

## INTRODUCTION

A hotly contested area of international and American law is the execution of juvenile offenders. There have been several instances in the twentieth century where the Supreme Court has heard cases questioning the constitutionality of this practice directly. However, there are other cases which bring to light the issues which must factor into a consideration of the death penalty for adolescent offenders. My contention is that in light of these other issues and other cases, the Supreme Courts preservation of the juvenile death penalty is inconsistent with both its interpretation of cruel and unusual punishment, and with the notions of jus cogens and international customary law which have been observed in connection with the delineation of cruel and unusual punishment.

In the case of *Trop v. Dulles*, the Supreme court confirmed that international norms and the notion of jus cogens is permissible in an examination of what constitutes the “Evolving standards of decency which mark the progress of a maturing society” (*Trop v. Dulles*, 1958). In this case the court noted the fact that a vast majority of nations deplored a certain punishment, and thereby it was not a fit punishment for the United States to levy against an individual. This is the basis for the evaluation of what role if any international treaty law and customary law may play in the consideration of the juvenile death penalty as cruel and unusual punishment.

Another facet of the examination of the consistency of Supreme Court decisions regarding juvenile execution is a point which was broached in the late seventies. The court has acknowledged that a punishment may be considered excessive if it makes no measurable contribution to the goals of punishment, which are deterrence, retribution, and in the case of juveniles, rehabilitation (*Coker v. Georgia*, 1977; *Gregg v. Georgia*,

1978). So attention will be paid to what these deterrent goals actually are and how they are met by the execution of a juvenile. Then it will be possible to speak to whether or not the juvenile death penalty may be considered excessive, as that term is defined by the Supreme Court.

Finally, returning to the decision in *Trop v. Dulles*, this paper will attempt to elaborate on the notion of an “evolving standard of decency” which the law must look to in order to gauge the acceptability of any given punishment. This topic is subdivided by the specific areas that the justices in *Coker v. Georgia* specified as being pertinent to the evaluation of any “evolving standards” test. These areas are public opinion, jury decisions, history and precedent, and legislative attitudes.

Based on the Supreme Court’s decisions in the three subjects described above, and on the actual state of affairs within the nation and world, which were not accurately represented in all the Supreme Court decisions, it is apparent that the protection of the constitutional right to avoid cruel and unusual punishment has not been consistently carried out by the court.

### **THE PRECEDENT OF CUSTOMARY INTERNATIONAL LAW**

In order to be able to understand the weight that international law, both customary and treaty, it is essential to look first and foremost to the Supremacy clause contained in the sixth article of the United States constitution. Here one will find the framers wish for the United States to be a law abiding citizen of the international community. The clause says that the United States is to be bound by the customary international law of nations, as it exists at any given time. This is a constitutional examination that cannot be

significantly linked to Supreme Court decisions concerning cruel and unusual punishment without attention being paid to the decision in *Trop v. Dulles*.

The 1958 case that the Supreme Court heard in *Trop* dealt with a soldier in the army who had been discharged for desertion, and the penalty of loss of citizenship that such a conviction carried under military law. The court decided that the punishment was inappropriate, in part due to a consideration of the status of banishment in the international community. Here Justice Warren made the statement that “the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime” (*Trop v. Dulles*, 1958). This was based on the earlier finding that the punishment of banishment was “universally decried by civilized people” since only a very few number of nations actually used the punishment anymore (*Trop v. Dulles*, 1958). Clearly from this case one may see the weight that the effective international norms restricting punishment may have on the Supreme Court. However, further evidence of the use of international sentiment may be found in other cases. The court has, more recently than *Trop*, cited “the climate of international opinion concerning the acceptability of a particular punishment” (*Coker v. Georgia*, 1977), and has referred to “international opinion” when considering death for a person who arguably lacked mens rea (*Enmund v. Florida*, 1982). From these case examples one may base the argument that the international community has weight in the delineation of cruel and unusual punishment.

