her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime." Id at 597.
\(^84\) 455 U.S. 104 (1982).
\(^85\) Id. at 120 (Burger, C.J., dissenting). Chief Justice Burger stated:

> It is important at the outset to remember—as the Court does not—the narrow question on which we granted certiorari. We took care to limit our consideration to whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on an offender because he was 16 years old in 1977 at the time he committed the offense; review of all other questions raised in the petition for certiorari was denied.

Id. (Burger, C.J., dissenting).
\(^86\) Id. at 116-17 (state court refused to consider as mitigating circumstance petitioner's unhappy upbringing and emotional disturbance).
\(^87\) Id. at 116. The majority did not suggest that there was an "absence of legal responsibility where the crime [was] committed by a minor." Id. The Court stated: "We are concerned here only with the manner of the imposition of the ultimate penalty: the death sentence imposed for the crime of murder upon an emotionally disturbed youth with a disturbed child's immaturity." Id.
\(^89\) Id. at 821.
\(^90\) Id. at 818. Justice Stevens announced the judgment of the Court, and delivered an opinion in which Justice Brennan, Justice Marshall and Justice Blackmun joined. Id. Justice O'Connor filed a concurring opinion. Id. at 848. Justice Scalia wrote a dissenting opinion joined by Justice White and Chief Jus-
dards of decency and was thus unconstitutional.\textsuperscript{91} In reaching this conclusion, the plurality applied the two-prong test established in Gregg.\textsuperscript{92} Under the first prong, the Thompson Court reviewed relevant legislative enactments and jury determinations.\textsuperscript{93} The Court found that all state death penalty statutes establishing a minimum age required that the defendant "have attained at least the age of sixteen at the time of the capital offense."\textsuperscript{94} Looking at jury sentencing trends, the Court concluded that in the past four decades, since 1948, when the last execution of a juvenile offender took place, juries had refused to impose the death penalty.\textsuperscript{95} Under the Gregg second prong, the Thompson Court ultimately decided whether the death penalty was directly related to the personal culpability of the fifteen year old defendant.\textsuperscript{96} The Court stated that "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children" retribution as a societal objective could not be met by the imposition of the death penalty.\textsuperscript{97} Furthermore, the Court found that the deterrence rationale was unacceptable in this context because teenage offenders are rarely deterred by the possibility of execution.\textsuperscript{98}

The Thompson plurality, in its assessment of objective indicia under...
the first prong of Gregg, also gave consideration to international standards which addressed juvenile executions.\textsuperscript{99} The Court stated that its holding was "consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European Community."\textsuperscript{100} Although resolving the death penalty issue with regard to juveniles under the age of sixteen, the Thompson Court left open whether state statutes prescribing the death penalty for sixteen- and seventeen-year-old offenders would pass constitutional scrutiny. The Court moved quickly to resolve this issue by granting certiorari in the cases of Stanford v. Kentucky and Wilkins v. Missouri nine months after the Thompson decision.

\section*{III. DISCUSSION}

In 1989, the Supreme Court addressed the issue of capital punishment for sixteen- and seventeen-year-old offenders when it decided the fate of Kevin Stanford and Heath Wilkins.\textsuperscript{101} Seventeen-year-old Kevin Stanford first raped, then sodomized, and finally shot Baerbel Poore after robbing a gas station.\textsuperscript{102} Stanford was certified for trial as an adult and convicted of murder, first degree sodomy, first degree robbery and receiving stolen property.\textsuperscript{103} He was sentenced to death and forty-five years in prison for his crimes.\textsuperscript{104} The Kentucky Supreme Court affirmed his death sentence.\textsuperscript{105}

\textsuperscript{99} Id. at 830-31. The Court specifically looked to countries that share the American heritage and to the Western European Community: Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

\textsuperscript{100} Id. at 830.


\textsuperscript{102} Id. at 2972-73.

\textsuperscript{103} Id. at 2973. Stanford was certified under a Kentucky statute which provided that juvenile court jurisdiction can be waived and an offender tried as an adult if he was either charged with a class A felony or capital crime, or was over 16 years of age and charged with a felony. Id. (citing KY. REV. STAT. ANN. § 208.170 (Michie/Bobbs-Merrill 1982)).

\textsuperscript{104} Id.

\textsuperscript{105} Id. The Kentucky Supreme Court rejected Stanford's argument that he had a constitutional right to treatment. Id. The Court found "that the record clearly demonstrated that 'there was no program or treatment appropriate for the appellant in the juvenile justice system . . .'" Id.
The second of the two consolidated cases involved sixteen-year-old Heath Wilkins. Wilkins killed Nancy Allen by stabbing her seven times after robbing a convenience store. He was charged with first degree murder, armed criminal action and carrying a concealed weapon. He was subsequently certified for trial as an adult and sentenced to death. The Supreme Court of Missouri affirmed the sentence, rejecting Wilkins’s argument that the punishment violated the eighth amendment. The Supreme Court granted certiorari in both cases to decide whether the eighth amendment prohibits the death penalty for crimes committed by sixteen- or seventeen-year-old offenders.

The consolidated Stanford decision resulted in a plurality opinion. Justice Scalia, writing for the plurality, joined by Chief Justice Rehnquist and Justices White and Kennedy concluded that no national consensus presently forbids the imposition of capital punishment on sixteen- and seventeen-year-old murderers. Significantly, however, the plurality applied only the first prong of the Gregg test, rejecting application of the proportionality prong. Justice O’Connor, while agreeing that no national consensus presently forbids capital punishment for sixteen- and seventeen-year-old offenders and concurring in the judgment, concluded, as did dissenting Justices Brennan, Marshall, Blackmun and Stevens, that the Court had a constitutional obligation to conduct a proportionality analysis. As a result, although the plurality disregarded the second prong of the Gregg test, five Justices agreed that the Constitution mandated a proportionality analysis.