Given the fact that the Supreme Court has before heard arguments concerning the eighth amendment drawn from the norms of the international community, it is now important to examine just what type of international law exists to govern the execution of

a juvenile offender. There are four international treaties which currently condemn the practice of killing a juvenile murderer among the nations of the world. Between these four documents one may find the signature of almost every country in the world (Wheaton-Rodriguez, 2001). There are currently only six countries which still execute juvenile offenders, and the United States makes up almost 66% of all executions carried among these nations (Wheaton-Rodriguez, 2001). The treaties which have joined so much of the world together in opposition to the juvenile death penalty are; the International Convention on Civil and Political Rights (ICCPR), the fourth Geneva Convention (1949), the American Convention on Human Rights, and the UN Convention on the Rights on the Child, which is also known as the Beijing rules (Nguyen, 1995). Between all of these international documents, the United States has signed all of them, but has only ratified the fourth Geneva Convention (Wheaton-Rodriguez, 2001).

The Fourth Geneva Convention forbids the execution of a person who committed their offense before the age of eighteen *during time of war*. So arguably, barring when the United States is engaged in war, it is still alright for juvenile offenders to be executed, since the other treaties were only signed, not fully ratified by the legislative. However, this argument fails to take into account the Vienna Convention on the Law of Treaties, which directly addresses the status of treaties which are signed but as of yet un-ratified. This bit of international legislature says that a nation must “refrain from acts which would defeat the object and purpose of a treaty when... it has signed the treaty... subject to ratification” (Wheaton-Rodriguez, 2001). By this the United States is bound to the agreements which it has signed, such as the ICCPR, as if they were the law of the land. Since the execution of a juvenile is an act which takes a life, and therefore is irreversible,

the act of killing a juvenile offender would defeat the object and purpose of the three signed agreements.

Another argument against the use of the ICCPR and similar international documents is that the United States, by virtue of its continued application of the juvenile death penalty, qualifies for a status known as a “persistent objector” (Hartman, 1983; Henkin, 1984). This means that a country is exempted from the constraints of a treaty when it shows objection and open dissent to the rule, during its formation, prior to its crystallization within the international community (Stein, 1985). However, the United States has not demonstrated this type of directed objection since the formation of the rules, in fact the United States dissent to the rule was not made until well after it had been instated (Wheaton-Rodriguez, 2001). Therefore, the claim that the United States is exempt under the concept of the persistent objector rule is unfounded and the international rules against the execution of juvenile offenders may apply with full force to the US.

Now that it is established that both international laws concerning the juvenile death penalty do exist, and the United States is bound by them, it is appropriate to look at the Supreme Court’s treatment of international norms restricting this punishment. In *Thompson v. Oklahoma* (1987), the court paid little attention to the question of international norms and their effect on the United States, when making their consideration of the eighth amendment. What little attention was paid to the issue came solely from the dissenting opinions, which noted that the international community did not generally engage in juvenile execution, but not making much more of a point than that. However, there would seem to the observer to be more of a history of significance

surrounding this issue than befits the attention paid it by the court in Thompson. Given the use of international precedent in Enmund, Trop, and Coker there is ample jurisprudence to allow the justices to consider the climate of the international community. In the case of Stanford v. Kentucky (1989) the majority opinion again fails to take note of international law and norms governing the power of the state to execute a juvenile offender. However, in the dissent of Justice Brennan, which was joined by Marshall, Blackmun and Stevens, there was note taken of the fact that the United States, at the time, contributed heavily to the total number of juveniles executed world wide. While at the same time this dissent notes that at the time “sixty one countries retain capital punishment and have no statutory provision exempting juveniles” (Stanford v. Kentucky, 1989). However, it should be noted that the United States had carried out three of the eight juvenile executions which had occurred since the reinstatement of capital punishment in 1976. So the court acknowledges on one hand that juvenile execution is still on the books in many countries, but that there have been only eight in the last thirteen years. This seems like it should be taken into consideration under the test that was employed in Coker or Trop, which looked at the practices of nations.

Since the court has in the past, looked at the status of international consensus on punishments as acceptable or not, it seems quite inconsistent that in the two cases dealing with the execution of a juvenile, they would not consider this factor in the majority opinion. Also, considering the legal requirements for the states to accept international treaty law as US law, it seems unfortunate that the Supreme Court would not weigh the sovereignty clause of the constitution into its decision either. Effectively the court

disavowed any authority of international treaty or norms, despite prior recognition of these factors by previous courts considering similar claims.

### **FUNCTIONS OF PUNISHMENT AND THE GOAL OF REHABILITATION**

There are only two recognized goals for the punishment of adult offenders. These are retribution and deterrence (both general and specific) (ASAP brief, Streib, 1987, 1999, 1998). In the case of capital punishment, the function of deterrence is primarily to disable the offender from any degree of recidivism, by removing his life. By killing the offender, there is no threat of future crimes from this particular individual. The other deterrent function of the death penalty is to discourage others from engaging in similar behavior, because supposedly, the more severe the punishment being inflicted, the more it will scare others into obeying the law. The first of these two deterrent types is specific deterrence and the second is general deterrence. These deterrent effects may be said to be the only measurable goals pursued by the punishment of an individual, that is, what effects may be measured in society as a result of the sanction. The punitive goal of retribution is comprised of two components. First, the desire for the offender to suffer the punishment that he or she deserves and second, retribution fulfills society's desire for vengeance (*Gregg v. Georgia*, 1976).

In determining what the deterrent effects of the death penalty for a juvenile offender are, one must look at both the offender individually and also at the effect that the punishment has on society in general. Obviously, the offender who is executed is deterred from ever re-offending, and thus society is protected. However, the argument that this end may be achieved by non-lethal means holds that life in prison will serve the same purpose. In the case of juvenile offenders, who will be incarcerated before their

eighteenth birthday, the prospect of spending the rest of their natural life in prison seems to be just as cruel as any form of execution (Streib, 1987). Also, the notion of absolute and irreversible punishments is antithetical to the principles of the juvenile justice system, which espouses rehabilitation as the goal of any juvenile punishment (Regolli & Hewitt, 2000)

In order to examine the function of general deterrence among a juvenile population, it is important to consider the special circumstances which surround the adolescent phase of life. If other potential juvenile murderers do not see the punishment applied, as is the case when the penalty is so rarely enforced, then the realization that they could suffer a similar fate will not take hold. Also, if juveniles are not able to understand and appreciate the gravity of their own mortality, they will not give enough weight to the possibility that they could die as a result of their actions (Sheras, 1983). The interaction between an adolescent's sense of immortality and their own ego results in a person who does not believe or appreciate that the end of their life is a possibility (ASAP brief). Also, the general deterrent effect is lessened by virtue of the fact that juveniles are generally more impulsive and risk taking than adults (ASAP brief). So a juvenile is unable to engage in the weighed value consideration that makes adult offenders culpable, and death worthy, because they do not act with one eye toward the future and the distant, eventual and possible consequences of their actions are not foreseen.

As far as the goal of retribution is concerned, it is "no longer the dominant objective of the criminal law" (Williams v. New York, 1949). If this recognition was evident over fifty years ago, then it should still apply today, regardless of the age of the offender. However, the treatment of juvenile offenders traditionally dilutes the

retributive goals of punishment with the rehabilitative aims that the juvenile justice system works for (Regolli & Hewitt, 2000). So with juvenile offenders, who are not considered fully responsible, the desire for retribution seems wholly disproportionate and against the purposes of the juvenile justice system.

The reason that all of this consideration of the goals and effects of capital punishment is necessary is that the Supreme Court has directly linked this functionality of the punishment with its definition of cruel and unusual punishment. The court has held that a punishment is cruel and unusual if it is excessive. A punishment may be considered to be excessive if it is either disproportionate to the crime or if it makes no measurable contribution to the goals of punishment (namely deterrence and retribution / rehabilitation) (*Coker v. Georgia*, 1977; *Gregg v. Georgia*, 1976). So it is essential to recognize the fruitlessness of executing juvenile murderers in any examination of whether such a punishment is cruel and unusual.

### **“EVOLVING STANDARDS OF DECENCY”**

In an attempt to clarify what the evolving standards of decency described in *Trop v. Dulles* should be measured by, Justice White said that “attention must be given to the public attitudes concerning a particular sentence – history and precedent, legislative attitudes, and the response of juries” (*Coker v. Georgia*, 1977). These measures have been creatively applied by the court in the two cases of *Thompson* and *Stanford*. The justices in the majority consistently looked to the “response of juries”, “legislative attitudes” and the long history that the US has with juvenile execution but made no real attempts to discern the “public attitudes” which were mandated by White.