Justice Scalia, writing for the plurality, stated that there are two ways a prescribed punishment violates the eighth amendment: (1) if it is one of “those modes or acts of punishment . . . considered cruel and unusual at the time that the Bill of Rights was adopted” and (2) if it is contrary to the “evolving standards of decency that mark the

106. Id. Wilkins was convicted of the premeditated murder of Nancy Allen.
107. Id.
108. Id. The Court found Wilkins competent to stand trial, and he entered guilty pleas to all charges. Id.
109. Id. at 2973-74. Wilkins was certified under a Missouri Statute which permits persons between 14 and 17 years of age who have committed felonies to be tried as adults. Id. (citing Mo. Rev. Stat. § 211.071 (1986)).
110. Id. at 2974.
111. Id.
112. Id. at 2972.
113. Id. at 2974-75. For a further discussion of the rejection of the proportionality prong, see supra notes 62-72 and accompanying text.
115. Id. at 2982 (O’Connor, J., concurring).
116. Id. at 2979 (Brennan, Marshall, Blackmun and Stevens, J., dissenting).
117. Id. at 2974.
118. Id. (quoting Ford v. Wainright, 477 U.S. 399, 405 (1986) (holding that
progress of a maturing society.'"119 Because neither Stanford nor Wilkins argued that the death penalty was considered cruel and unusual in 1789,120 the Court had to determine whether capital punishment for sixteen- and seventeen-year-old offenders violated the first prong of the Gregg test.121

Stanford and Wilkins offered several kinds of evidence to demonstrate a consensus in modern society against the execution of sixteen-year-old juveniles.122 First, they offered empirical evidence demonstrating that of the thirty-seven states whose laws permit capital punishment, fifteen decline to impose it on sixteen-year-old offenders, and twelve decline to impose it on seventeen-year-old offenders.123 Second, they offered evidence demonstrating that juries are reluctant to impose, and prosecutors are reluctant to seek, the death penalty for minors.124 Third, the petitioners offered public opinion polls125 and statements from various public interest groups and professional organizations supporting the position that society objects to juvenile capital punishment.126 The petitioners also offered numerous state and federal laws that set eighteen as the legal age for engaging in various activities,127 as well as evidence that other countries, especially Western European nations, do not authorize the death penalty for offenders under the age of eighteen.128 Finally, the petitioners argued that imposing the death penalty on minors does not serve the penological goals of retribution and deterrence.129

eighth amendment prohibits state from inflicting death penalty upon insane prisoner).


120. For a discussion of execution of minors under common law, see supra notes 73-79 and accompanying text.

121. Stanford, 109 S. Ct. at 2979.

122. Id. at 2975-77. The petitioners relied heavily on evidence that there is no federal death penalty statute for offenders under 18. Id. at 2976. The Court, however, stated: "It is not the burden of Kentucky and Missouri, however, to establish a national consensus approving what their citizens have voted to do; rather, it is the 'heavy burden' of petitioners to establish a national consensus against it." Id. at 2977 (citation omitted) (emphasis in original).

123. Id. at 2975.

124. Id. at 2977.

125. Id. at 2979.

126. Id.

127. Id. at 2977. The petitioners cited to laws which "set 18 or more as the legal age for engaging in various activities, ranging from driving to drinking alcoholic beverages to voting." Id.

128. Id. at 2985 (Brennan, J., dissenting) ("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.").

129. Id. at 2979. "According to petitioners, [capital punishment] fails to deter because juveniles, possessing less developed cognitive skills than adults, are less likely to fear death; and it fails to exact just retribution because
The Stanford Court excluded most of this evidence, considering only evidence that fifteen states decline to impose the death penalty on sixteen-year-old offenders, and that twelve decline to impose it on seventeen-year-old offenders. In accord with prior cases which placed a heavy burden on challengers to demonstrate the applicability of eighth amendment protection, the Court held this evidence insufficient to prove a national consensus against the death penalty for minors.

The Court found inconclusive the evidence concerning jury and prosecutor reluctance to impose death penalty sentences on minors, stating that this evidence merely reflects the fact that a small percentage of capital crimes are committed by juvenile offenders. The Court further opined that evidence of this nature failed to establish a national consensus against the death penalty for minors, but rather established a national consensus that the death penalty should rarely be imposed on minors. The Court also quickly disposed of the petitioners' contention that international norms indicate "evolving standards of decency." In a footnote, the Court stated that only American conceptions of decency are relevant because the eighth amendment merely requires that the practice in question be "accepted among our people."

A majority of the Court joined in the aforementioned portion of the opinion. The rest of the opinion, as discussed below, reflects the views of a plurality of the Court.

juveniles, being less mature and responsible, are also less morally blameworthy." Id.

130. Id. at 2975-80. The Court stated: (1) there was no support for petitioner's argument that a demonstrable reluctance of juries to impose and prosecutors to seek, capital sentences for 16 and 17 year olds establishes a societal consensus that such sentences are inappropriate; (2) there is no relevance to the state laws cited by petitioners which set 18 or more as the legal age for engaging in various activities; and (3) public opinion polls, the views of interest groups, and the positions of professional associations are too uncertain a foundation for constitutional law. Id.

131. Id. at 2975.

132. Id. at 2977 ("As far as the primary and most reliable indication of consensus is concerned—the pattern of enacted laws—petitioners have failed to carry that burden.").

133. Id. The Court noted that statistics showing a far smaller number of offenders under 18 than over 18 have been sentenced to death reflect in part the fact that a far smaller percentage of capital crime is committed by persons in the younger age group. Id. Beyond that, it is likely that "the very considerations that induce petitioners and their supporters to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed," so that the statistics are no proof of a categorical aversion. Id.

134. Id.

135. Id. at 2975.

136. Id. at 2975 n.1.

137. Id. at 2972-82 ("Scalia, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, and IV-a, in
The plurality reasoned that state laws setting eighteen as a minimum age for various activities were not relevant in ascertaining "evolving standards of decency"\textsuperscript{138} because these laws operate "in gross" and do not give individual consideration to each offender as is constitutionally required in capital punishment cases.\textsuperscript{139} Moreover, the plurality maintained that secondary indicia of national consensus, such as public opinion polls and the views of professional organizations and interest groups, were too uncertain to serve as a basis for constitutional analysis.\textsuperscript{140}

Finally, the plurality rejected the petitioners' evidence that the death penalty for minors does not meet the goals of penology.\textsuperscript{141} Justice Scalia wrote that "[i]f such evidence could conclusively establish the entire lack of deterrent effect and moral responsibility, resort to the Cruel and Unusual Punishment Clause would be unnecessary; the Equal Protection Clause of the Fourteenth Amendment would invalidate these laws for lack of rational basis."\textsuperscript{142} The plurality urged that these arguments should instead be directed at the legislature.\textsuperscript{143}

Although concurring in the judgment, Justice O'Connor disputed several statements made by the plurality. While stating that the particular cases before the Court could not be overturned on the basis of a Gregg proportionality analysis, she rejected the plurality's suggestion "that the use of such analysis is improper as a matter of [e]ighth [a]mendment jurisprudence."\textsuperscript{144} Justice O'Connor stated that, in her view, age-based statutory classifications which were rejected by the plurality, were relevant to this constitutionally mandated proportionality which Rehnquist, C.J., and White, O'Connor, and Kennedy, JJ., joined, and an opinion with respect to Parts IV-B and V, in which Rehnquist, C.J., and White and Kennedy, JJ., joined.

\textsuperscript{138} Id. at 2977.
\textsuperscript{139} Id. at 2977-78. The Court stated: "These laws set the appropriate ages for the operation of a system that makes its determinations in gross, and that does not conduct individualized maturity tests for each driver, drinker, or voter. The criminal justice system, however, does provide individualized testing." Id. The Court also rejected the petitioners' reliance on the Anti-Drug Abuse Act of 1988, which limits punishment to offenders 18 and over. Id. at 2976. The Court stated: "That reliance is entirely misplaced. To begin with, the statute in question does not embody a judgment by the Federal Legislature that no murder is heinous enough to warrant the execution of such a youthful offender, but merely that the narrow class of offense it defines is not." Id. (emphasis in original).
\textsuperscript{140} Id. at 2979. The plurality stated: "We decline the invitation to rest constitutional law upon such uncertain foundations." Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. The Court stated: "[O]ur job is to identify the 'evolving standards of decency'; to determine not what they should be, but what they are. We have no power under the [e]ighth [a]mendment to substitute our belief in the scientific evidence for the society's apparent skepticism." Id. (emphasis in original).
\textsuperscript{144} Id. at 2982 (O'Connor, J., concurring).
analysis. Dissenting Justices Brennan, Marshall, Blackmun and Stevens agreed with Justice O'Connor that the eighth amendment required a proportionality analysis.

Justice Brennan, writing for the dissent, stated that the majority's interpretation of state laws gave "a distorted view of the evidence of contemporary standards that these legislative determinations provide." He noted that twenty-seven states prohibit the death penalty for seventeen-year-old offenders and that thirty states do not authorize it for those who committed their offenses when less than seventeen years of age.

Justice Brennan also stated that the rest of the evidence offered by the petitioners and discarded by the plurality was not only in line with previous Supreme Court precedents, but also relevant in determining the "evolving standards of decency" at issue. He argued that federal and state statutes could not serve as conclusive evidence of contemporary values when in "the vast majority of cases, juries have not sentenced juveniles to death." He made an analogy between Stanford and Coker v. Georgia, pointing out that the Coker Court invalidated Georgia's death penalty statute for rapists precisely because, in the vast majority of cases, juries had not sentenced rapists to death.

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145. Id. (O'Connor, J., concurring).
146. Id. (Brennan, J., dissenting). As stated previously, however, Justice O'Connor did not find that application of Gregg's second prong warranted overturning the petitioner's sentence. Id. (O'Connor, J., concurring).
147. Id. (Brennan, J., dissenting).
148. Id. at 2982-83 (Brennan, J., dissenting). Justice Brennan wrote: Currently, 12 of the States whose statutes permit capital punishment specifically mandate that offenders under age 18 not be sentenced to death. When one adds to these 12 states the 15 (including the District of Columbia) in which capital punishment is not authorized at all, it appears that the governments in fully 27 of the States have concluded that no one under 18 should face the death penalty. A further 3 states explicitly refuse to authorize sentences of death for those who committed their offenses when under 17, making a total of 30 States that would not tolerate the execution of petitioner Wilkins. Id. (Brennan, J., dissenting) (citations and footnotes omitted).
149. Id. at 2982 (Brennan, J., dissenting). Justice Brennan wrote: "The method by which this Court assesses a claim that a punishment is unconstitutional because it is cruel and unusual is established by our precedents, and it bears little resemblance to the method four Members of the Court apply to this case." Id. (Brennan, J., dissenting).
150. Id. at 2984 (Brennan, J., dissenting). The dissent cited to the Brief for the Office of the Capital Collateral Representative for the State of Florida as Amicus Curiae which indicated that between January 1, 1982 and June 30, 1988 "there were 97,086 arrests of adults for homicide, and 1,772 adult death sentences, or 1.8 percent; and 8,911 arrests of minors for homicide compared to 41 juvenile death sentences, or 0.5 percent." Id. (Brennan, J., dissenting).
Justice Brennan reasoned that the views of professional organizations were relevant as objective indicia of public opinion and therefore relevant in the Court's inquiry. He also stated that in the past, the Supreme Court had recognized legislation in other countries in its eighth amendment analysis especially when ascertaining "evolving standards of decency." Finally, in concurrence with Justice O'Connor, Justice Brennan stated that the public's perception of juvenile executions could not be conclusive without the utilization of a proportionality analysis.

The final outcome of Stanford can be summarized as follows. Although five Justices concluded that the execution of sixteen-year-old offenders passed constitutional scrutiny according to the "evolving standards of decency" test of Gregg's first prong, five Justices maintained that the eighth amendment mandated a "proportionality analysis," under Gregg's second prong. Under the first prong of Gregg, four Justices accepted legislative enactments as the sole evidence reflecting contemporary values concerning juvenile capital punishment, but five Justices stated that such evidence was inadequate to determine contemporary values. Justice O'Connor stated that age-based classifications were also relevant to the eighth amendment inquiry, while dissenting Justices Brennan, Marshall, Blackmun and Stevens stated that jury trends, international norms and views of professional organizations were relevant as objective indicia of public opinion under the first prong of Gregg.

IV. Analysis

In concluding that the Kentucky and Missouri death penalty statutes passed eighth amendment scrutiny, the Stanford Court relied primarily on evidence that twenty-two similar state statutes authorized the death

153. Id. at 2985 (Brennan, J., dissenting) (citing Thompson v. Oklahoma, 487 U.S. 815 (1988)). The Court emphasized that "[w]here organizations with expertise in a relevant area have given careful consideration to the question of a punishment's appropriateness, there is no reason why that judgment should not be entitled to attention as an indicator of contemporary standards." Id. (Brennan, J., dissenting). The dissent cited the following organizations: American Bar Association, National Council of Juvenile and Family Court Judges, American Law Institute and the National Commission on Reform of the Federal Criminal Laws. Id. (Brennan, J., dissenting). All of these organizations oppose the imposition of the death penalty on anyone under 18 years of age. Id. (Brennan, J., dissenting).

154. Id. (Brennan, J., dissenting). In addition, Justice Brennan noted that "within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved." Id. at 2986 (Brennan, J., dissenting). For a discussion of international norms and United States domestic law, see infra notes 186-244.

155. Id. at 2987-88 (Brennan, J., dissenting). "[T]he proportionality principle takes account not only of the 'injury to the person and to the public' caused by a crime, but also of the 'moral depravity' of the offender." Id. (Brennan, J., dissenting) (quoting Coker v. Georgia, 433 U.S. 584, 598 (1977)).
penalty for minors.\textsuperscript{156} By rejecting other indicia reflecting societal norms,\textsuperscript{157} the Stanford analysis results in a tautological argument. The Court essentially adopts the reasoning that statutes authorizing the death penalty for sixteen-year-old offenders do not violate societal norms because societal norms have already been defined by similar statutes authorizing the death penalty for sixteen-year-old offenders. Moreover, the methodology of Stanford\textsuperscript{158} is inconsistent with the Supreme Court's prior methodology in other capital punishment cases.\textsuperscript{159} In the past, the Supreme Court looked not only to state statutes when determining whether a punishment is cruel and unusual, but also to jury trends, international norms and views of professional organizations.\textsuperscript{160} The Stanford Court's deviation from that traditional methodology in capital punishment cases highlights the need for a more consistent approach in determining "evolving standards of decency that mark the progress of a maturing society."