The exclusion of this singular unit of measure may seem like it is not important, given that the other, “official” means of measuring public opinion have been taken into account. However, the picture of capital punishment that arises from an examination of the sentiment of the American people, especially concerning the juvenile death penalty, will reveal a very different picture than what one finds by looking at the sentencing practices of the several states which still employ capital punishment.

As an example of this it is useful to look at a sampling of the public, taken from Harris County and Texas in general. This poll comes from a part of the country that has been responsible for 55% of all juvenile executions since the reinstatement of the death penalty in 1976, and so naturally one would think that there would be large amounts of public support for the practice. However, in direct opposition to what the “legislative attitudes, and the response of juries” would lead one to think, the people of Texas are not staunch proponents of the practice. In fact when asked, only 25% of the citizens of Harris county (which has the highest capital sentencing rate in Texas) were in favor of executing juvenile offenders, while only 34% of the entire state population approved of the practice (Turner, 2000).

What this has to do with the consistency of the Supreme Court decisions in *Thompson and Stanford* deals with the court’s prior treatment of the weight that should be given to the various measures of public opinion cited in *Coker*. As justice Brennan stated in his decision from *Furman v. Georgia* (1976) “legislative authorization, of course, does not establish acceptance”. This is significant because in the cases of *Stanford* and *Thompson*, neither majority decision looked at the direct measure of the public opinion toward the death penalty, despite the fact that the measures which they did

employ were qualified by Justice Brennan as being an insufficient measure of the evolving standards of decency on their own. This insufficiency is illustrated by the findings of the Harris county poll, which draws a clear distinction between what the laws and sentencing practices of the area say about the acceptance of the death penalty and the actual opinions of the people that those sentencing practices are supposed to represent.

A final aspect of the examination of the evolving standards of decency that the court has precedent to employ, but didn't in Stanford, is the stance of "informed organizations" such as amnesty international, or the ABA (Thompson v. Oklahoma, 1988). While there are enough statements of opposition to the death penalty to fill a large book, a few stand out among them and will serve to represent the rest. First there is the aforementioned ABA, which has officially opposed the execution of juvenile offenders as cruel and unusual punishment (Streib, 1998). Also, there are calls from all over the religious community, including the Catholic Church, Baptists, Methodists, and so forth. The list goes on to include over thirty one major religious denominations from within the United States that oppose the execution of a juvenile offender (Clark, 2000). However, these informed organizations were not included in the court's consideration of the Stanford decision, thereby making it inconsistent, in part, with the standards that the court had laid out only a year before in Thompson.

## **CONCLUSION**

The decisions of the Supreme Court are supposed to form a consistent base upon which to draw future decisions. In the case of the juvenile death penalty, which was addressed by the court in Stanford v. Kentucky (1989), and previously in Thompson v. Oklahoma (1988), the court appears to have failed in rendering it's decisions consistently

with prior statements of the court. In the determination of whether or not a punishment constitutes cruel and unusual punishment, especially against children, the most serious and unbiased consideration must be employed. However, as has been shown, the court has failed to adequately address the measures of public opinion, international jus cogens, and effectiveness of punishment that have been previously ruled as directly bearing on the construction of a cruel and unusual punishment ruling. This is significant to the course of Supreme Court jurisprudence because with an examination of these factors, consistent with their prior rulings, the court would arguably come to a very different conclusion than it did (Lechner, 1997; Streib, 1987; Ricotta, 1988). Applying the harmless error doctrine to these cases, in some imaginary review, would surely call for a reversal of the decisions, and bring the spirit of America's juvenile justice system into alignment with its practices. *Coker v. Georgia*, *Trop v. Dulles*, *Enmund v. Florida*, *Furman v. Georgia* and *Gregg v. Georgia* all provide the rules by which the Supreme Court should render its decisions concerning the death penalty and cruel and unusual punishment, but the decisions on this matter have failed to remain consistent with these earlier cases.