This Note suggests a broader analysis of the phrase "evolving standards of decency that mark the progress of a maturing society" than that used by the Stanford Court. The Stanford Court brushed aside important threshold issues, particularly that of providing a straightforward definition of "evolving standards of decency." For example, does the phrase indicate status quo contemporary values, or should the phrase include values and norms not yet adopted by all of society? Moreover, do standards of a maturing society include standards adopted by the international community or are they restricted to societal norms within the United States? The following section will address these questions by demonstrating that courts should consistently consider jury trends and international norms when determining whether society approves or dis-

\textsuperscript{156} For a discussion of the Stanford Court's primary reliance on state statutes in its decision, see supra notes 131-32 and accompanying text.

\textsuperscript{157} For a discussion of the Stanford Court's rejection of all evidence except state statutes, see supra notes 133-43 and accompanying text.

\textsuperscript{158} 109 S. Ct. 2969 (1989).

\textsuperscript{159} It is submitted that the Stanford Court did not take into account jury sentencing trends which were relevant in previous Supreme Court cases. See Thompson v. Oklahoma, 487 U.S. 815 (1988) (jury determinations are relevant in Court's constitutional scrutiny); Tison v. Arizona, 481 U.S. 137 (1987) (same); Coker v. Georgia, 433 U.S. 584 (1977) (same); Gregg v. Georgia, 428 U.S. 153 (1976) (same). It is also submitted that the Stanford Court did not take into account international norms which were relevant in previous Supreme Court cases. See Thompson v. Oklahoma, 487 U.S. 815 (1988) (civilized treatment recognized in international customary norms); Enmund v. Florida, 458 U.S. 782 (1982) (same); Coker v. Georgia, 433 U.S. 584 (1977) (same); Trop v. Dulles, 356 U.S. 86 (1958) (same).

\textsuperscript{160} It is submitted that the Stanford Court refused to evaluate objective indicators used to determine "evolving standards of decency" as had previous Supreme Court death penalty cases. For a discussion of "subjective evaluation" in Gregg v. Georgia and Coker v. Georgia, see supra notes 59-72 and accompanying text.
approves of a particular form of punishment.  

A. Sentencing Juries and Statistical Analysis

1. Precedent Established

Determinations of sentencing juries are a source of objective indicia necessary to evaluate "evolving standards of decency that mark the progress of a maturing society." Prior to Stanford, Supreme Court death penalty cases had consistently included determinations of sentencing juries in their constitutional analysis. As a cross-section of the community, the jury is a reliable objective index of contemporary values. As recognized by the Gregg Court, "[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment or death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system." Adoption of this reasoning is evident in later death penalty cases such as Coker v. Georgia and Thompson v. Oklahoma, where the Supreme Court explicitly weighed evidence regarding jury trends.

In Coker, the Court held unconstitutional the imposition of the death penalty for rape almost exclusively because juries rarely sentenced rapists to death. Because of the considerable weight attached to jury

161. For a discussion of jury trends with respect to capital punishment, see infra notes 162-76 and accompanying text. For a discussion of international norms, see infra notes 186-244 and accompanying text.

162. See Stanford, 109 S. Ct. at 2983-85 (Brennan, J., dissenting). Justice Brennan stated: "Just as we have never insisted that a punishment have been rejected unanimously by the States before we may judge it cruel and unusual, so we have never adopted the extraordinary view that a punishment is beyond Eighth Amendment challenge if it is sometimes handed down by a jury." Id. at 2983-84 (Brennan, J., dissenting).

163. See Enmund v. Florida, 458 U.S. 782, 792 (1982) (holding death penalty cruel and unusual punishment for participation in felony in which accomplice commits murder, although about one-third of American jurisdictions authorized such punishment; six "nontriggermen" were sent to death row by juries and three had been already executed); Coker v. Georgia, 433 U.S. 584 (1977) (Court held death penalty for rapist unconstitutional because in vast majority of cases juries had not sentenced rapists to death); Gregg v. Georgia, 428 U.S. 153, 181 (1976) (jury determinations relevant and part of objective indicia reflecting contemporary values).

164. See Gersten, supra note 7, at 113.

165. Gregg, 428 U.S. at 181 ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved.").


168. For a discussion of Coker, see supra notes 55-58, 69-70 and accompanying text. For a discussion of Thompson, see supra notes 88-100 and accompanying text.

169. For a discussion of Coker's adherence to jury determinations in its analysis, see supra notes 55-58 and accompanying text. It should be noted that the Coker decision parallels the present issue in Stanford. Both Coker and Stanford address the fact that juries rarely impose the death penalty for rapists or children.
trends in the Coker decision, Coker bolsters the proposition stated in Gregg that jury trends are a reliable indicator of contemporary values and furthermore, must be considered when proceeding under the eighth amendment. In refusing to consider jury sentencing trends, the Stanford Court abandoned the established practice of the Supreme Court in reviewing eighth amendment challenges to the death penalty.

In Stanford, petitioner Wilkins pointed out that the last execution of a person who committed a capital crime under seventeen years of age occurred in 1959.170 The Court gave no weight to this statistic.171 Ironically, however, only a year before, the Thompson Court, faced with similar factual evidence, concluded that juries refused to sentence fifteen-year-old offenders to death because not one had been sentenced since 1948, when the last execution of a fifteen-year-old took place in the United States.172

In Stanford, statistics were also admitted into evidence which demonstrated that actual executions for crimes committed by offenders under eighteen years of age accounted for only two percent of the total number of executions that have occurred between 1642 and 1986 in the United States.173 Although the Stanford Court conceded that a "substantial discrepancy" existed between the number of juvenile and adult executions,174 the Court concluded that this evidence "does not establish the requisite proposition that the death sentence for offenders under 18 is categorically unacceptable to prosecutors and juries."175 Instead, the Court determined that this evidence established a national consensus that the death penalty should be rarely imposed on minors.176

The Stanford Court's conclusion is without merit and is inconsistent with precedent especially in light of Coker where the death penalty for

This should be distinguished from the issue addressed in Gregg. In Gregg, the Court addressed the relative infrequency of jury verdicts imposing the death sentence for murder and stated that this evidence does not indicate rejection of capital punishment per se. See Gregg, 428 U.S. at 182.

171. Id.
172. Thompson, 487 U.S. at 832.
173. Stanford, 109 S. Ct. at 2977 (citing Streib, Imposition of Death Sentences for Juvenile Offenders, Jan. 1, 1982-April 1, 1989 p.2 (paper for Cleveland-Marshall College of Law)). The Court also admitted into evidence statistics showing that from 1982 through 1988 "out of 2,106 total death sentences, only 15 were imposed on individuals who were 16 or under when they committed their crimes, and only 30 on individuals who were 17 at the time of the crime." Id.
174. Id.
175. Id. The Court stated: "To the contrary, it is not only possible but overwhelmingly probable that the very considerations which induce petitioners and their supporters to believe that death should never be imposed on offenders under 18 cause prosecutors and juries to believe that it should rarely be imposed." Id.
176. Id.
rape was abolished precisely because juries rarely sentenced rapists to death. The Court’s analysis, by rejecting evidence of jury trends, is an incomplete evaluation of society’s conceptions of standards of decency.

2. Contemporary Values Reflected in Jury Sentencing Trends

Statistics bolster the proposition that American society is presently moving away from the imposition of capital punishment for juvenile offenders. As early as 1965, a Gallup Survey showed that only twenty-three percent of respondents favored capital punishment for persons under twenty-one years of age. Recent sentencing patterns between 1983 and 1987 also indicate that the trend is toward the abolition of capital punishment for minors. Statistics show that between December, 1983 and March, 1987 juveniles under the age of eighteen on death row decreased in number from thirty-eight to thirty-two; a sixteen percent decrease. For the same time period, however, the overall death row population increased by forty-two percent. Statistics show that eleven juveniles were sentenced to death in 1982, while only nine in 1983, six in 1984, four in 1985, and seven in 1986.

The contention of the Stanford Court that the infrequency of the death penalty sentence for juveniles results from the infrequency of criminal homicides by juveniles is inadequate. Statistics demonstrate that between 1973 and 1983 juveniles have accounted for about an average of nine percent of all arrests for murder and non-negligent manslaughter. This proportion has been steadily declining, from 10.4

177. See V. Streib, supra note 8, at 30. “[A] deep-seated reluctance to sentence youths to death is reflected dramatically in the declining rate of juvenile death sentences, the declining juvenile death row population, and the minuscule proportion of juvenile murderers actually sentenced to death.” Id. Streib specifically quotes Justice Brennan’s reaction to such reluctance: “When an unusually severe punishment is authorized for wide-scale application but not, because of society’s refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it.” Id. (quoting Furman v. Georgia, 408 U.S. 258, 300 (1972) (Brennan, J., concurring)).

178. See Gersten, supra note 7, at 114 (citing Erskine, The Pools: Capital Punishment, 34 PUB. OPINION Q. 290 (1970)).

179. Id. Gersten also notes that of the “approximately 280 death sentences imposed by juries each year from 1982 to 1986, only one percent to 2 percent of these were imposed on juveniles.” Id.

180. Id.

181. Id.

182. See V. Streib, supra note 8, at 27. Streib notes the contrast that “[w]hile the number of juvenile death sentences has been declining significantly each year, the number of adult death sentences has remained fairly constant at a rate of 250 to 300 a year.” Id. at 27-29.

183. See id. at 29.

Approximately 9.2 percent of criminal homicides from 1973 through 1983 were committed by persons under age eighteen. While only a small percentage of these criminal homicides were capital murders, it seems reasonable to assume that juveniles commit roughly the same proportion (9 percent) of capital murders as of all criminal homicides.
percent in 1973 to 7.4 percent in 1983.\textsuperscript{184} The nine percent representing juveniles arrested for capital murders only, however, has remained the same throughout this period.\textsuperscript{185}

Without taking into account the trend against juvenile executions as evidenced by jury sentencing patterns and bolstered by statistics reflecting societal norms, the \textit{Stanford} Court could not have focused on contemporary values in its eighth amendment analysis. It is submitted that in future capital punishment cases the Court should consistently weigh jury trends under the first prong of the \textit{Gregg} test because they provide a reliable objective index of contemporary values.

\section*{B. International Norms}

While the majority in \textit{Stanford} refused to consider relevant international norms concerning the death penalty for juveniles,\textsuperscript{186} the dissent pointed out that the United States stands almost alone in its tolerance of juvenile executions.\textsuperscript{187} Justice Brennan noted that since 1979, Amnesty International has recorded only eight executions of offenders under eighteen, three of which were carried out in the United States.\textsuperscript{188} Furthermore, he pointed out that the United States has signed three executive agreements which prohibit capital punishment for minors.\textsuperscript{189}

At present, there are at least three possible methods of applying international law to death penalty cases.\textsuperscript{190} One method of analysis

\begin{footnote}{In striking contrast to this 9 percent commission rate, juveniles have received a maximum of 2 percent to 3 percent of all capital sentences imposed over this period.}

\textit{Id.}

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} \textit{Id.}

\textsuperscript{186} \textit{Stanford}, 109 S. Ct. at 2975. The Court, however, in its criticism of the dissent, did acknowledge that customary practice in other nations does affect interpretation of constitutional provisions. The Court stated:

\begin{quote}
We emphasize that it is \textit{American} conceptions of decency that are dispositive, rejecting the contention of petitioners and their various \textit{amicus} \ldots that the sentencing practices of other countries are relevant. While "practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, test permitting, in our Constitution as well," \ldots they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.
\end{quote}

\textit{Id.} at 2975 n.1 (quoting \textit{Palko} v. Connecticut, 302 U.S. 319, 325 (1937)).

\textsuperscript{187} \textit{Id.} at 2985 (Brennan, J., dissenting).

\textsuperscript{188} \textit{Id.} (Brennan, J., dissenting) (other five executions were carried out in Pakistan, Bangladesh, Rwanda and Barbados).

\textsuperscript{189} \textit{Id.} at 2985 & n.10 (Brennan, J., dissenting) (Article 6(5) of the International Covenant on Civil and Political Rights; Article 4(5) of the American Convention on Human Rights; Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War).

\textsuperscript{190} Some commentators have suggested at least five. \textit{See generally} Sprout,
views the execution of juvenile offenders as a violation of a norm of customary international law which is binding on the United States and applies to the states through the Supremacy Clause of the Constitution.191 The second method calls for the indirect use of international norms to interpret various provisions of the United States Constitution, including the eighth amendment.192 The third method, assuming that a norm of customary law against juvenile executions cannot be established, maintains that the Supreme Court should look to foreign practice, treaty provisions, etc., and take into account "the climate of international opinion" when evaluating contemporary values.193

1. Norm of Customary International Law and the United States

With regard to the first method of analysis, two issues deserve consideration: (1) is there a norm of customary international law barring the execution of sixteen- and seventeen-year-old offenders?194 and (2) if this norm is established, is it binding on the United States for purposes of the Supremacy Clause of the United States Constitution?195

a. Customary International Norm Against Juvenile Executions

A principle attains the status of a rule of customary international law if it meets two criteria: 1) there must be evidence of state custom or practice demonstrating that the principle has been adopted by most states; and 2) the state practice must be followed out of a sense of legal obligation or opinio juris.196 The role of custom as a source of international law is expressly recognized in Article 38 of the statute of the International Court of Justice, a statute which has been recognized by most


193. This approach is evident in previous Supreme Court decisions concerning the eighth amendment, including Trop v. Dulles. For a discussion of Trop, see supra notes 39-44 and accompanying text.


195. Id. at 682; see also Restatement (Third) of Foreign Rel. Law § 111 (1) (1987). Harold G. Maier provides a complete analysis of the theory that customary international law becomes part of United States law and is binding on the states through the Supremacy Clause of the Constitution. See Maier, United States Constitution in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: Pre-emption of State Law: A Recommended Analysis, 83 AM. J. INT'L L. 832 (1989).

196. See Brief, supra note 191, at 11-12.

countries of the world community.\textsuperscript{197} 

Substantial evidence exists demonstrating a state practice against the execution of offenders under the age of eighteen. Fifty countries, including most Western European nations, have abolished the death penalty or "have limited its use to exceptional crimes such as treason."\textsuperscript{198} These countries clearly do not acknowledge the execution of juvenile offenders. Statistics also reveal that of nations retaining capital punishment, a majority (sixty-five) prohibit the execution of offenders under the age of eighteen.\textsuperscript{199} These countries include those that share the Anglo-American heritage and its jurisprudence: Britain, Canada and Australia.\textsuperscript{200} Of the sixty-one countries that retain capital punishment and have no statutory provisions exempting juveniles, some have ratified international treaties prohibiting the execution of juvenile offenders and twenty-seven others do not in practice impose the penalty.\textsuperscript{201} Thus, a definite majority of countries in the world community prohibit the execution of offenders under the age of eighteen.

Although evidence amply demonstrates the existence of state practice against the execution of minors, this practice must be followed out of a sense of legal obligation to constitute a norm of international law. As noted, international treaties best demonstrate \textit{opinio juris} or legal obligation.\textsuperscript{202} At present there are three international treaties which explicitly prohibit juvenile death penalties: Article 6(5) of the International Covenant on Civil and Political Rights\textsuperscript{203} (International Covenant); Article 4(5) of the American Convention on Human Rights\textsuperscript{204} (American Convention); and Article 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War\textsuperscript{205} (Geneva Convention).\textsuperscript{206} Moreover, the United Nations General Assembly has endorsed, and the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders has adopted "Resolutions and Decisions of United Nations Economic and Social Council"

\begin{footnotesize}
\begin{enumerate}
\item[197.] \textit{Id}. at 11; \textit{see also} Hartman, \textit{supra} note 194, at 665-66.
\item[198.] \textit{See Stanford}, 109 S. Ct. at 2985 (Brennan, J., dissenting).
\item[199.] \textit{Id}. (Brennan, J., dissenting). In addition, the norm against the execution of juvenile offenders existed prior to its codification in the International Covenant and other treaties. \textit{See Thompson}, 487 U.S. 815 (capital punishment is non-existent in most of Western Europe).
\item[200.] \textit{Thompson}, 487 U.S. at 830-31.
\item[201.] \textit{Id}.
\item[202.] \textit{See Brief, supra} note 191, at 12. "Courts will look to treaties, national laws, the practice of international organizations ... as evidence of the existence of a customary norm of international law." \textit{Id}.
\item[205.] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 68, 6 U.S.T. 3516, T.I.A.S. No. 3365.
\item[206.] \textit{See Stanford}, 109 S. Ct. at 2985 (Brennan, J., dissenting).
\end{enumerate}
\end{footnotesize}
which specifically prohibits the execution of offenders under the age of eighteen.\textsuperscript{207} International treaties and resolutions clearly denounce the practice of executing offenders under the age of eighteen and thus create the necessary \textit{opinio juris} to complement the firm state practice. The issue next arises, assuming the norm has been established by the demonstration of empirical evidence cited above, whether the United States is bound to follow the norm.

b. Can the United States be Bound by the Norm?

The International Court of Justice holds that a State may keep itself from becoming bound by a rule of customary international law if: (1) the State mounts an explicit and disciplined opposition to the coalescing norm;\textsuperscript{208} and (2) the State has maintained consistent opposition since the rule's formation.\textsuperscript{209} Thus, a state may avoid the application of an international norm through explicit rejection of the norm combined with a consistent practice contrary to the norm.

It appears that the United States presently has rejected the norm against the execution of juvenile offenders. Of the three international treaties prohibiting the execution of juvenile offenders under the age of eighteen, the United States has ratified only one—the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.\textsuperscript{210} Under domestic law, ratification of a treaty by the United States is necessary if the treaty is to constitute law for the purposes of the Supremacy Clause of the United States Constitution.\textsuperscript{211} The United States failed to ratify both the International Covenant and American Convention.\textsuperscript{212}

\textsuperscript{207} \textit{Id.} at 2985 n.10 (Brennan, J., dissenting).

\textsuperscript{208} \textit{See} Brief, \textit{supra} note 191, at 28; \textit{see also} Hartman, \textit{supra} note 194, at 682-85. Hartman describes a dissenting state in these terms: "Although a nation that protests during the process of norm creation may not prevent the formation of customary law, it may succeed in carving out for itself an exemption from the rule, while passive states will be bound." \textit{Id.} at 683.

\textsuperscript{209} \textit{See} Brief, \textit{supra} note 191, at 28.

\textsuperscript{210} \textit{See id.} at 32-34. The vote by Congress to adopt Article 68 was 33 votes to five, with five abstentions. \textit{Id.} at 34. It was noted that during the Geneva conferences when Article 68 was formulated, the United States delegation "failed to mount any unequivocal opposition to the rule excluding juvenile offenders from punishment by death." \textit{Id.}

\textsuperscript{211} The supremacy clause states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges of every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

\textit{U.S. Const.} art. VI, cl. 2.

\textsuperscript{212} \textit{See} Brief, \textit{supra} note 191, at 35-39. Although it was never ratified by Congress, the United States representative "eventually voted in favor of adoption of the International Covenant in 1966." \textit{Id.} at 35. Further, the United States sponsored a General Assembly Resolution of the United Nations which
Thus the norm against the execution of juveniles under eighteen is presently binding on the United States only at time of war. Furthermore, although President Carter signed the International Covenant, the United States made a reservation to Article 6(5) which prohibits the execution of offenders under the age of eighteen.\footnote{The wording of the reservation does not appear to be an express refusal to follow the norm, its implications, and the fact that the United States never ratified the treaty, weakens the norm of customary international law analysis.} Consistent practice within the United States contrary to the norm against juvenile executions is inconclusive at present. First, the execution of juvenile offenders has been rare throughout the history of American capital punishment. Only two percent of legal executions were for crimes committed by offenders under the age of eighteen.\footnote{The United States, in its recent history, has assumed fiduciary obligations towards its juveniles. At the turn of the century, the juvenile court system was established in the United States to prevent the subjugation of juvenile offenders to harsh penalties prescribed by the adult penal system because of broad agreement that adolescents as a class are less mature and responsible than adults. The United States Supreme Court, too, has reflected this proposition in its decisions, taking into consideration a defendant’s youth as a mitigating factor in capital cases.} Moreover, the United States, in its recent history, has assumed fiduciary obligations towards its juveniles. At the turn of the century, the juvenile court system was established in the United States to prevent the subjugation of juvenile offenders to harsh penalties prescribed by the adult penal system because of broad agreement that adolescents as a class are less mature and responsible than adults. The United States Supreme Court, too, has reflected this proposition in its decisions, taking into consideration a defendant’s youth as a mitigating factor in capital cases.

recognized the International Covenant. \textit{Id.} at 36. President Carter did sign the International Covenant in 1977 and submitted it, with reservations, to the Senate in 1978. \textit{Id.} The reservations, however, were considered to be only “proposals” and not amounting to “an explicit and principled manifestation of refusal to follow the international norm.” \textit{Id.} at 37-38.

\footnote{Article 6(5) of the International Convention states: “Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.” \textit{See id.} at 17. A memorandum from the State Department provided: “The United States reserves the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment.” \textit{See id.} at 36-37. The State Department’s explanation that the proposed reservation was with respect to implementation difficulties “and certainly not the preservation of any right to execute children or pregnant women, something never done in the United States” poses uncertainty, however, as to an explicit reservation. \textit{See} Hartman, \textit{supra} note 194, at 685.}

\footnote{213. \textit{See} Brief, \textit{supra} note 191, at 46. \textit{“Amicus submits that as a result of having signed these treaties, the United States incurred legal obligations which are violated when juvenile offenders are executed.” \textit{Id.} They specifically look to Article 18 of the Vienna Convention on the Law of Treaties which provides that “[a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty … subject to ratification … until it shall have made its intention clear not to become a party to the treaty.” \textit{Id.} at 46-47.}}

\footnote{For a general discussion of juvenile capital punishment at common law, see \textit{supra} notes 74-79 and accompanying text.}

\footnote{214. \textit{See} Brief, \textit{supra} note 191, at 46. \textit{“Amicus submits that as a result of having signed these treaties, the United States incurred legal obligations which are violated when juvenile offenders are executed.” \textit{Id.} They specifically look to Article 18 of the Vienna Convention on the Law of Treaties which provides that “[a] state is obliged to refrain from acts which would defeat the object and purpose of a treaty … subject to ratification … until it shall have made its intention clear not to become a party to the treaty.” \textit{Id.} at 46-47.}}

\footnote{215. \textit{For a general discussion of juvenile capital punishment at common law, see \textit{supra} notes 74-79 and accompanying text.}}
The United States, however, has never categorically prohibited the execution of sixteen- and seventeen-year-old offenders and, therefore, the norm against juvenile executions has never been explicitly adopted by this country. 219 At best, the argument that the United States violates a norm of customary international law by authorizing the execution of juvenile offenders can only be persuasive.

2. *Indirect Use of International Law in Interpreting the Constitution*

The second method of applying international law to death penalty cases calls for the indirect use of international norms to interpret provisions of the United States Constitution. This proposition is derived from the “incorporation” theory, which states that “international law was part of the English common law, that, as such, it became part of the common law of the American colonies, and remained so after the secession of those colonies from the British Empire and after the formation of the United States.” 220 International law was part of English common law due to the accepted belief throughout the seventeenth century of a “natural law” which set forth uniform rights and duties of nations. 221 This philosophical approach is reflected in article I, section 8, clause 10 of the Constitution, which grants Congress the power to define and punish crimes against the “Law of Nations.” 222

United States federal courts of the eighteenth century applied foreign customary norms in ascertaining federal common law. 223 For example, in *Talbot v. Jansen*, 224 Mr. Justice Iredell stated that the law of nations constituted a branch of the common law. 225 In *Ware v. Hylton*, 226 Mr. Justice Chase observed that “the law of nations is part of the municipal law of Great Britain.” 227 More recently, however, the Second Circuit in *Filartiga v. Pena-Irala* 228 and the Tenth Circuit in *Fernandez v. Wilkinson* 229 have initiated the revival of constitutional interpretation us-

220. Sprout, supra note 190, at 282.
221. Id. at 284.
222. See Hartman, supra note 194, at 660 & n.21 (“Customary law is a time-honored and essential component of international law and is domestically enforceable in the United States.”).
223. See id. at 661 (citing The Antelope, 23 U.S. (10 Wheat.) 66 (1825) (illegality under international law of slave trade)); Bentzon v. Boyle, 13 U.S. (3 Cranch) 191, 198 (1815) (process for determining law of nations governing belligerent and neutral rights); Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (effect of law of nations on Virginia statute to confiscate property of British Subjects)).
224. 3 U.S. (3 Dall.) 133 (1795).
225. Sprout, supra note 190, at 284-85.
226. 3 U.S. (3 Dall.) 199 (1796).
227. Id.
228. 630 F.2d 876 (2d Cir. 1980).
ing international human rights norms.\textsuperscript{230}

In \textit{Filartiga}, the court recognized the absolute prohibition of torture in customary international law.\textsuperscript{231} Dr. Joel Filartiga brought a wrongful death action in federal court for the tortured death of his son Joelito by Paraguay's Inspector General of Police, Pena-Irala.\textsuperscript{232} In its decision against Pena-Irala, the Second Circuit reaffirmed that "[t]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became part of the law of the United States, upon the adoption of the Constitution."\textsuperscript{233} In \textit{Fernandez}, the Tenth Circuit, using the doctrine of incorporation, held that a prolonged detention of an alien violated international norms upholding human dignity; therefore, the defendant's six month detention was held unconstitutional.\textsuperscript{234} This incorporation theory should have been addressed by the \textit{Stanford} Court, particularly in light of its recent revival by federal circuit courts. By ignoring developments within the federal courts and historical precedent, the \textit{Stanford} analysis is inflexible and incomplete.

Although the plurality in \textit{Stanford} failed to incorporate a norm of customary international law against juvenile executions into its constitutional analysis, a strong argument, based on Supreme Court precedent, still prevails: the Court, under \textit{stare decisis}, had an obligation to look to international standards in its decisionmaking process.

3. \textit{Supreme Court Precedent, the Death Penalty and International Norms}

The strongest argument for interpreting the eighth amendment in light of international standards, assuming no norm exists against the execution of sixteen- and seventeen-year-old offenders, is that Supreme Court precedent has consistently used this method. In \textit{Trop v. Dulles},\textsuperscript{235} where the phrase "evolving standards of decency" was first set forth, the Court directly referred to an "internationally shared principle" of civilized treatment in its eighth amendment analysis.\textsuperscript{236} The Court in

\textsuperscript{230} For a discussion of the \textit{Fernandez} decision, see generally Hassan, \textit{The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights}? 5 \textit{Hum. Rts. Q.} 68 (1983). For an in-depth discussion of the \textit{Filartiga} decision, see generally Christenson, supra note 192.

\textsuperscript{231} Christenson, supra note 192, at 41 ("Following an extensive review of international human rights documents condemning and prohibiting torture, as well as opinions of noted publicists and other sources of customary international law, the court rightly concluded that official torture violates the law of nations.").

\textsuperscript{232} \textit{Id.} (citing Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980)).

\textsuperscript{233} See Brief, supra note 191, at 8.

\textsuperscript{234} See Hassan, supra note 230, at 75.

\textsuperscript{235} 356 U.S. 86 (1958).

\textsuperscript{236} \textit{Id.} at 102.
Furman v. Georgia\textsuperscript{237} and Solem v. Helm\textsuperscript{238} read the words “cruel and unusual” in light of the English proscription against selective and irregular use of penalties. In Coker v. Georgia,\textsuperscript{239} the Court took account of the “climate of international opinion concerning the acceptability of a particular punishment” when it surveyed United Nations documents which indicated that only three out of sixty nations retained capital punishment in rape cases.\textsuperscript{240} In Enmund v. Florida,\textsuperscript{241} the Court again referred to “international opinion” in determining that the death sentence violated the eighth amendment when imposed on an offender who had not intended to kill his victim.\textsuperscript{242} Finally, in Thompson v. Oklahoma,\textsuperscript{243} decided only one year before Stanford, the Court clearly weighed international norms in reaching its conclusion that imposing the death penalty on fifteen-year-old offenders violated the eighth amendment.\textsuperscript{244}

The growth of a comparative approach to constitutional and international human rights law is evident by its acceptance both internationally and domestically. For example, in Sterling v. Cupp,\textsuperscript{245} the Oregon Supreme Court looked to the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights when it held that the subjugation of prisoners to personal offensive touching or observation by guards of the opposite sex violated both the United States and Oregon Constitutions.\textsuperscript{246} In 1988, Zimbabwe’s Supreme Court, in State v. Neube,\textsuperscript{247} looked to the Universal Declaration, the European Convention and the eighth amendment of the United States Constitution when it was faced with the issue of whether the whipping of an adult male offender constituted “inhuman or degrading punishment” in violation of Zimbabwe’s constitution.\textsuperscript{248} Justice Gubbay looked to decisions

\textsuperscript{237} Furman v. Georgia, 408 U.S. 238, 242-43 (1972).
\textsuperscript{238} Solem v. Helm, 463 U.S. 277, 285 (1983). The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the eighth amendment: “‘[E]xcessive Bâile ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted.’” Id. (quoting 1 W. & M., sess. 2, ch.2 (1689)).
\textsuperscript{239} 433 U.S. 584 (1977).
\textsuperscript{240} See Brief, supra note 191, at 49 (citing Coker v. Georgia, 433 U.S. 584, 597 n.10 (1977)).
\textsuperscript{241} 458 U.S. 782 (1982).
\textsuperscript{242} Brief, supra note 191, at 49 (citing Enmund v. Florida, 458 U.S. 782, 796 (1982)).
\textsuperscript{243} 487 U.S. 815 (1988).
\textsuperscript{244} Id. at 2696. For a discussion of international norms in Thompson, see supra notes 99-100 and accompanying text.
\textsuperscript{245} 290 Or. 611, 625 P.2d 123 (1981).
\textsuperscript{246} Id. at 128.
of the United States Supreme Court involving the eighth amendment, especially *Trop v. Dulles*, and "‘borrowed’ from them to frame Zimbabwe’s judicial approach to the concept of ‘inhuman or degrading punishment.’”

Policy considerations bolster the argument that the Supreme Court should apply international standards and human rights norms in its decision-making process. The Founding Fathers pieced together the “American Charter” on the basis of Natural Rights, a theory which involves no “territorial confines” and is the basis of international human rights norms today. The paradox lies in the fact that the United States, in its refusal to recognize international and customary law in its domestic affairs, still points to the “interconnectedness of global reality as justification for universal norms outlawing torture, preventing arbitrary arrest and detention, and condemning terrorism and gross violations of human rights.”

V. Conclusion

The *Stanford* analysis is incomplete for three reasons. First, the reliance solely on state statutes is inconsistent with precedent and may weigh heavily in future “cruel and unusual punishment cases” because it gives states the power to determine the constitutional norm. While this reflects the Rehnquist Court’s deference to legislative enactments, it is questionable whether such deference is proper in the context of the death penalty analysis because the eighth amendment was intended to provide a check on legislative power.

Second, and more importantly, the *Stanford* holding is not responsive to the changing views of Americans toward capital punishment. The phrase “evolving standards of decency that mark the progress of a maturing society” suggests that societal norms are developing continuously. It does not necessarily suggest that contemporary values alone should determine norms. Moreover, *Stanford* may turn out to be a self-...

249. Id. at 854.
250. See Christenson, supra note 192, at 7.
251. See Christenson, supra note 192, at 6.
252. For a discussion of the *Stanford* Court’s sole reliance on state statutes for its decision, see supra notes 151-32 and accompanying text.
254. For a discussion of the eighth amendment and its use as a check on legislative power, see supra note 60 and accompanying text.
fulling prophecy. As a result of this precedent, states that presently do not authorize the death penalty for sixteen-year-old offenders may re-evaluate their statutes and enact such punishment.255 If this happens, then it will be unquestionably true that the death penalty for minors is consistent with societal norms in the United States.

Finally, the Court's rejection of international norms in its inquiry is inconsistent with precedent because in previous death penalty cases, the Supreme Court considered relevant international norms in its eighth amendment analysis.256 Ironically, with notable exceptions such as Rwanda, Barbados, Pakistan and Bangladesh,257 the United States now stands almost alone in its tolerance of capital punishment for sixteen-year-old juvenile offenders.

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255. It is submitted that the Stanford ruling may create a similar reaction as did _Furman v. Georgia_. See 408 U.S. 238 (1972). The _Furman_ Court noted that legislatures, instead of defining and enacting capital homicide statutes, “adopted the method of forthrightly granting juries the discretion” over life and death and therefore struck down the Georgia statute as a violation of the eighth amendment. _Id._ at 247. In reaction to _Furman_, 35 states quickly enacted capital punishment statutes. See Note, _State v. Shaw: The Status of Juvenile Executions_, 10 Am. J. Trial Advoc. 171, 174 (1986).

256. For a discussion of the Supreme Court’s use of international norms, see _supra_ notes 235-44 and accompanying text.

257. In the last 10 years, only four other countries besides the United States have executed offenders who had committed offenses while under 18 years of age: Pakistan, Rwanda, Barbados and Bangladesh. _See Stanford_, 109 S. Ct. at 2985 (Brennan, J., dissenting) (citation omitted).